



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
ENVIRONMENT AND LAND COURT

KTL ELC MISC CIVIL APPLICATION NO.104 OF 2005

CHRISTOPER SHIVAMBO KARAMOJA.....1ST PLAINTIFF

FRANCIS MOSE MASESE.....2ND PLAINTIFF

**RACHEL WANJIRU MWAURA (AS THE PERSONAL
REPRESENTATIVE OF JIDRAPH NDUNGU**

MWAURA (DECEASED).....3RD PLAINTIFF

VERSUS

JANE NJERI.....1ST DEFENDANT

JOSEPH K. KIIRU (AS THE PERSONAL REPRESENTATIVE OF

ELIZABETH WANJIRU KARANJA(DECEASED)..2ND DEFENDANT

MONICA NJERI NGANGA.....3RD DEFENDANT

R U L I N G

1. The applicants filed an application dated 22/3/2017. It was amended later. The amended application was filed on 3/5/2017. There is an objection by the respondents that the applicants never applied for leave to amend their application dated 22/3/17.

2. I must deal with this as a preliminary issue before considering any other issue. The record before me states that on 10/4/17, an application dated 22/3/17 was brought before this court and it was ordered that the application be served upon the respondents within 7 days and that an appropriate date be taken at the registry.

3. On 11/4/2017, the application dated 22/3/17 was fixed for hearing on 13/6/17. It was not heard on 13/6/17. On that day the application was fixed for hearing on 27/6/2017. On 27/6/2017, Mr. Samba appeared before court and stated that he had amended the application on 1/5/2017. The court certified the application urgent and granted prayer 3A thereof pending *inter-partes* hearing on 11/7/17. The issue of how the amendment came about was not addressed then. On 11/7/2017 the court ordered that the parties should file their submissions on the application and highlight them on 27/7/2017. Interim orders were extended. On the latter date, parties adopted their submissions.

4. The issue at hand that is whether the application dated 22/3/2017 was amended with or without leave of court, was raised, by the respondents in Reply and Submission.

5. The respondents urged that under **Order 8** of the **Civil Procedure Rules 2010**, a party can amend its plaint defence or reply to defence before the close of pleadings without leave of court and that under **Order 1 rule 5** of the **Civil Procedure Rules 2010**, a party can amend its plaint, defence or reply to defence before the close of pleadings without leave of court and that under **Order 8 Rule 5** of the **Civil Procedure Rules**, a party who intends to amend any document proceedings or any other court process must seek leave of court. The Respondents cite the cases of *Frederick Mwangi Nyaga –vs- Garam Investments & Another 2013 eKLR* *George K. Kimani & 5 Others -vs- County Government of Trans Nzoia 2014 eKLR* and *Avanti -vs- JaswantVohora 2008 eKLR*.

6. The issue is not specifically addressed by the applicants in their submissions nor was it replied to when it was raised. I agree with the court in the case of Avanti quoted by the respondents, when it states as follows:-

“Moreover the appellant, having purported to amend the original motion the same was no longer available for hearing as he could only proceed with the amended motion. Secondly, no leave having been obtained from the court for amendment of the original motion the Amended Notice of Motion was improperly before the court. To that extent, the appellants amended Notice of motion is incompetent and ought to be struck out on that ground alone.”

7. In the quoted Avanti case the appellant had filed an original Notice of Motion on 4/9/2008 an amended Notice of Motion on 9/9/2008. The original Notice of Motion that had been scheduled for hearing on 8/9/2008 did not come up for hearing on that date, instead the appellant filed an amended Notice of Motion under Certificate of urgency just as in the instant case, and interim orders, were issued just as was done in the instant case. At the hearing Counsel for the appellant purported to argue the original Notice of Motion filed on 4/9/2008. That is the action that prompted the court to observe as per the passage cited above.

8. I find that to allow parties to amend documents at will without leave of court would remove the process from the control of the court. I find that the amended Motion is improperly before this court. The same is struck out with costs to the respondents. The Notice of Motion dated 3/9/2008 is also struck out but with no orders as to costs.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Sitati holding brief for Samba for Applicants

Ms. Oketch holding brief for Mr. Githumbi for Defendants/respondents

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017