

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 129 OF 1999

KASOLO MUTISO ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

PETER MBAI KISILU ::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

When this case up for hearing on 17.3.2004 the Counsel for the defendant raised an objection to the validity of the pleaded reply to the amended defence dated 26.6.2002. He contends that the original reply to defence filed on 13.6.2002 was not served on the defence. He contends that the amended reply to defence is irregularly on record because there had been no reply to defence to be amended. He further contends the purported amended reply to defence is not a pleading and should be struck off the record and matter to proceed with no reply to amended defence.

In response Mrs. Nzei for plaintiff states that when they were served with the plaint defendant entered appearance on 6.11.1999 in person and the plaintiff filed a reply to defence dated 10.4.1999 and filed in court on 15.4.1999 and it was served on defendant in person. That the Counsel now on record came on record after pleadings had closed on 22.9.1999 and applied to amend the defence. Application for amendment was heard and ruling given on 6.6.2002 when the judge ordered that plaintiff had leave to amend reply to defence and that reply to defence had therefore been filed and therefore the preliminary objection is misguided.

When Mr. Mbithi first raised his objection, his contention was that no reply to defence was ever filed. However after Mrs Nzei pointed out that it is on the file and the court in its ruling of 6.6.2002 allowed them to amend the reply counsel raised issue of service in his reply – that the reply may be on the file but it was not served.

The fact is that at the time Mr. Mbithi filed his application for amendment of defence a reply to defence had been filed by the defendant acting in person. There was a reply to the defence and that is why the court made the order that plaintiff had leave to file amended reply to defence. Counsel for defendant never raised any issue regarding the reply to defence, that is that the defendant had never been served with it. The ruling was given on 6.6.2002, 1½ years ago. The plaintiff was not given chance to demonstrate that the reply was served on defendant. Because he never raised the issue within that time the court will find that he was aware of the reply to defence filed on 15.4.1999 and can not be heard to object to it at this stage. The amendment was allowed by court and is properly on record and it will be considered as one of the pleadings. The objection raised is misguided and dismissed. Defendant to pay court adjournment fees and plaintiffs costs for the day.

Dated, read and delivered at Machakos this 27th day of April, 2004.

R. V. WENDOH

JUDGE