



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 21 OF 2016

KINTALEL OLE PARKIRONKA.....PLAINTIFF

VERSUS

JOHN OLE LINTI1ST DEFENDANT

MITIAKEI KISHAU..... 2ND DEFENDANT

RULING

1. This ruling is in respect of 1st and 2nd defendants' Notice of Motion dated 30th April 2018, an application seeking an order that the plaintiff's suit be struck out with costs in so far as it relates to the 1st and 2nd defendants. The application is supported by an affidavit sworn by the 1st defendant. He deposed that the plaintiff filed an amended plaint on 27th March 2018 thereby joining Kapaition Ole Kishau as 3rd defendant. That following the amendment, no cause of action is left against the 1st and 2nd defendants.

2. The 1st and 2nd defendants opposed the application through grounds of opposition in which they state that the application is incompetent, frivolous and without merit. Parties also filed and exchanged submissions.

3. The applicants seek striking out of the plaintiff's suit in so far as it relates to them. Whenever invited to strike out a pleading, the court must caution itself that striking out is a draconian act which may only be resorted to in plain cases and that whether or not a case is plain is a matter of fact. Striking out should only be granted where a pleading discloses no semblance of a cause of action or defence and is incurable by amendment. See **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR**.

4. The application was triggered by amended plaint which was filed on 27th March 2018. The amended plaint itself has a statement within it to the effect that it was filed "pursuant to the court order dated 16th March 2018". I have perused the record herein and I have not seen any such order. Instead, the record reveals that on 16th March 2018 counsel for the plaintiff sought to be allowed to amend the plaint. Counsel for the 1st and 2nd defendants insisted that a formal application be filed. The court then ordered the plaintiff to file a formal application for leave to amend the plaint. Subsequently, no such application was filed and no consent allowing amendment was filed. It follows therefore that the amended plaint which was filed on 27th March 2018 was irregularly filed. The plaintiff's claim remains as pleaded in the originally filed plaint. Parties seem to have been acting under a wrong impression. Notice of Motion dated 30th April 2018 cannot succeed since it's aimed at a non-existent amended plaint.

5. Assuming that the amended plaint was validly filed, I note that none of the allegations that were made and prayers that were sought against the 1st and 2nd defendants in the original plaint have been removed. All I see is the addition of Kapaition Ole Kishau as 3rd defendant and some additional averments in the body of the amended plaint. I do not therefore agree with the applicants that following the amendment, no cause of action is left against them.

6. I find no merit in Notice of Motion dated 30th April 2018. It is dismissed with costs to the plaintiff. Parties may wish to regularize the amended plaint, hopefully by consent, so that progress in disposal of the main suit is achieved.

7. Ruling in this matter was to be delivered on 6th March 2019 but was delayed since I proceeded on a lengthy medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 18th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Karuga holding brief for Mr Karanja Mbugua for the 1st & 2nd defendants/applicants

Mr Okeke for the plaintiff /respondent

No appearance for the 3rd defendant

Court Assistants: Beatrice & Lotkomoi