



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 2900 OF 1992

MUTUA KIOKO PLAINTIFF

VERSUS

ANNA MUKONYO KIMEU DEFENDANT

R U L I N G

This case has a history of Judgment having been once entered for the plaintiff against the defendant for failure to enter appearance and file a defence, vide a request for judgment dated 20th July, 1999.

The judgement must have been entered and eviction orders issued by Dugdale, J on 11th May, 1993 but the orders were set aside by Juma, J on 22nd April, 1994.

The records then show that amended plaint was filed by Messrs Mussilli & Mussilli on 10th July, 1997, bringing in a second plaintiff, Dominic Musei Ikombo.

A date for formal proof was taken when the matter went before Githinji, J who made the following observations,

“The interlocutory Judgement appears irregular. It appears that it was entered on the basis that an Amended Plaint served on the defendant personally, but defendant had engaged a counsel who had filed a Notice of appointment and a defence on 27.8.93. Again there was no application for leave to amend the plaint. It appears that there is no valid amended plaint as there was no leave”

The learned Judge then gave the following order,

“Order, Mr. Mussi lli to consider the above matter and take the necessary action. Suit Stood over generally”.

The court records show at this stage that Mr. Mussilli then filed an application for leave to amend the plaint. It was dated 25th February, 2000, and filed in court on 29th March, 2000.

That application was heard by Bhatt, Principal Deputy Registrar, (as he then was). He granted the following order

“In terms of prayer 1 of the application filed on 29.3.2000 Amended plaint be filed and be served within 15 days from today. Liberty to defend to file amended defence if any within 15 days from date of service. Costs in the cause”.

The court records do not show when amended defence was filed and served as directed by Mr. Bhatt, PDR, but I have found a copy of the amended defence in the court file stamped received by Messrs Onyango Otieno advocates on 5th April, 2000. These were the advocates of the defendant then. I note that the date 5th April, 2000 was before Mr. Bhatt who gave leave to file amended plaint.

The plaintiff's counsel took a date for formal proof and the matter started for hearing before me, when at some point, I was not satisfied that proper service on the defendant had been effected. I adjourned the matter for that purpose to have the defendant served with a hearing notice which was done and the formal proof hearing proceeded – to conclusion. However, the defendant's counsel Mr. Nyachote who was in court raised legal points on the invalidity of the interlocutory judgement and the amended plaint which brought in the second plaintiff. Mr. Mussilli replied to the points raised.

I have gone through the entire court file and established that Mr. Bhatt's orders of 8th June, 2000, were not complied with fully in that I have not seen a copy of the amended plaint filed and served within 15 days after leave was obtained.

Given these circumstances, I have decided in the interests of justice to nullify the proceedings of the formal proof hearing which went on before me. All the exhibits produced by the plaintiff's should be returned to them.

In order to be fair to both parties herein, I hereby direct the plaintiff to comply with orders of Bhatt, Principal Deputy Registrar, granted on 8th June, 2000.

The plaintiff's counsel should file and serve the amended plaint on the defendants Counsel on record Messrs K. A Nyachoti & Co. Advocates, for the defendant who filed a Notice of appointment on 27th November, 2000.

Dated at Nairobi this 14th day of March, 2002.

JOYCE ALUOCH
HIGH COURT JUDGE