



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 71 OF 2017

REBECCA AJIAMBO OMALA..... PLAINTIFF

VERSUS

EPHRAIM SIKENYI KWENA.....DEFENDANT

RULING

1. This ruling arises from a preliminary objection raised by the Defendant regarding an amended plaint filed here on 5/3/2018. The notice to raise that objection was filed on 12/3/2019. The objection is two – pronged and is as follows:

1. The amended plaint was filed without leave of court and hence unprocedural.

2. The amended plaint offends the mandatory provisions of Section 13A of Government Proceedings Act (cap 40) laws of Kenya.

2. It is necessary first to give some background or history relating to this suit. The suit was first filed on 3/4/2017 vide a plaint dated 31/3/2017. By then, the Plaintiff – **REBECCA AJIAMBO OMALA** – had sued only one Defendant – **EPHRAIM SIKENYI KWENA**. It is clear that the Defendant was served and he entered appearance on 5/4/2017. A defence was later filed on 24/4/2017. The Plaintiff did not file a reply to defence. What happened next is that about one year later – on 5/3/2018 to be specific – the amended plaint was filed. The amended plaint brought on board four (4) other defendants – **GABRIEL OLUOCH, BRIDGIT NDUBI, THE COUNTY LAND REGISTRAR** and **THE ATTORNEY GENERAL**.

3. The objection was canvassed by way of written submissions. The Defendant filed two sets of submissions, the first one on 26/6/2018 and the second, which was in response to Plaintiff's submissions, on 28/6/2018. The Plaintiff's submissions were filed on 27/6/2018. The Defendant submitted that pleadings had closed by the time the amended plaint was filed and leave of court was therefore required before filing it. He pointed out that the pleadings closed 14 days after the defence was filed.

4. The other line of attack related to the joinder of COUNTY LAND REGISTRAR and THE ATTORNEY GENERAL as parties. These are agents of the government and the Defendant pointed out that under Section 13A of the Government Proceedings Act (cap 40) a 30 days notice needed to be given before they could be sued. This court was asked to strike out the suit.

5. The Plaintiff submitted, *inter alia*, that the Defendant was merely being legalistic. To the Plaintiff, the Defendant was placing legalism above substance. He submitted that article 159 (2) (d) of the Kenya Constitution 2010, enjoins that justice shall be administered without undue regard to procedural technicalities; a position reiterated under Sections 1A and 1B of the Civil Procedure Rules, 2010.

6. Probably not to be outdone, or possibly to even out scores, the Defendant filed other submissions to respond to the Plaintiff. In the submissions, he accused the Plaintiff of not knowing or seeming to know that when pleadings are closed, leave of court must be sought first before a party can do any amendment. Similarly, the Plaintiff was accused of apparent lack of knowledge requiring a 30-days notice to the government agencies involved before suing them in a court of law.

7. I have considered the objection, rival submissions, and the pleadings in general. As I pointed out earlier, the amended plaint was filed about one year after the filing of the initial plaint. By then, the defence had long been filed. The Plaintiff did not file reply to defence, meaning that about 14 days after filing defence, the pleadings were deemed closed. Obviously, the Plaintiff was supposed to seek leave of court before filing the amended plaint. That is what the law requires. That is the common practice in our courts.

8. And as to the requirement to give notice before suing the County Land Registrar and The Attorney General, again that is what the law requires and the Plaintiff was supposed to give such notice. But instead of accepting the reality of violating procedure, the Plaintiff chooses to engage in circumlocution. He then tries to seek refuge in article 159(2) (d) of the Constitution and Sections 1A and 1B of Civil Procedure Rules.

9. In **CHINA SICHUAN CORPORATION FOR INTERNATIONAL TECHNO – ECONOMIC CO-OPERATIVE (SIETCO) Vs KIGWE COMPLEX LIMITED: HCC No. 464 of 2012, NAIROBI**, the court declined to treat article 159(2) (d) of the Constitution as a cure for omission to adhere to section 6(1) of the Arbitration Act, which had a mandatory provision for filing an application for arbitration proceedings at the time of entering appearance. The court took the position that article 159(2) (d) is not a panacea for incompetence. I take the same position here.

10. Neither article 159(2) (d) of the Constitution of Kenya, 2010, nor Sections 1A and 1B of the Civil Procedure Rules, 2010, are a refuge for the negligent, the incompetent, and/or the careless. A careful readings of all these provisions will readily show that procedure is not thrown out of the window. What is de-emphasised is **“UNDUE REGARD”** to procedural technicalities, meaning, in effect, that **DUE REGARD** must be had to procedure. It is this due regard that the Plaintiff failed to observe. While the courts must hold high the imperative to do substantive justice, it needs to be realised that disregard of procedure can lead to anarchic proceedings and undesirable outcomes.

11. I therefore uphold the preliminary objection but, upon due consideration, I realise too well that striking out the case will only serve to delay the dispute and increase costs for the parties. For striking out will not prevent a fresh suit from being filed. I therefore order and direct that proceedings stay as they are but the Plaintiff will pay costs amounting to Kshs.5000/= to the party who filed the objection. The costs should be paid before the Plaintiff can be entertained regarding any other action in this matter.

Dated, signed and delivered at Busia this 21st day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Present

Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendant: Absent

Court Assistant: Nelson Odame