



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 314 OF 2015

PARAGON ELECTRONIC LIMITED.....PLAINTIFF

-VERSUS-

BAMBURI SPECIAL PRODUCTS LTD.....DEFENDANT

RULING

1. Paragon Electronic Limited, the Plaintiff herein, took out the motion dated 25th September 2018 in which it sought for the following orders:

i) THAT the following pleadings and documents filed on behalf of the Defendant be struck out for being scandalous and an abuse of the process of court.

- a) The Notice of Appointment of Advocates dated 13th October 2015 and filed on 13th October 2015.
- b) The undated and unsigned Defendant's Statement of Defence filed on 29th October 2015.
- c) The undated Defendant's witness statement of Moses Keru Maina filed on 16th November 2015.
- d) The undated Defendant's witness statement of Titus Rex filed on 30th November 2015.
- e) Case management Request dated 26th September 2016 and filed on 26th September 2016.
- f) The undated Defendant's witness statement of John Mutiso filed on 18th October 2016.
- g) The Defendant's Supplementary List of Witness dated 17th October 2016 and filed on 18th October 2016.
- h) The Defendant's List of Issues for Determination dated 17th October 2016 and filed on 18th October 2016
- i) The Defendant's list and Bundle of Documents dated 21st November 2016 and filed on 21st November 2016
- j) Certificate of Authentication of a computer output by Paul Kariuki dated 13th February 2016 and purportedly filed on 13th February 2017.
- k) Certificate of authentication of a computer output by Stephen Ngechu Gachie dated 6th April 2016 and purportedly filed on 7th April 2017.
- l) Defendant's submissions dated 6th April 2016 on Admissibility of Email dated 25th July 2013 , and
- m) Any other pleadings or documents filed on behalf of the Defendant by the law firm of M/s Gikera & Vadgama Advocates

ii) THAT Interlocutory Judgment be entered for the Plaintiff as prayed in the Plaint dated 6th August 2015 and filed on 9th September 2015.

iii) THAT the costs of this Application be borne by the Defendant on full indemnity basis.

The Plaintiff filed the affidavit of Bulent Gulbahar in support of the motion.

2. When served with the motion, Bamburi Special products Ltd, the Defendant herein, filed the replying affidavit of Betty Kenyagia and a notice of preliminary objection to oppose the application. The court gave directions to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions and the authorities cited. It is the submission of the Plaintiff that the documents and pleadings filed by the Defendant are scandalous and are an abuse of the process of court. It is argued that the Defendant has not filed or served a memorandum of appearance.

4. The Plaintiff also stated that the Defendant's statement of defence filed on 29th October 2015 is not dated nor signed hence it is defective scandalous and an abuse of the court process.

5. The Plaintiff further stated that the defence filed on 29th October 2015 was filed out of time. It was also averred by the Plaintiff that the documents and pleadings filed by the law firm of Ms Gikera & Vadgama Advocates were filed before the aforesaid law firm properly came on record in the matter.

6. The Defendant opposed the Plaintiff's application stating that the firm of Gikera & Vadgama Advocates is properly on record having filed a notice of appointment to act for the Defendant. The Defendant also averred that it filed a defence which was duly signed and served upon the Plaintiff's erstwhile advocates namely Henia Anzala & Associates Advocates.

7. It is argued that the aforesaid defence was received without any protest. It was also argued that the filing of a defence out of time did not prejudice the Plaintiff in any way. The Defendant further argued that the application is devoid of merit and is meant to delay the expeditious disposal of this case.

8. Having considered the rival arguments and the material presented before this court, it is apparent that the Plaintiff is basically seeking to have the defence struck out for three reasons: **First** is that the defence and written witness statement were not dated nor signed.

Secondly, that the defence was filed out of time without leave being sought.

Thirdly, that the law firm of Ms Gikera & Vadgama Advocates is not properly on record having failed to file a memorandum of appearance.

9. On the question as to whether or not the defence and witness statement were signed and dated, I have looked at the copies of those documents which are annexed to the replying affidavit of Betty Kanyegia together with those in the court file and I am satisfied that the defence was properly signed. The witness statement though not dated but the same is duly signed by the witness.

10. The Plaintiff in fact acknowledged receipt of the defence and in fact it filed a reply to it. The Plaintiff did not state in its reply to defence that the defence was not signed.

11. The other question is whether the defence was filed out of time and if so whether it was fatal. It is admitted by the Defendant that it filed its defence two days after the time it was required to be filed. The Plaintiff has argued that the Defendant should have obtained leave from court before filing the defence.

12. I am of the humble view that the Defendant did not need to seek for leave to file a defence out of time because the Plaintiff had not taken any step to seek for entry of a default Judgment. The Defendant was entitled to file a defence where no Judgment had been entered. In any case the Plaintiff did not show the prejudice it suffered by the Defendant's delay in filing a defence in time.

13. The third and final issue is whether the acts by the law firm of Gikera & Vadgama Advocate of filing a notice of appointment of advocates instead of a memorandum of appearance rendered that firm to be improperly on record. It is not in dispute that the law firm of Gikera & Vadgama Advocates filed a notice of appointment instead of filing a memorandum of appearance.

14. There is no doubt that the law requiring a party served with summons to enter appearance to in response file a memorandum of appearance within 15 days from the date of service. The Defendant instructed the firm of Gikera & Vadgama Advocates to appear for it. Instead of the aforesaid law firm filing a memorandum of appearance it filed a notice of appointment. The question is whether that is fatal. In my view, that is not fatal because the notice of appointment contains the physical address of the advocate appointed for purposes of service. The same also shows that the Defendant is aware of the existence of the suit and in any case the Defendant filed a defence soon thereafter. The Plaintiff did not show what prejudice it suffered as a result.

15. In any case, under Order 6 rule 2 of the Civil Procedure Rules, it is expressly stated that where a defence contains the information required by rule 3, it shall where necessary be treated as an appearance.

16. In a nutshell, I am convinced that the notice of appointment serves the same purpose since it relays the same information as a memorandum of appearance.

17. On the basis of the above reasons, the Plaintiff's motion is found to be without merit. It is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered at Nairobi this 28th day of February, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant