



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS**

**Civil Suit 241 of 1996**

**1. KINYASYA MUTIE**

**2. KYUMWA KATIKU.....PLAINTIFFS**

**VERSUS**

**1. KALIMBU NGUNGI**

**2. SAMMY KIMONGO.....DEFENDANTS**

**RULING**

The application by the court is dated 28.11.2005. It seeks that the plaintiffs amended plaint dated 1.10.1999, be struck out and/or be dismissed. The ground indicated, upon which the said amended plaint should be struck out are that:-

- a) It is incurably defective and incompetent
- b) It is an abuse of the process of court.

The application is supported by an affidavit sworn by Sammy Kimongo Kioko, one of the defendants.

During the prosecution of the application the applicants/defendants tried to amply their grounds. Mr.Makau said that the original plaint was filed on 2.10.96 but that the amended plaint, the target of this application, was filed three years later on 1.10.99 without the authority or consent of court.

The plaintiffs/respondents through, on the other hand, argued that the amendment did not offend the provisions of Order VI of Civil Procedure Rules and should not be struck out. They also through Mr.Makau Junior argued that even if the amended plaint were to be struck out, the result would only be that the suit will still remain intact but based upon the original plaint.

I have carefully considered the application before me. All it seeks is to strike out the amended plaint upon the grounds shown on the face of the application. As I perused the supporting affidavit and the grounds of opposition, I realised that the grounds upon which the application are based are quite misleading. In my view the only grounds valid enough upon which a pleading could be struck out, are those contained in Order VI of the Civil Procedure Rules. All the ground advanced by the applicants and defended by the respondents, except the ground of amending without leave and several years after filing the plaint, are irrelevant grounds. They are grounds which form the issues of the case to be addressed during the full hearing, whether they are meritorious or otherwise. That is to ay, that whether the suit is time barred or incompetent or nullity for given reasons, are issues to be addressed during the proper hearing of the suit. Such cannot addressed in an application to strike out an amended plaint.

On the other hand this court has power and discretion to allow an amendment o leading at any stage before judgment. Even if this amendment was therefore file out of time or with some defects, this court can on application or suo moto validate it, upon reasonable grounds. Such reasonable grounds are provided under Order VI of Civil Procedure Rules and this court need not repeat.

Suffice it to say that I have examined the pleadings alongside the amended plaint. I am satisfied that the amended plaint clarified the issues required to be addressed in this suit whether they fail to succeed or otherwise.

I accordingly find merit in allowing the amendments I as a result dismiss this application with costs. What this mans is that all the raised issues will be addressed either during the hearing of the suit under appropriate application if any for striking out and/or dismissing of the plaint and suit. Orders accordingly.

Costs in the cause.

Dated and delivered at Machakos on **20<sup>th</sup>** day of **December, 2006**.

**D.A. ONYANCHA**

**JUDGE**

20/12/2006

**Coram**

R.N. Sitati- Lady Judge,

Mr. O.N.Makau (present) for applicants

Mr.J.A.Makau (absent) for respondents

CC-Mueni

**COURT**

Ruling read and delivered in open court in the presence of Mr. O.N.Makau for the applicant and in the absence of counsel for the respondent.

**R.N. SITATI**

**JUDGE**

20/12/2006