



REPUBLIC OF KENYA

High Court at Embu

Civil Case 159 of 2010

ZAKARIA KINYUA.....PLAINTIFF

VERSUS

MURIITHI KALLEN.....1ST DEFENDANT

ALEX MUTUA.....2ND DEFENDANT

R U L I N G

The Notice of Motion before me is dated 13/7/2011 filed under Order 2 Rule 15, order 7 Rule 17(2) and Order 8 Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act seeking an order to strike out the amended plaint filed in Court on 1/7/2011.

Its supported by the grounds on the face of the application plus an affidavit of C.W. Githae. The main ground being it was filed without leave of the court and out of Court. Mr. Kamunyori filed a replying affidavit saying his amended plaint was filed within time before pleadings closed in accordance with the Civil Procedure Rules 2010.

Both counsels for the parties submitted before me in Court. The facts from the record are as follows:-

- ***On 2/6/2011 the Defendants entered appearance and filed a defence pursuant to the Court order of 31/5/2011.***
- ***on 14/6/2011 the defence was served on the Plaintiffs counsel.***
- ***On 17/7/2011 the plaintiff filed a reply to the Defence.***
- ***On 1/7/2011 the plaintiff filed an amended plaint and served it on 4/7/2012.***

All the provisions related to pleadings under the Civil Procedure Rules must be read together. Order 2 Rule 13 of the Civil Procedure Rules provides:-

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim after service of the reply or defence or counterclaim or if neither is served fourteen days after service of the defence notwithstanding that any order or request for particulars has been made

but not complied with.

Order 7 Rule 17(2) of the Civil Procedure Rules

“No pleading subsequent to the reply shall be pleaded without leave of the Court, and then shall be pleaded only upon such terms as the Court thinks fit”.

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”.

There is no dispute that the amended plaint was filed and served without the leave of the Court. The issue then is whether such leave ought to have been sought? The law is that pleadings may be amended once before the close of the pleadings, without leave as long as pleadings have not been closed. When then are pleadings closed?

Order 2 Rule 13 of the Civil Procedure Rules provides that pleadings are closed fourteen days after service of the reply or defence to counterclaim. However, even with this wide window in Order 2 Rule 13 of the Civil Procedure Rules, its clearly indicated under Order 7 Rule 17(2) of the Civil Procedure Rules that no pleading subsequent to the reply shall be pleaded without leave of the Court.

It clearly means that inspite of how many days may still have been left of the fourteen days, once a reply has been filed then any subsequent pleading can only be made with the leave of the Court. The filing of the reply sealed his fate and he had to comply with Order 7 Rule 17(2) of the Civil Procedure Rules. The amended plaint could have been acceptable if he had filed it instead of the reply.

And that being the case, I strike out the amended plaint filed herein on 1/7/2012 with costs.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH OF NOVEMBER 2012.

H.I. ONG'UDI

JUDGE

In the presence of:-

**Mr. Njoroge for Maina Ngechu for Defendant/Applicant
Njue CC**