

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISC. 67 OF 1997

REPUBLIC.....PLAINTIFF

VERSUS

**RESIDENT MAGISTRATES COURT MKS. & STEPHEN MAUNDU
MUIA.....DEFENDANT**

R U L I N G

This is the defendants applicants chamber summons dated 18.2.2004 brought under section 100 and 3A Civil Procedure Act, Order VI Rule 3 Civil Procedure Rule seeking leave of the court to be granted to the applicant to amend his application dated 11.2.2004 as per the draft annexed to the application and that the draft be deemed as filed and served.

The grounds upon which the application is brought are found on the body of the application which are that there are new developments after the application was filed and they had to add a new prayer that was left out which is that it had been presumed that the decree extracted had been sent to the defendant/applicants for approval but it was discovered that it was not and that they want to have the execution declared null and void. The application is also supported by the affidavit of the advocate Mr. Masika who further contents that there was no decree extracted or send to the advocates for approval as required by order XXR 7(2) Civil Procedure Rule.

The application was opposed and grounds of opposition were filed to the effect that the application is misconceived, bad in law, and has no legal basis and that an affidavit cannot be amended.

Counsel further submitted that an affidavit is not a pleading and cannot be amended and further that the applicants intents to bring in a new cause of action i.e. a declaration that execution was unlawful which requires evidence and cannot be tried in an application.

Counsel for respondent relied on the case of the EASTERN & SOUTHERN AFRICAN DEVT. BANK VERSUS AFRICAN GREENFILEDS LTD HCCC 1189/00 where the Judge ruled that an affidavit cannot be amended as it is the truth and the truth cannot be amended. The applicant seeks to amend his affidavit annexed to the application dated 11.2.2004. I agree with the ruling in the above cited case that counsel cannot amend his affidavit. He has told the court the truth in his earlier affidavit annexed to application dated 11.2.2004. He cannot change it. The court cannot allow an applicant to amend his affidavit.

The main reason for seeking this amendment is that order XXR7 (2) was not complied with. I have seen a decree on the file. Order XX Rule 7 (2) is not a mandatory provision. It is discretionary. A party may prepare a draft decree and submit for approval to the other party. Failure to submit a decree for approval by the other party cannot be fatal to an execution unless the counsel is complaining that the decree was not properly drafted which is not the case here. The applicant has not explained that the contents of the decree are improper or that figures are wrong. The court will not make orders in vain,. There would be no reason for allowing amendment of the chamber summons as it stands and the application is therefore refused and dismissed with costs to respondent.

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

R. WENDOH

JUDGE