



**New Age Developers & Construction Co. Limited v Sidian Bank Limited (Civil Case 1 of 2019) [2022] KEHC 13122 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL CASE 1 OF 2019  
FN MUCHEMI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**NEW AGE DEVELOPERS & CONSTRUCTION CO. LIMITED ..... APPLICANT**

**AND**

**SIDIAN BANK LIMITED ..... RESPONDENT**

**RULING**

**Brief Facts**

1. This is a ruling for two applications dated June 9, 2021 and September 30, 2021 which were consolidated on October 4, 2021 by consent of the parties. The first application seeks for orders that the defence be struck out and that judgement be entered in favour of the plaintiff as sought in the plaint. The second application seeks for orders that this court grants leave to file the defence out of time and that the defence filed on March 23, 2021 be deemed as properly on record.
2. The two applications are related considering the prayers sought and as such it is appropriate that the two be heard together to save precious judicial time. The plaintiff's application dated June 9, 2021 will be treated as the application and that of the defendant dated September 30, 2021 will be treated as the response. The same case will apply to the replying affidavits of the parties and the supplementary affidavit of the plaintiff.
3. It is important to state that the application (as consolidated) is vehemently opposed.

**The Applicant's Case**

4. The applicant states that the respondent was served on May 24, 2017 with the Plaint, Verifying Affidavit, plaintiff's List of Witnesses, List of Documents and bundle of Documents and the plaintiff's witness statement. On June 16, 2017, the applicant served the respondent with summons to enter appearance issued on May 25, 2017. However, the respondent failed to file a Statement of Defence



until March 26, 2021 which was served on the applicant's advocates on April 19, 2021 by which time the matter was set down for hearing. As such, the applicant contends that the Statement of Defence was filed over three years out of time without the leave of the court. The applicant therefore contends that the defence is an abuse of the court process and ought to be struck out with costs.

5. Moreover, the applicant contends that the delay in filing the Statement of Defence by the respondent is inordinate, inexcusable and prejudicial to the applicant. The applicant further states that it is an overriding objective of the Civil Procedure act that litigation must be heard and determined expeditiously.

### **The Respondent's Case**

6. It is the respondent's case that no summons to enter appearance were ever served upon the respondent as is required by Order 5 Rule 8 of the Civil Procedure Rules. Further, the respondent states that it did not authorize the said firm of advocates as alleged by the applicant to receive summons to enter appearance on behalf of the respondent. As such, the respondent avers that there being no proper service to enter appearance upon the respondent, the obligation to file the defence had not legally crystallized.
7. The respondent states that even assuming that service upon its advocates was proper, default judgment was not sought and entered which fact left the respondent's right to file its defence alive.
8. The respondent concedes to filing its defence on March 23, 2021 and states that its omission to file the defence in time was occasioned by the fact that the applicant was filing numerous applications being applications dated May 24, 2017, April 19, 2018 and November 8, 2018.
9. The respondent avers that they received a notice that the matter herein had been screened and referred to mediation. The matter was thereafter mentioned variously before the mediator with the last appearance being on February 7, 2020 but no progress was made and the matter was returned to the instant court. Subsequently after, the respondent states that covid 19 pandemic set in and the court process slowed down and ultimately came to a halt.
10. The respondent states that no prejudice will be suffered by the applicant as no default judgment has been sought and entered in favour of the applicant and the defence is already filed and served upon the applicant. The respondent further states that the right to be heard is a fundamental constitutional right which should not be taken away except in very exceptional circumstances which is not the case here.
11. The applicant filed a Supplementary Affidavit dated December 2, 2021 and states that the respondent's allegation that no summons were ever served upon it by the applicant is a falsehood aimed at misrepresenting facts and misleading the court. The applicant relies on Order 5 Rule 8 of the Civil Procedure Rules and states that they served the respondent's advocates who accepted and confirmed that they had the respondent's instructions to do so.
12. The applicant avers that on 13<sup>th</sup> April 2021, his advocates on record filed a Request for Interlocutory Judgment dated February 13, 2021. Further the applicant contends that they were served with the Statement of Defence on April 19, 2021 long after the request for interlocutory judgment was filed.
13. The applicant avers that the respondent's explanations as to why it failed to file its Statement of Defence is not satisfactory. Even after mediation failed on February 7, 2020, the respondent did not file its defence and now blames the pandemic. The applicant invites the court to take judicial notice that it was not until March 2020 when courts slowed down their operations. As such, the delay in filing the defence by the respondent is inordinate, inexcusable and prejudicial to the applicant.



14. I have perused the affidavits of the parties herein and noted that the grounds supporting the application dated September 30, 2021 seeking leave to file defence is supported by the same grounds in its replying affidavit to the application dated June 9, 2021 which material has already been summarised herein as the respondent's case. the applicant's supporting affidavit to its application dated June 9, 2021 and its supplementary affidavit also contain the similar averments as already summarised in this ruling.
15. The applicant argues that the court ought not to allow the defence by the defendant as it is a collection of hearsays and falsehoods as the defendant bank did not legally exist at the time it purports to have advanced credit facilities to the applicant. Further since the bank did not legally exist, it could not have issued statutory notices. As such, the defence defends an illegal sale of the suit properties scheduled to take place in 2017, which the respondent contends is in the past and which the defendant cannot seek leave of the court to permit an impossibility. Moreover, the defence refers to a letter dated August 4, 2016 which has not been exhibited but could not have been possibly issued by the bank as at the material time it was non-existent.
16. The Applicant argues that it will be greatly prejudiced if the defendant's application is allowed as some of the suit properties belonging to the respondent have already been sold illegally by the defendant and which illegality the defendant intends to sanitize through its statement of defence and which is also intended to prevent the respondent from challenging the illegal sales. The respondent further avers that it will be prejudiced if the application is allowed as the instant application is a back door attempt by the defendant to defeat the respondent's application dated June 9, 2021.
17. The Applicant urges the court not to reward the defendant for disposing off its properties during active litigation on the same properties in court in breach of the common law doctrine of lis pendens by virtue of Section 106 of the *Land Registration Act* 2012. The respondent avers that the application is mischievous and covered in malice with the aim of curtailing the expeditious and final determination of this suit and ought to be dismissed with costs.
18. Parties disposed of the applications by way of written submissions.

### **Applicant's Submissions**

19. The applicant relies on Order 7 Rule 1 of the *Civil Procedure Rules* and submits that a statement of defence filed out of time without the leave of the court and without an explanation of the basis of the delay amounts to an abuse of the court process. As such, such a pleading ought to be struck out under Order 2 Rule 15 (1) (c) and (d). The applicant submits that the power to strike a pleading is a discretionary one and the court in exercising its discretion ought to consider the interests of both parties. To support its contention, the applicant cites the case of *Fred Kiithusi Kula & Another vs Housing Finance Company Limited & Another* [2021] eKLR.
20. The applicant submits that the statement of defence having been filed about three years after the lapse of the statutory time should not be entertained. As such, the applicant relies on the cases of *Afapack Enterprises vs Punita Jayant Acharya (Suing as the legal administrator of the late Suchila Anatrai Raval)* [2018] eKLR; *Nginyaga Kavole vs Mailu Gideon* (Misc Application No 401 of 2018) and *Union Insurance Co of Kenya Ltd vs Ramzan Abdul Dhanji* Civil Application No 179 of 1998 and submits that the delay of over three years is inordinate.
21. Further, on March 22, 2021, when the matter came up for mention to take directions on the hearing of the main suit, counsel for the respondent did not disclose that the defendant had not complied with Order 11 of the *Civil Procedure Rules* nor seek leave to file the Statement of Defence. Instead the



- respondent opted to file its defence after the suit had been set down for hearing and long after the close of pleadings.
22. The applicant relies on the oxygen principles as set out in Section 1A and 1B of the *Civil Procedure Act*, Article 159 (2) (b) of the *Constitution* and the case of *Teachers Service Commission vs Simon P Kamau & 19 Others* [2015] eKLR and submits that justice ought not to be delayed. The applicant contends that the respondent has failed to give a satisfactory reason for the delay in filing its defence and thus the delay is intentional, contumelious and inexcusable.
  23. The applicant further relies on the case of *Elizabeth Kavere & Another vs Lilian Atho & Another* [2020] eKLR and submits that service upon an advocate who has instructions to accept service and to enter appearance is good for purposes of default judgment. As such, the respondent by lying about its instructions to its firm of advocates, the respondent is misleading the court into adopting its defence out of time and is undeserving of the court's discretion. Further, the applicant contends that the respondent is being untruthful on service of summons to enter appearance in this suit and is therefore not entitled to the equitable remedy sought.
  24. The applicant further cites that case of *Wayua James & Another vs Daniel Kipkorong Tarus & Another* [2014] eKLR and submits that the respondent has been indolent and is desirous of dragging the hearing and determination of the instant suit. The applicant further relies on the equitable maxim equity aids the vigilant and not the indolent and the case of *Remco Limited vs Mistry Jadva Parbat Ltd* (2002) 1 EA 233 (CCK) to support its contention. As such, the applicant prays that its application be allowed and the court to dismiss the application dated September 30, 2021.

### **The Respondent's Submissions**

25. The respondent submits that the applicant did not file a replying affidavit to their application and thus the application is unchallenged and uncontroverted. In my view, this argument is misguided since the applicant filed a replying affidavit dated December 2, 2021 on together with submissions in opposition to the application.
26. The respondent reiterates what it deponed in its application and affidavits and submits that it was never served with any summons to enter appearance. The respondent contends that it did not give the advocates on record any instructions and the respondent's advocates have equally denied ever receiving instructions to accept service of summons on behalf of the respondent. The respondent relies on Order 5 Rule 8(1) and (2) of the *Civil Procedure Rules* and the cases of Civil Appeal No 2 of 2019 *Jason Mbugua Kuria vs Kennedy Kuria & Another* and HCCC No 52 of 2014, *Middle East Bank Limited vs Prisco Petroleum Network Limited & Others* and submits that there was no proper and regular service of summons.
27. The respondent makes reference to the case of Civil Appeal No 2 of 2019 *Jason Mbugua Kuria vs Kennedy Kuria & Another* and submits that its defence raises triable issues particularly whether the plaintiff breached the terms of the charge document, whether the plaintiff defaulted in its loan obligations and whether the defendant's right of foreclosure had properly crystallized.
28. The respondent further cites the case of Civil Appeal No 217 of 2015, *Kivanga Estates Limited vs National Bank of Kenya Limited* and submits that striking out pleadings is a very drastic and draconian remedy which the court should be very reluctant to grant. It is only available in the most helpless cases which the respondent submits is not the case here. As such, the respondent prays that its application be allowed and the application dated June 9, 2021 be dismissed with costs.



## Issues for determination

29. The main issues for determination are:-
- a. Whether the Statement of Defence should be struck out and judgement be entered as prayed in the plaint.
  - b. Whether leave to file defence out of time should be granted and whether the defence filed on March 23, 2021 raised trouble issues.

## The Law

### Whether the Statement of Defence should be struck out

30. Order 7 Rule 1 of the *Civil Procedure Rules* provides:-

Where a defendant has been served with a summon to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit.

31. The suit herein was instituted by way of a Certificate of Urgency in the Environment and Land Court being ELC Case No 90 of 2017. The applicant filed a Notice of Motion, Supporting Affidavit and Plaint with its accompanying documents on May 24, 2017. The applicant served the respondent with the said pleadings on the same date. The respondent filed a Notice of Appointment through the firm of Waruhiu K'owade & Ng'ang'a Advocates on May 25, 2017. The matter was then transferred to the High Court on March 12, 2018 following the Court of Appeal decision in *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR. On April 13, 2021, the applicant filed a Request for Interlocutory Judgment. The applicant annexed its Affidavit of Service as proof of Service whereby the process server averred that he served the respondent bank on May 24, 2017 with the Plaint, Verifying Affidavit, List of documents and witnesses, Plaintiff's witness statement and Bundle of documents. He further averred that on June 16, 2017 he served the firm of Waruhiu Kowade & Nga'ng'a Advocates with Summons to Enter Appearance who were on record for the respondent.
32. Order 5 Rule 8 (1) and (2) of the *Civil Procedure Rules* provides:-
- 1) Wherever it is practicable, service shall be made on the defendant in person, unless he as an agent empowered to accept service, in which case service of the agent shall be sufficient.
  - 2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.
33. Clearly, a service upon an advocate who has instructions to accept service and to enter appearance is good for purposes of default judgment under Order 5 Rule 8(2) of the *Civil Procedure Rules*.
34. The respondent herein filed a Notice of Appointment on May 25, 2017 which is a clear indication that they had instructions to act for the respondent and they were on record for the respondent. The respondent did not produce any evidence to indicate that in fact no such service was done in accordance with the rules. The respondent merely renounced instructions on part of the counsel to accept service on their behalf. Consequently, I find that service upon the respondent was proper within the provision of Order 5 Rule 8(2) of the *Civil Procedure Rules*.



35. The respondent state that they delayed in filing their defence because the applicant was filing numerous applications thereafter the matter went through mediation and then covid 19 happened. The applicant on the other hand states that the reasons for delay are not plausible and therefore the defence ought to struck out.

36. Order 2 Rule 15 of the Civil Procedure Rules provides:-

At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that:-

- a) It discloses no reasonable cause of action or defence in law; or
- b) It is scandalous, frivolous or vexatious; or
- c) It may prejudice, embarrass or delay the fair trial of the action; or
- d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered according as the case may be.

37. The principles which guide the court in exercising discretion in striking out pleadings have been stated in DT Dobie & Co (Kenya) Ltd vs Muchina & Another [1982] KLR 1.

The court would not strike a pleading if it discloses an arguable case or raises a triable issue. Madan JA (as he then was) stated as follows in the said case:-

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trail thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way”.....No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to be allowed to go forward for a court of injustice ought not to act in darkness without the full facts of the case before it.”

38. Similarly, in The Cooperative Merchant Bank Ltd vs George Fredrick Wekesa Civil Appeal No 54 of 1999 the Court of Appeal stated:-

Striking out a pleading is a draconian act which may only be resorted to, in plain cases... Whether or not a case is plain is a matter of fact.....Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.

39. Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between the principle and the policy consideration that a plaintiff should not be kept away from his judgment by an unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. Kenya Commercial Bank vs Suntra Investment Bank Ltd [2015] eKLR.



40. It is noted from the record that this case was transferred to this court from ELC court where it had been filed in 2019. the ELC court had heard and determined two applications of the applicant by the time of transfer. The respondent proceeded with the applications and omitted a very crucial step of filing defence. A hearing date was taken by the parties before this court on March 22, 2021 and parties took directions on the applicant's application dated June 9, 2022. The parties were given time to exchange submissions on the said application. It is during this period that it dawned on the respondent that it had not filed defence. The application was filed a few days before the date of mention to confirm compliance on submissions. As such, it is not correct to say that the defence was not filed on time because the applicant had filed numerous applications. The record supports the fact that the failure was an oversight on part of the respondent.
41. The second explanation for late filing was said to be the setting in of the Covid-19. During that period, the court downgraded its operations from mid-March 2021 for about 30 days and then resorted to e-filing which continued for several months and was later adopted as the norm. By the time Covid-19 set in this case had been in court for two years. This delay of two years has not been explained by the respondent. The delay during Covid -19 has not been explained either because e-filing was introduced only a few weeks after the courts downgraded its operations. The delay is just an excuse and does not aid the respondent who is guilty of three (3) years indolence.
42. The authorities relied on herein stipulated that the power to strike out pleadings is a drastic step that ought to be exercised only in the clearest of cases. It is therefore this court's duty to strike a balance between a plaintiff who should not be kept away from fast determination of its case where defence which is a sham is filed simply for the purpose of delaying the finalization a case and defendant's constitutional right of being heard under Article 50 of the Constitution.
43. The issue herein is whether the respondent's statement of defence raises any triable issues. In Kenya Trade Combine Ltd vs M Shah (Civil Appeal No 193 of 1999) (unreported) this court said this:-
- In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence must succeed
44. So what amounts to a triable issue? The court in the case of Equatorial Commercial Bank Limited vs Jodam Engineering Works limited & 2 Others (2014) eKLR had occasion to determine this question. In its decision, Kasango J. stated as follows:-
- A Statement of Defence is said to raise a reasonable defence if that defence raises a prima facie triable issue.
45. In the case of Olympic Escort International Co Ltd & 2 Others vs Parminder Singh Sandhu & Another (2009) eKLR, the Court of Appeal held that for an issue to be triable, it has to be *bona fide*. The court stated as follows:-
- It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.



46. Similarly in Kenya Trade Combine Ltd vs Shah, Civil Appeal No 193 of 1999, the Court of Appeal stated as follows:-

In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.

47. A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of *Giciem Construction Company vs Amalgamated Trade & Services* LLR No 103 (CAK) this court stated:-

As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”

48. The defence raises several issues which include:-

- i. Whether the applicant breached the terms of the charge documents.
- ii. Whether the applicant defaulted in its loan obligations.
- iii. Whether the respondent’s right of foreclosure had crystallized and
- iv. Whether the defendant followed due process in exercising its statutory power of sale.

In my considered view, these are issues that can only be determined through evidence of the parties in a hearing. In that regard, I am convinced that the statement of defence filed on March 26, 2021 raised triable issues and that it is appropriate that the respondent be given his right of being heard. The defendant by failing to file its defence on time and over a long period for that matter has occasioned delay in the disposal of this suit and wasted time of the opposite party. Due to this shortcoming, I hereby find that the respondent ought to be penalised by way of costs.

49. Consequently, this court declines to grant the prayers in the Applicants application dated June 9, 2021. However, the prayers in the application dated September 30, 2021 are granted in the following terms:-

- a) That leave is hereby granted to the respondent to file his defence out of time.
- b) That the defence filed on March 26, 2021 is hereby deemed to be properly filed
- c) That the respondent to meet the costs of this consolidated application which will abide in the suit.

50. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 22<sup>nd</sup> DAY OF SEPTEMBER, 2022.**

**F. MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEO LINK THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022**

