



**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 54 OF 1998**

**FRANCIS MUKOYA ..... PLAINTIFF**

**V E R S U S**

**ANDREW CHIRISWA MASHISIA ..... DEFENDANT**

**R U L I N G**

The application dated 18.6.2013 seeks to review and set aside the judgment of this court delivered on 7.2.2013. The application is supported by the applicant's affidavit sworn on the same date. It is contended that there is an apparent error on the face of the record. The amended originating summons was not approved by the court and was supported by an unsigned affidavit. Leave to amend the originating summons was not obtained and that the court awarded the respondent plot number **BUTSOTSO/ESUMEYIA/229** which was not prayed for in the plaint.

Parties agreed to determine the application by way of written submissions. Mr. Mukabwa, Counsel for the applicant contends that the originating summons dated 13.3.1998 was claiming plot number **BUTSOTSO/ESUMEYIA/235**. After pleadings closed the respondent filed an amended originating summons without leave of the court and changed the plot number. The amended originating summons was supported by an unsigned affidavit which purported to amend the previous affidavit. Counsel cited the case of **GREENHILLS INVESTMENT LIMITED VS CHINA NATIONAL COMPLETE PLANT EXPORT CORPORATION T/A COVEC [2002]1 KLR 384**. Counsel maintains that an affidavit cannot be amended as it is evidence. The court ought to have awarded the respondent plot number **235** and not **229**. The court can only grant the relief that has been prayed for and not otherwise. Counsel cited the case of **GREAT LAKES TRANSPORT COMPANY (U) LIMITED V KENYA REVENUE AUTHORITY. [2009] KLR 722**.

Mr. Momanyi, counsel for the respondent opposed the application. Counsel maintains that there is no error on the face of the record. Counsel contends that when the initial originating summons was filed there was no reply to it. All what the applicant did was to file an application seeking to have the originating summons struck out. In essence therefore the pleadings remained open. The amended originating summons was therefore properly filed. The applicant was served with the amended originating summons but did not respond to it. There was no complaint and the matter was fully heard. On 13.8.2007 the applicant filed an application for directions indicating that the pleadings had closed and sought directions. The relief being sought was for plot number 229 as per the amended originating summons.

The record shows that the original originating summons was filed on the 17.4.1998. Those summons referred to plot number 235. The applicant herein filed an application dated 21.5.1998 through his advocate seeking to have the originating summons struck out for lack of locus standi. There was an affidavit accompanying the application and it indicated in its paragraph 9 that it was being sworn in support of the prayers to have the suit dismissed or struck out. The respondent filed a replying affidavit sworn on the 17.11.1998 in reply to that application. On 13.10.1999 the respondent filed an amended originating summons and amended the plot being sought from 235 to 229. In the court file the application was supported by a further affidavit sworn on the 2.10.1999 which is signed before J.S. Shivutse Advocate. I do therefore find that the amended originating summons had a proper affidavit.

The record also shows that on the 8.3.2000 the respondent requested for judgment since the applicant had been served through his advocate with the amended originating summons but had not responded. That

request was granted and on 15.3.2000 interlocutory judgment was entered in favour of the respondent. The interlocutory judgment was entered in terms of the amended originating summons. On 24.4.2006 the applicant herein filed an application seeking to have the interlocutory judgment set aside and he be granted leave to file a replying affidavit in response to the originating summons. Counsel for the applicant had appeared before Justice Waweru on the 20.9.2000 and indicated that he had noted that there was interlocutory judgment and wanted to file an application to have it set aside. The application was filed almost six years later. On 24.4.2007 parties and their counsels appeared before Justice G.B.M. Kariuki and recorded a consent to the effect that the application dated 24.4.2006 for setting aside the interlocutory judgment be allowed. The consent was endorsed by the court.

Given the background of the matter it is clear to me that when the amended originated summons was filed there was no reply to the earlier originating summons. Therefore the pleadings had not closed. Secondly, judgment was entered by the court in terms of the amended originating summons. When the judgment was set aside there was no complaint that the amended originating summons had been wrongly filed. In fact the affidavit in support of the application to set aside the judgment indicates that the amended summons were served on his advocate and not on him personally. The service was proper as his advocate had entered appearance and filed an application to have the suit struck out. Since parties agreed to set aside the interlocutory judgment and the applicant was granted leave to defend the suit as per prayer 2 of his application dated 24.4.2006 which requested him to be granted leave to file a replying affidavit in response to the amended originating summons, I do find that there was consent on the fact that the amended originating summons were properly on record. The current application is made quite late and it is an afterthought.

During the hearing of the case it emerged that the respondent's father had bought the land from the applicant who was his brother. It also emerged that the agreement had erroneously referred to plot number **235** instead of **229**. The applicant himself in his evidence indicated that he had leased plot number **229** to the respondent's father. According to the respondent in the current application he has been living on plot **229** and the applicant was told by the D.O. to reveal the plot number to the respondent, it is my finding that there is no error on the face of the record. The reference to plot **235** was cured by the amended originating summons. It could have even been orally made before the hearing. It is clear that parties were litigating on plot number **229** and not **235**. The respondent produced evidence to show that plot number **235** belongs to a different person.

There is no amended affidavit as contended by the applicant's counsel. What was filed with the amended originating summons was a further affidavit which has no amendments and therefore the contentions that an affidavit cannot be amended are misplaced. There was no need for leave to be granted to amend the summons. Indeed it is the applicant who was granted leave to reply to the amended summons. I do find that the amended originating summons were not only approved by the court but were also approved by the parties when they recorded a consent to have the interlocutory judgment set aside. This court awarded the respondent plot number **BUTSOTSO/ESUMEYIA/229** which was pleaded in the amended originating summons. That was the relief being sought and there is no error that the respondent was granted a relief contrary to his pleadings.

In the end I do find that the application dated 18.6.2013 lacks merit and the same is hereby dismissed with costs.

Delivered, dated and signed at Kakamega this 16<sup>th</sup> day of October 2014

**SAID J. CHITEMBWE**

**J U D G E**