



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 89 of 2004

KOFEXCO LIMITEDPLAINTIFF/RESPONDENT

-VERSUS-

CETCO LIMITEDDEFENDANT/APPLICANT

RULING

The defendant's application dated 19th September 2006 brought under Order 6 Rules 13 (d) and 14 of the Civil Procedure Rules seeks the striking out of the Re-Amended Plaintiff and as a consequence thereof the dismissal of this suit. The application is based on the ground that the Re-Amended plaintiff filed and served upon the defendant being neither dated nor signed is no pleading and should be struck out.

The plaintiff does not oppose the first limb of the application. Its Counsel Mr. Omolo readily concedes that the Re-Amended plaintiff being neither dated nor signed is fatally defective and should be struck out. He said that the error arose when they filed the application to further amend the plaintiff to which they annexed the proposed Re-Amended Plaintiff and prayed that the same be deemed as duly and properly filed upon payment of the requisite court fees. Being an exhibit in that application it was not dated or signed. That application was by consent allowed as prayed and counsel for the plaintiff inadvertently failed to file a dated and signed Re-Amended Plaintiff

As regards the second limb of the application seeking the dismissal of the suit Mr. Omolo said that cannot be. Once the purported Re-Amended Plaintiff is struck out the parties revert to the position they were in before that attempted amendment. I concur with that view. There is no basis upon which I should dismiss this suit. The Re-Amended plaintiff having been of no effect, it did not, as it were, replace the amended plaintiff that had been filed before. If it had replaced the amended plaintiff and for some other reasons it was struck out then I would agree that the suit would be dismissed. In the circumstances I hereby strike out the Re-Amended Plaintiff annexed to the application dated 20th April 2006. The parties shall rely on their pleadings as they stood before the filing of the purported Re-Amended Plaintiff.

The Plaintiff through the replying affidavit of its advocates and in the oral submissions he made in court sought leave to file a proper Re-Amended Plaintiff. Mr. Nyachoti, counsel for the defendant did not address that aspect of the matter. Bearing in mind the fact that the defendant had consented to the further amendment of the plaintiff I allow the plaintiff's oral application and order that it shall file and serve a proper further amended plaintiff within fourteen days. The defendant has also leave to file an amended or further amended defence within 14 days of service of the further amended plaintiff.

The costs of this application and those the defendant shall incur in filing an amended defence shall be born by the plaintiff.

DATED and delivered this 21st day of February 2007.

D.K. MARAGA

JUDGE

21.2.2007

Before Maraga Judge

Buti for Nyachoti for applicant

Omolo for respondent

Court clerk – Mitoto

Court – Ruling delivered in Chambers.

D.K. MARAGA

JUDGE