



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 160 OF 2016**

**JAMES KIMANI MWANGI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**ANNE NYOKABI WAKANG'U.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**POWER ELECTRICAL CORPORATION LTD.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ANTI-COUNTERFEIT AGENCY.....1<sup>ST</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

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

**RULING**

1. The application dated 4<sup>th</sup> July, 2017 and the application dated 6<sup>th</sup> November, 2017 were heard simultaneously. This ruling is therefor in respect of both applications.

2. The application dated 4<sup>th</sup> July, 2017 seeks orders that:

**“(1) That the Plaintiffs/Applicants herein be granted leave to obtain judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in default of appearance and failure to file defence.**

**(2) That upon grant of prayer (1) hereinabove, the court do enter interlocutory judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

**(3) That costs of this application be provided for”**

3. It is stated in the grounds and the affidavit in support that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were served with the Summons to Enter Appearance and the Complaint but did not enter appearance nor file a defence. That the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were also served with an application to amend the Complaint and thereafter with Amended Complaint but never responded.

4. In opposition to the application, the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents filed a replying affidavit. It is stated that the Attorney General was not served with the Complaint and Summons to Enter Appearance but was served with an Amended Complaint on 15<sup>th</sup> May, 2017. That the counsel who was in conduct of the matter moved on transfer to another Government Office and filed away the file in their registry without complying with the instructions to enter appearance and file a Statement of Defence. That they became aware of the matter when the application for entry of judgment was served and immediately filed a Memorandum of Appearance and a Statement of Defence.

5. It is contended that the failure to enter appearance and file a Statement of Defence was not deliberate but was due to the inadvertence of the counsel who was handling the matter. That delay is not inordinate and is excusable. It is deponed that the Statement of Defence raises triable issues. The court was urged to enlarge the time within which to file the Memorandum of Appearance and the Statement of Defence and deem the same as duly filed.

6. On 21<sup>st</sup> September, 2017 the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents entered appearance and filed a Statement of Defence.
7. The Applicants subsequently filed the application dated 6<sup>th</sup> November, 2017 which seeks orders that the Memorandum of Appearance and Statement of Defence filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 21<sup>st</sup> September, 2017 be struck out.
8. It is stated that the Memorandum of Appearance and the Statement of Defence filed by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were filed late and without the leave of the court.
9. The 1<sup>st</sup> Respondent filed the grounds of opposition dated 2<sup>nd</sup> July, 2019 stating that the applications herein are unconstitutional and that the application dated 4<sup>th</sup> July, 2017 has been overtaken by events and that the application dated 6<sup>th</sup> November, 2017 is an abuse of the court process.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their replying affidavit stated that the application is meant to condemn the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents unheard. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents will be highly prejudiced if driven away from the seat of judgment.
11. The applications were canvassed by way of written submissions. I have considered the applications, the responses to the same and the submissions filed.
12. The service of summons is not denied. By the time the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Memorandum of Appearance and a Statement of Defence, they were late by a period of about one year and three months. The delay was inordinate but has been sufficiently explained. It seems the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were only woken up by the service of the application seeking leave for entry of judgment.
13. Striking out a pleading is a discretionary power. The principles applicable are set out for example in the Case of **Abubakar Zain Ahmed v Premier Savings and Finance Limited** (formerly Known as **Mombasa Savings & Finance Limited**) & 4 others CA No. 109 of 2004 where the Court of Appeal stated as follows while quoting from the case of **D.T.Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR**:
- “the discretion will be exercised by applying two fundamental, although complementary principles. The first principle is that the parties will not lightly be driven from the seat of judgment, and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may “often be required by the very essence of justice to be done, so as to prevent the parties being harassed and put to expense by frivolous vexatious or hopeless litigation.”**
14. As stated by Madan, J in the case of **D.T.Dobie (supra)**:
- “A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.**
- 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 it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**
15. In the upshot, the applications are hereby dismissed but with costs to the Applicants. The Memorandum of Appearance and the Statement of Defence filed by the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents are hereby deemed as duly filed.

Date, signed and delivered at Nairobi this 5<sup>th</sup> day of March., 2020

**B. THURANIRA JADEN**

**JUDGE**