



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC NO. 666 OF 2002(O.S)**

**STANLEY MATHAARA MUCHUI.....1<sup>ST</sup> PLAINTIFF**

**PETER KINYURU MURIU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAKOMBOKI TEA FACTORY.....1<sup>ST</sup> DEFENDANT**

**K.T.D.A LIMITED.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**PATRICK MWANGI NJOROGE.....4<sup>TH</sup> DEFENDANT**

**RULING**

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were added to this suit on 5<sup>th</sup> February 2003 through amended Plaintiff dated 30<sup>th</sup> January 2003. The amendment of the plaintiff to add the said defendants to the suit was carried out without leave of the court before the pleadings closed. The 3<sup>rd</sup> defendant filed its statement of defence on 17<sup>th</sup> March 2003. The 2<sup>nd</sup> and 4<sup>th</sup> defendants filed a joint statement of defence on 24<sup>th</sup> March 2003 while the 1<sup>st</sup> Defendant filed its statement of defence on 29<sup>th</sup> April 2003.

On 20<sup>th</sup> May 2002, the 1<sup>st</sup> defendant filed a notice of preliminary objection to the suit herein and sought the striking out of the same on among other grounds that the amended plaintiff that added the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to the suit was accompanied by a defective affidavit. The 1<sup>st</sup> Defendant's preliminary objection was heard by Rawal J. (as she then was) on 12<sup>th</sup> February, 2007. In a ruling that was delivered on 28<sup>th</sup> February, 2007, Rawal J. made a finding that the verifying that had accompanied the amended plaintiff was defective and proceeded to strike out the amended plaintiff dated 30<sup>th</sup> January 2003 with costs. After the striking out of the amended plaintiff, the parties proceeded with the matter as if nothing had happened.

What I now have before me is another notice of preliminary objection by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants have contended that since the amended plaintiff dated 30<sup>th</sup> January 2003 was struck out by Rawal J. on 25<sup>th</sup> February 2007, there is no suit pending against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' preliminary objection was argued by way of written submissions. I have considered the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants' preliminary objection together with the submissions which were filed in support thereof. I have also considered the submissions by the Plaintiffs'

advocates in opposition to the objection. As I have stated at the beginning of this ruling, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were added to this suit through the amended plaint dated 30<sup>th</sup> January 2003. It is not disputed that the said amended plaint was struck out by Rawal J. on 28<sup>th</sup> February 2007 on the ground that it was accompanied by a defective verifying affidavit. I am in agreement with the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants argument that once the amended plaint was struck out, that marked the end of the Plaintiffs' claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who were added to the suit herein through the amended plaint which ceased to exist. I have agonized over the fate of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant was a party to the suit before the amendment of the plaint which brought in the 2<sup>nd</sup> to 4<sup>th</sup> defendants to the suit. As I have stated above, the amended plaint was struck out on a technicality namely; that the same was not accompanied by a competent verifying affidavit. I am of the view that where an amended plaint is struck out in the circumstances such as this, nothing stops the Plaintiffs from going back to the original plaint. I am of the opinion that where a court finds a pleading to be defective and proceeds to strike out the same, such a pleading is deemed as having never existed for all intents and purposes. In the circumstances, there is no reason why the plaintiffs herein who had filed a competent suit but purported to amend the same which amendment turned out to be defective null and void should not be allowed to revert to the original plaint.

I am fully in agreement with the decision of Ringera J. (as he then was) in **Mutuku and 3 others vs. United Insurance Co. Ltd. (2002) KLR 250** which was adopted by Makhandia J. (as he then was) in **Nyeri HCCC No. 108 of 2004, Cecilia Wamuyu Kabu & another Vs. Zipporah Wangui Kabu (unreported)** to the effect that an amended pleading supersedes and replaces the original pleadings. That in my view is the position where the amended pleading is valid but not like in this case where the amended pleading was found to be defective null and void. If the 1<sup>st</sup> defendant herein had pleaded to the original plaint that was filed herein by the Plaintiff on 18<sup>th</sup> April, 2002, I would not have hesitated to find and hold that when the amended plaint was struck out by the court, the parties reverted to the status quo prior to the amendment of the plaint. I have noted however that the 1<sup>st</sup> Defendant like the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed its statement of defence to the amended plaint and not to the original plaint. It follows therefore that when the amended plaint in respect to which the 1<sup>st</sup> defendant had filed a defence was struck out, no pleading was left in place on the basis of which this suit can proceed as against the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant having filed its defence to the amended Plaint which was struck out, the Plaintiffs cannot pursue their claims against the 1<sup>st</sup> defendant on the basis of the original plaint which the plaintiff had not pleaded to.

Due to the foregoing, it is my finding that there is no suit pending herein against the defendants. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' preliminary objection is upheld. Since the defendants had been awarded costs of the suit when amended plaint was struck out on 28<sup>th</sup> February 2007, I make no further order as to costs.

**Delivered and Dated at Nairobi this 2<sup>nd</sup> day of August, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

**N/A for the Plaintiffs**

**Mr. Mahugo for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants**

**N/A for the 3<sup>rd</sup> Defendant**

**John**

**Court Assistant**