

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 428 OF 2002

DANIEL KAMAU KARIITHI PLAINTIFF

VERSUS

BAMBURI CEMENT LIMITED DEFENDANT

Coram: Before Hon. Justice Mwera

Gakuo for the plaintiff

Kingi for the defendant

Court clerk – Kazungu

RULING

When the court was poised to conduct a trial in this cause the defendant drew its attention to a notice of preliminary objection it filed and served on 18th January 2005. It was to the effect that the amended plaint filed here on 13th January 2005 without the court's leave contravened O6A r.6 Civil Procedure Rules and so there is no plaint to sustain the proceedings herein. Mr. Kingi told the court that under that provision of law if a party is granted leave to file an amended pleading with no time span stated, then that should be done within 14 days. If that is not complied with, then leave ought to be sought and granted by the court before filing the intended pleading after the 14 days.

It was explained that on 3rd December 2004 the plaintiff had leave without time limit to file an amended plaint. That he did not do so by 17th December 2004. That on 13th January 2005 when that pleading was filed without this court's leave, it was worthless.

Mr. Gakuo posited that the defendant had not brought and properly argued its notice as one for preliminary objection. That it was not based on a point of law and thus it was an unnecessary proceeding meant to confuse issues and not, if successful, meant to dispose of the matter finally. He added that if this court upheld that objection then it should consider, in the interests of justice, to allow the amended plaint to remain on the file since the minor amendment in it did not prejudice the defendant. And that December has so many public holidays and lawyers like Mr. Gakuo usually close their offices, meaning that they do not therefore do what they ought to do.

This court's view is that O6r13 Civil Procedure Rules permits this court to strike out a pleading at any stage if it discloses no reasonable cause of action or it is vexatious, frivolous, scandalous or an abuse of the court process. But it must be a proper pleading on record for the court to examine and conclude which ground or grounds have been alleged and proved or otherwise, before it decides what orders to make. Here the defendant has posited that the pleading (the amended plaint) should not be on the record at all because it was filed out of time and without this court's leave. In essence the defendant is saying that the law on procedure does not allow for such a pleading to form a basis on which to commence and continue a trial.

This court agrees with Mr. Kingi. The plaintiff got orders to amend his plaint on 3rd December 2004. He did not do so within 14 days since the court order did not give the time limit within which to file the

intended amended plaint. The 14 days as per O6Ar6 Civil Procedure Rules expired on or about 17th December 2004. The amended plaint was filed about 4 weeks later and without this court's leave. That pleading is invalid and stands expunged from the record. If the plaintiff desired that time be enlarged to file the amended / plaint, he did nothing since 18th January 2005 when this notice of preliminary objection was filed and served. A real interested and serious litigant should have taken the earliest opportunity, if he had not noticed his misstep earlier, to move to rectify the error as soon as the defendant filed and served the notice of preliminary objection. Again he lay back and for some six months did nothing until he made a feeble plea at the hearing of the notice, and orally so that, his amended plaint be deemed filed within (enlarged) time.

This the court will not accept and the preliminary objection is upheld with costs to the defendant.

Orders accordingly.

Delivered on 29th July 2005.

J.W. MWERA

JUDGE