



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL CASE NO. 10 OF 2014**

**KEVIN DUKE OMBAGI OKINYI .....PLAINTIFF**

**VERSUS**

**JOHN KIRIRA KARIUKI..... 1<sup>ST</sup>DEFENDANT**

**NOOR AHMED HARI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application is dated the 23<sup>rd</sup> October, 2015 and is brought under the provisions of Section 3A of the Civil Procedure Act and Order 8 Rule (2) and (3) of the Civil Procedure Rules. The applicant seeks the following orders;
  - i. The Plaintiff's amended Plaint dated 14<sup>th</sup> April, 2015 be struck out.
  - ii. Costs of this application be borne by the Plaintiff.
2. The applicant places reliance on the grounds on the face of the application and on the Supporting Affidavit made on the same date made by **MAINA NJUGUNA** who depones that he is an advocate of the High Court of Kenya and is conversant with the facts and is duly authorized to make the affidavit.
3. A short preview of the facts is that the on the 10/04/2014 the plaintiff filed suit against the 1<sup>st</sup> Defendant seeking for general and special damages arising from a road traffic accident that occurred on the 12<sup>th</sup> October, 2012.
4. The defendant entered appearance on 11/07/2014 and filed defence on the 22/07/2014. On the 14/04/2015 the plaintiff filed an amended plaint without seeking the leave of the court; that it introduces new issues; that no receipts or documents were annexed to support of the amendment; the sums claimed are substantial and the defendant needs to be heard before the amendment is allowed; that the amended plaint will prejudice and delay the case.
5. The applicant therefor seeks to have the amended plaint struck out as it is not properly on record.
6. At the hearing of the application only Counsel for the applicant was present; Counsel for the applicant stated that the respondent was not in attendance on the date fixed for hearing of the application despite being duly notified and served accordingly.
7. After perusing the court file and hearing the submissions made by Counsel for the applicant, which are controverted and unchallenged, the issues framed for determination are;
  - i. Whether service of the hearing notice was properly effected;
  - ii. Whether an advocate should make an affidavit on behalf of his client;
  - iii. Whether to allow the application to strike out the amended plaint.

## **ANALYSIS**

### **i. Whether service of the hearing notice was properly effected;**

8. Order 51 rule 7 requires that at the hearing of the application the court must be satisfied that sufficient notice has been given to any person who ought to have such notice; in this instance the person under reference would be the respondent, herein.
9. Delivery of the hearing notice may either be by hand or a process server or by registered mail. Upon delivery a return of service is duly filed. A quick perusal of the court record shows evidence of delivery of the notice upon the respondents' advocates of the hearing of the application set down for the 17/11/2015, by a process server; which notice is supported by a return of service dated 13/11/2015.
10. This court is satisfied that the respondent was given sufficient notice.

### **ii) Whether an advocate should make an affidavit on behalf of his client;**

11. I have noted that the supporting affidavit is made by learned counsel who is in conduct of the suit on behalf of the applicant, herein; it is prudent practice that counsel ought not to swear an affidavit on behalf of his client particularly if the latter is available; the affidavit makes no mention of the unavailability of the said client.
12. The above notwithstanding a court can exercise its discretion and allow the affidavit if the information deponed to relates to facts which are within the independent knowledge of the Counsel; indeed the irregularity pointed out in the averment relates to an amended plaintiff that is not properly on record; which averment it is noted is not based on hearsay but on information which was within Counsels' knowledge arising from the time frames set down for closure of pleadings; and that the Respondent ought to have sought leave of court to introduce the amendments.
13. This court reiterates the fact that swearing of affidavits by counsel on behalf of their clients is a practice that ought to be discouraged; and this has been restated time and time again by the courts of law.
14. In this case I shall allow the supporting affidavit to stand as I am satisfied that the timelines averred to were within the deponents' personal knowledge.

### **iii. Whether to allow the application to strike out the amended plaintiff.**

15. The provisions of Order 8 Rule 1 allows parties to amend their pleadings to make them right and this can be done without leave of court before pleadings are closed; pleadings close after 14 days after service of the Reply to the Defence or if there is none 14 days from the date of service of the Defence.
16. In this instance the court record indicates that the pleadings closed with the Statement of Defence; the defence was filed on the 4<sup>th</sup> August, 2014; the applicant avers that one year after the close of pleadings the respondent proceeded to file an amended plaintiff without the leave of the court;
17. This court has had occasion to peruse the court record and indeed notes that the date indicated on the amended Plaintiff is 14<sup>th</sup> April, 2015 and the same was filed in court on the 5<sup>th</sup> day of June, 2015; this court has already dealt with the issue of service and can only state that had Counsel for the respondent been in attendance and invoked the provisions of Article 159 (2) (d) this court would have considered administering justice without undue regard to technicalities of procedure and would have cured the anomaly; but that was not to be as both the respondent and his counsel were absent.
18. In the light of the above this court's hands are tied by the provisions of Order 8 Rule (2).

## **DETERMINATION**

19. This court finds that the amendments were done without leave of the court; the amended plaintiff is hereby struck out.
20. The costs shall abide the outcome of the suit.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 7th day of April 2016.**

**A.MSHILA**

**JUDGE**