



- 1) Civil Practice and Procedure
  - 2) Application for stay of proceeding (41 r 4 CPR) Sec. 3P CPA)
- Facts
- 3) i) Interlocutory Judgment on record
  - ii) Plaintiff amends her pleadings and serves the defendant
  - iii) The defendant files defence to amend pleadings which is struck out
  - iv) Defendant appeals or intends to do so and seeks for stay of proceeding
- 4) Held: Application incompetent and is dismissed on grounds that there is an interlocutory judgment already on record.
- 5) Case law
- a) Sneade v Wortherton Barytes & Lead Mining Co. Ltd. 1904 KB 295
  - b) The Dictator, admiralty cause 1982 page 64
- 6) Advocate:
- Ameka & Co. Advocate for the plaintiff
- Njoroge state counsel for the defendant

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 601 OF 2002

VIOLET MUMBUA NDABUKI ..... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL .....DEFENDANT

RULING

The application before me has been brought under a certificate of urgency dated the 20th of July 2004 and filed on the 21st July 2004 by the Attorney General. It seeks for:-

“... The court order dated 20.7.04 directing that this suit be heard on 21.7.04 be stayed pending the hearing and determination of this application interparties. That all proceedings in this suit be stayed pending appeal against the court’s order dated 20.7.04 striking out the defendant’s defence.”

A brief background of this matter is that the plaintiff, an administratrix to the estate of the deceased filed suit against the Attorney General for the alleged wrongful death of the deceased at the hands of the police due to a shooting. The plaintiff was filed on the 8.4.02 (dated 5.4.02). The Attorney General filed a memo of appearance on the 30.4.02 but failed to file defence. An application by way of a chamber summons dated 6.8.02 and filed 8.8.03 was made by the plaintiff for leave to enter Interlocutory Judgment against the Attorney General for failure to file defence. This leave was duly granted by Kuloba J on the 26.9.02. The plaintiff applied and was granted by the deputy registrar her request for an interlocutory judgment on the 25th October 2002.

Before the suit was set down for hearing the plaintiff obtained leave to amend her plaint (Rawal J 3.3.03) which she duly did dated 10.3.03. She then served the defendant with the amended plaint and the defendant responded by filing a statement of defence.

On the day set down for trial a state counsel appeared for the Attorney General. The advocate for the plaintiff prayed that the defence be struck out. This was opposed.

The defence was duly struck out and parties entered into some preliminary pre-trial issues by consent. The suit was adjourned to the following day. On the following day, the state counsel brought an application under certificate of urgency seeking that the proceeding be stayed pending his application to appeal to the court of appeal against the striking out of the defence. The parties took consent dates in the registry for the hearing of the said application.

It is the said application that is the subject matter of this ruling

. The state counsel (another one) said that the proceeding be stayed as the Attorney General was not served with the plaint or summons. That the defence having been struck out, he intends to appeal to the court to appeal in that he is permitted to file a defence after the Interlocutory Judgment was entered. That there be a stay pending an appeal to the court of appeal. In reply, Mrs Ameka for the plaintiff said that there was Interlocutory Judgment on record. The plaintiff amended his plaint (which said plaint only amended the figures to the income). Leave was duly given. The amended plaint having been served did not in fact bring a new matter but related back to the original.

What the Attorney General should have done is set aside the Interlocutory judgment then file defence. The effect of amending the plaint in fact did not mean that it is a new plaint. She relied on the case law of:- Sneade v Wortherton Barytes & Lead Mining Co. Ltd (1904) IKB 295

She brought out the statement at para 296 that:-

“The actual making of amendments is mere matter of form which can be done at any time and must be taken for the present purpose to have taken place.”

In the admiralty cause of The Dictator (1891) Pg 64.

Where a claim for ‘service rendered’ in salvage of a ship was made – an amendment was made after judgment altering the amount claimed to a higher figure.

I noted that the affidavit of the state counsel at Para 4 states:-

“4. That I have perused the court file and found that after the plaint was amended no interlocutory judgment was ever entered against the defendant.”

The fact though is that there was indeed an interlocutory judgment that had been entered. I believe that the state counsel may have been under a mistaken belief that it had not.

I find that the application for stay of proceeding has no merits. I hereby dismiss it with costs to the plaintiff.

Dated this 30th day of July 2004 at Nairobi.

**M.A. ANG’AWA**

**JUDGE**

Ameka & Co. Advocates for the plaintiff

Njoroge State Counsel for defendant