



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 558 OF 2001

BLASIO OMONDI PLAINTIFF

VERSUS

ELIZA WAIRIMU CHEGE DEFENDANT

Summary Notes:

1) Civil practice and Procedure

2) Application for prayer of:-

a) Dismissal of suit due to the issuance irregularly of summons to enter appearance.

b) Application (dated 2.8.03 and filed 14.8.03) dismissed by G.B.M.Kariuki J. on 29.10.03 for non-attendance of parties.

3) The advocate for defendant unaware of dismissal amends the application of 24.5.04

4) The issue before court was that of order 31 r 1 CPR – authority to sue by next of friend

5) Held

6) i) The issue of summons was functus officio ii) Order 31 r 1 CPR.

The application for striking out has to be in writing and duly filed.

7) Case law Kedowa Saw Mills Ltd & Another v Dina Mogaka Ombiro CA 163 of 1987

8) Advocates:-

S.N. Wachira Advocate for the plaintiff

P.M. Kimani Advocate for the defendant

RULING

The advocate for the defendant wished to raise an objection to this suit when the matter came up for hearing on the 4.5.02 on two points.

The first point is:-

“i) Whether the summons to enter appearance was issued irregularly (order Vr1 CPR) and

ii) Whether the absence of the letter of authority by the next of friend (under order 31 r 1 CPR) Invalidates a suit”.

Parties were given time for the defendant to file a formal application and preparation on the submissions

On 25.5.04 when the advocate argued his application on these two points and completed, the plaintiff said the defendants application had infact been dismissed by Kariuki G.B.M.J on the 29.10.03. Thus the original application of 7.8.03 and filed 14.8.03 having been dismissed could not in effect be awarded. I was under the impression that a new application would be filed. Instead the applicant/defendant had filed an amended application without leave to the court.

Can I treat this matter as a Preliminary Objection? Under order V r 32 CR and Order 31 r 2(1) CPR the application has to be in writing and duly filed.

The same cannot be orally made.

The court on its own motion after 24 months may struck out a suit. The circumstances of this case is different.

I hereby struck out the application before me with no orders as to costs as the defendant made no reply to the same nor bring it to the attention of court material facts.

Dated this 2nd day of June 2004 at Nairobi.

M.A. ANG’AWA

JUDGE

Wetangula & Co. Advocates for the plaintiff

Waruhiu & Gathuru advocates for the defendant