



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC APPEAL NO.34 OF 2014**

**T N K.....APPELLANT**

**=VERSUS=**

**MICHAEL MWAURA NDUNGU.....RESPONDENT**

*(Being an appeal from the ruling and orders of the Honourable Mrs. P Kidula (CM) delivered on 19<sup>th</sup> June 2006 in Thika CMCC No.1194 of 2004)*

**JUDGEMENT**

1. The appellant is the *guardian ad litem* of **W K G**. The appellant was appointed a *guardian ad litem* of **W K G** following a finding that **W K G** was of unsound mind. **W K G** had secured a loan from Family Finance Building Society over which he offered his two properties namely *Ndarugu/Kamunyaka/721* and *722* as security. These two properties were sold in a public auction following **W K G**'s default. The two properties were purchased by the respondent and they were duly registered in the name of the respondent.

2. Unknown to the respondent that **W K G** had been declared to be of unsound mind and a guardian ad litem to manage his affairs had been appointed, the appellant filed a suit before Thika Chief Magistrates Court against **W K G** seeking orders for his eviction and for mesne profits. When it became known to the appellant that there was a guardian ad litem who had been appointed to manage the affairs of **W K G**, the appellant applied to court for leave to substitute Wilfred Karanja Githuka with the appellant. The application for substitution and amendment was allowed on 21<sup>st</sup> March 2005.

3. An amended plaint was duly filed and served upon the appellant. The appellant filed a defence. The respondent thereafter filed an application dated 27<sup>th</sup> October 2005 in which he sought to strike out the appellant's defence. At the hearing of this application, a preliminary objection was raised on behalf of the appellant on the grounds that there was no competent suit before court upon which orders sought in the application dated 27<sup>th</sup> October 2005 could be made. The reason was that the amended plaint dated 23<sup>rd</sup> March 2005 offended the provisions of *Order VIA Rule 7* (now *Order 8 Rule 7*) and *Order XXXI Rule 3(4)* (now *Order 32 Rule 3(4)*) of the Civil Procedure Rules.

4. The preliminary objection was argued before the trial magistrate who in a two sentence ruling dismissed it with costs to the respondent. This is what triggered this appeal in which the appellant has raised one ground of appeal namely that the trial magistrate erred in law and in fact in not appreciating sufficiently the appellant's submissions and the law on pleading and in particular *Order VIA Rule 7* and *Order XXXI Rule 3(4)* which are now *order 8 Rule 7* and *Order 32 Rule 3(4)* of the Civil Procedure Rules respectively.

5. This being a first appeal to this court, I am obliged to evaluate the submissions before the trial magistrate in relation to the issues before the court and arrive at my own conclusions. I have gone through the proceedings before the trial magistrate. The first ground argued on behalf of the appellant before the trial magistrate was that the amended plaint dated 23<sup>rd</sup> March 2005 offended *Order VIA Rule 7* (now *Order 8 Rule 7*) of the Civil Procedure Rules. *Order 8 Rule 7* which is exactly the same as the previous *Order VIA Rule 7* states as follows:-

***(1) Every pleading and other documents amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.***

***(2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.***

***(3) Colours other than red shall be used for further amendments to the same document.***

6. The second ground argued on behalf of the appellant before the trial magistrate was that the provisions of *Order XXXI Rule 3 (4)* (now

Order 32 Rule 3(4) of the Civil Procedure Rules was offended. The counsel for the respondent opposed the preliminary objection raised on the ground that they were of a technical nature and there was no prejudice which had been suffered by the appellant.

7. The Court had directed parties to file written submissions in respect of this appeal. The appellants filed her submissions on 20<sup>th</sup> August 2014. The respondent filed his submissions on 19<sup>th</sup> September 2014. The appellant contends that the respondent had sued a wrong party and that when the respondent's counsel realised that they had sued a wrong party, they purported to amend the plaint to substitute the defendant with his guardian ad litem. The appellant also argued that the respondent offended the mandatory provisions of order VIA Rule 7 (now order 8 rule 7) of the Civil Procedure Rules.

8. In answer to the appellant's submissions, the respondent contends that failure to endorse a date or rule under which an amendment is done is not fatal. The respondent argues that this is a mere technicality which does not go to the root of the case and cannot cause prejudice on the part of the appellant. In this regard, the respondent relied on the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commissions & 7 others Civil Appeal No (application No.228 of 2013) 2013 eKLR.**

9. On the issue of suing a person of unsound mind, the respondent argues that the suit was filed against a person who had been declared to be of unsound mind by mistake. This mistake was corrected by amending the plaint to substitute the defendant with his guardian ad litem. The appellant therefore argues that the appellant was trying to challenge the order which granted leave to amend when there was no application to review that order or appeal against the same.

10. I have considered the submissions filed herein and the only issue which emerges for determination is whether the trial magistrate appreciated the submissions before her and whether she arrived at a correct finding as regards the law. I will start with the second ground which was raised before the trial magistrate. The appellant's counsel had argued that there was no compliance with Order XXXI Rule 3(4) ( Now Order 32 Rule 3(4) of the Civil Procedure Rules. what was before the trial magistrate was a preliminary objection in relation to an application dated 27<sup>th</sup> October 2005. The appellant's lawyer tried to challenge what had already been granted through an application for leave to amend which was granted on 21<sup>st</sup> March 2005. The respondent had not made an application under Order XXXI (Now Order 32) of the Civil Procedure Rules for appointment of a guardian ad litem. The appellant had already been appointed as a guardian ad litem. What the respondent did was to merely ask that the plaint be amended and the defendant be substituted with the appellant who was his guardian ad litem.

11. The appellant's advocate was trying to urge his preliminary objection dated 28<sup>th</sup> May 2005 in which the appellant had raised an issue of the competence of the application dated 25<sup>th</sup> January 2005 which sought leave to amend. When the application for leave to amend came up for hearing, the appellant's advocate was not in court. The application for leave to amend was granted and the respondent proceeded to amend. As the appellant's advocate lost the opportunity to oppose the application for substitution he could not raise it before the trial magistrate. In fact the record shows that the appellant's counsel abandoned his line of submission regarding this point. This was because he realized that this was not the right forum to do so. What was before the trial magistrate was beyond order XXI (Now Order 32).

12. Regarding the first ground, failure to endorse the date when leave to amend was granted was not fatal to the suit. There is no prejudice which was caused to the appellant by this omission. The counsel for the respondent cited binding authorities to the trial magistrate and emphasized the fact that the court should not be bound by technicalities. I therefore find that the trial magistrate was correct in dismissing the preliminary objection. I find that this appeal has no merits. The same is hereby dismissed with costs to the respondent.

**Dated, Signed and delivered at Nairobi on this 28<sup>th</sup> day of June 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Otieno Mudanyi for Mr Kimondo for respondent

Court Clerk: Hilda

**E.O.OBAGA**

**JUDGE**