



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CIVIL APPEAL NO.17 OF 2014
JOSEPH KIPKIRUI MUTAI.....APPELLANT/APPLICANT
VERSUS
RICHARD KIBET.....1ST RESPONDENT
ERICK SIELE.....2ND RESPONDENT
(Being an Appeal from the Ruling made by the then Resident Magistrate
Hon. L. Kiniale at Kericho in CMCC No. 220 of 2013)

J U D G M E N T

1. The Appellant is the Plaintiff in Kericho CMCC No. 220 of 2013, while the Respondents are the 1st and 2nd Defendants therein respectively.
2. By a Ruling delivered on 24th July, 2014 the Hon. learned trial Magistrate struck out the Amended Plaintiff dated 31st October, 2013 and filed on 4th November 2013, by the Appellant.
3. The said Ruling has prompted this Appeal, which is premised on the following grounds;
 - a. **THAT** the learned Resident Magistrate erred in fact in arriving at a finding that the appellant herein had not filed a response opposing the respondents application dated 11th March, 2014.
 - b. **THAT** the learned Resident Magistrate erred in law and misdirected herself on the law and principles applicable in respect to striking out pleadings.
 - c. **THAT** the learned Resident Magistrate erred in law in mis apprehending the facts of the case and therefore misdirected herself as to the fact and law applicable in respect to the application.
 - d. **THAT** the learned Resident Magistrate erred in law by holding that the appellant ought to have filed an application seeking leave to file an amended plaintiff before pleadings had closed.
 - e. **THAT** the learned Resident Magistrate erred in law and misdirected herself in fact in holding that the appellants counsel was indolent in not requesting for judgement when pleadings had closed; whereas the issue as to request for judgment in default of filing a defence was not an issue for determination in the application.

f. **THAT** the learned Resident Magistrate erred and misdirected herself in law in alluding that the Plaintiff ought to have sought leave to file an amended plaint.

g. **THAT** the learned Resident Magistrate misdirected herself as to the provisions and procedure of the law applicable in the circumstance.

h. **THAT** the decision and or ruling of the learned Resident Magistrate was completely against the basic principles in a case of this nature.

i. **THAT** the learned Magistrate misdirected herself in fact in holding that counsel for the appellant had committed unforgivable omission in the pleadings and that an amendment cannot be allowed to atone counsel's mistake.

j. **THAT** the learned Magistrate misdirected herself on the issue/s that fell for determination, and therefore misdirected herself as to the facts, principles and the law applicable.

4. Both Counsels agreed to file written submissions in respect of this appeal. They did file the said submissions which I have seriously considered, alongside the record from the Lower Court.

5. **Background**

The brief facts of this matter are that the Appellant filed a suit *vide* a Plaint on 28th June, 2013. The suit was against the two Respondents.

- The 1st Respondent entered appearance and filed his defence on 25th October, 2013.

- On the same date he filed a Notice of Motion under **Order 2, Rule 15 (1) (a)** of the **Civil Procedure Rules** seeking to dismiss the Appellant's suit for failure to disclose any cause of action against him.

- This Application was set for hearing on 23rd January, 2014.

- The Appellant did not file any response to this application dated 25th October, 2013.

- He instead filed an amended plaint on 4th November, 2013.

- The 1st Respondent also filed another Notice of Motion dated 11th March, 2014 seeking to have the Appellant's amended plaint filed on 4th November, 2013 struck off the record. The same was allowed on 24th July, 2014.

6. The Appellant has raised ten grounds of appeal. After perusing the Lower Court record, the Grounds of Appeal, and the Submissions I find two issues falling for determination, by this Court.

They are the following;

(i) *Whether the Appellant required leave of the Court to file the amended Plaint.*

(ii) *Whether the pendency of the 1st Respondent's application dated 25th October, 2013 barred the Appellant from exercising his right of amending pleadings without leave under Order 8 Rule 1 (1) of the Civil Procedure Rules.*

7. **Order 8 Rule 1 (1)** of the **Civil Procedure Rules** provides;

“A party may, without the leave of the court, amend any of his pleadings once at any time before

the pleadings are closed,”

Order 8 Rule 2 (a) & (b) of the **Civil Procedure Rules** provides;

“Where an amended plaint is served on a defendant—

(a) if he has already filed a defence, the defendant may amend his defence; and

(b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.”

8. It is therefore clear that the law gives a party the right to amend any of its pleadings without leave once before close of pleadings. When are pleadings said to be closed?

9. **Order 7 Rule 7 (1)** of the **Civil Procedure Rules** provides;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

From this provision, pleadings close fourteen days (14) after the service of the defence or last of the defences on the Plaintiff. After closure of the pleadings a party may only file subsequent pleadings with the leave of the Court.

10. In the present case the defence was filed on 25th October, 2013. Counsel for the Appellant has confirmed that he was served with the defence on 25th October, 2013.

11. My understanding of **Order 8 Rule 1 (1)** of the **Civil Procedure Rules** is that within the period of 25th October, 2013 to 8th November, 2013 either of the parties was at liberty to amend any of his pleadings without leave of the Court. The Appellant filed his amended plaint on 4th November, 2013 which fell within the fourteen days period.

12. In her Ruling the learned trial Magistrate at page 88 lines 2-4 Record of Appeal stated;

“What the Plaintiff ought to have done is to put a reply to defence and a response to the application then file an application for leave to amend owing to the existence of the application dated 25th October, 2013.”

13. I disagree with this finding. One, because **Order 7 Rule 17 (1)** of the **Civil Procedure Rules** does not make it mandatory for a Plaintiff to file a Reply to a defence. It is an opportunity he/she may utilize or not. If no reply is filed it simply means there is a joinder of issues. Secondly, it is nowhere stated in the Civil Procedure Act and/or Civil Procedure Rules that “Pleadings are Closed” once there is an application challenging the same. Both the learned trial Magistrate and Counsel for the 1st Respondent did not refer to any such provision, and I am not aware of any.

14. The Application dated 11th March, 2014 sought to have the amended plaint struck out for being incompetent. One of the grounds was that it disregarded the law and rules of procedure since there was an unheard application filed by the 1st Respondent. That no leave was sought before the amendment.

I have looked at the original plaint and the amended plaint. Its clear that in the original plaint the role played by the 1st Respondent in the claim was not outlined and this has been brought out in the amended plaint. Its also clear that the 1st Respondent was one of the parties sued by the Appellant, and what he did as far as the claim is concerned had to be stated in the pleadings.

15. The argument that the appellant could not amend even when the law allows it because of a pending application is neither here nor there. What is the purpose of the provision for amendments in the law? Its to enable parties correct any errors, omissions etc so as to bring before the Court all the relevant material to enable the Court arrive at a just decision.

16. I am persuaded by what the late Justice Kaburu Bauni said in the case of **National Bank of Kenya Ltd Vs. Magut Agencies Ltd Eldoret HCCC No.124 OF 2007** to be the right approach in a matter of this nature. He stated thus:

“Under Order 6A Rule 2 the applicant was entitled to apply to challenge the amended Plaintiff filed. However, I have looked at the same and I am satisfied that even if an application for leave to amend was presented then I would not have granted the same. The amendment sought to clarify the year when the loan facility was given to the applicant. True the applicant raised that in his defence but I see no prejudice suffered by the applicant due to that clarification.”

17. In the case at hand the Appellant's amendment clarified the position of the 1st Respondent in the claim against the Respondents. It was a clear omission, as can be seen from both Plaints.

18. My finding therefore is that;

(i) The Appellant made the amendment within the confines of Order 8 Rule 1 (1) of the Civil Procedure Rules and did not therefore require leave to do so.

(ii) The pendency of the application dated 25th October, 2013 could not have barred the appellant from exercising his right under Order 8 Rule 1 (1) of the Civil Procedure Rules. The said application was infact overtaken by events.

19. The upshot is that the appeal has merit and is allowed.

20. The Order striking out the amended plaintiff is set aside and substituted with an order confirming the said amended plaintiff from the date of filing. The 1st Respondent is at liberty to file an amended defence within fourteen (14) days from the date of this judgment.

21. The Suit Kericho C.M.C.C No.220 of 2013 to be heard by any other Court with competent jurisdiction at Kericho besides Hon. Lilian Kiniale, Senior Resident Magistrate.

22. Costs to the Appellant.

Dated, signed and delivered in open court this 2nd day of June, 2015.

H.I.ONG'UDI

JUDGE

In the presence of:

Mr. Langat for 1st Respondent-Present

M/s Rotich for Rono for Appellant

Kipyegon- court assistant

Parties Absent