



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

HCCC NO. 199 OF 2017

CLEARWATER INDUSTRIES.....PLAINTIFF/RESPONDENT

VERSUS

FIRST COMMUNITY BANK LIMITED.....DEFENDANT/APPLICANT

AND

RURAL POWER SOLUTIONS LIMITED.....THIRD PARTY

RULING

(On directions on third party notice)

1. When this matter came up for mention before me on 14th November 2019, Mr. Osoro, learned counsel for the plaintiff, objected to the defence filed by the third party on the basis that the same was filed without first obtaining the leave of the court and that the same was therefore premature. Counsel argued that the defence filed by the third party ought to be struck out as it offends a procedure which cannot be overlooked.

2. In response to the objection, Mr. Nyanyuki for the third party conceded that the defence was filed prematurely but stated that the defect is curable as the court could still grant orders that the defence be deemed as duly filed. Counsel argued that such an order would not prejudice any party.

3. Mr. Mbabu for the defendant, on the other hand, stated that Order 1 Rule 22 of the Civil Procedure Rules envisages that the application to be made by the defendant for directions is not a mandatory application as the court could still give directions regarding the hearing of the suit. Counsel sought directions to have the dispute between all the parties canvassed at the same time.

4. The third party herein entered appearance on 25th June 2019 and filed its statement of defence dated 10th July 2019. It is not in dispute that the defence was filed without leave of court. The question which arises is whether the court should consider the defence as duly filed or strike it out on the basis that it was filed without adherence to the correct procedure as laid out in the civil procedure rules.

5. **Order 1 Rule 15 (1) of the Civil Procedure Rules** stipulates as follows:

' (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)— (a) that he is entitled to contribution or indemnity; or (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit..'

6. **Order 1 Rule 22 of the Civil Procedure Rules**, pursuant to which the instant application has been brought, stipulates thus:-

“If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court

by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

7. The aforementioned provision mandates the court to consider the pleadings and to give directions on whether there is a triable issue between the defendant and third party as to the liability of the third party and to establish the manner in which the dispute between the defendant and the 3rd party is to be tried. The parties herein have therefore conceded to the fact that leave was not sought from this court before the defence was filed. This now leaves the issue for determination to be whether, in the circumstances of this case, this irregularity is an abuse to the court process and ought to be rectified by striking out the defence.

8. In the case of *Kanake Peter v David Lemba Mbuli & 2 others* [2018] eKLR the court opined that

“Where a third party makes an appearance under Order 1 Rule 22 of the Civil Procedure Rules as was the case of the 1st Third Party, the Defendant was supposed to apply for directions by way of summons. As it is at this point that the directions in the manner the matter may be determined is given. Prior to giving directions the Court must be satisfied that there is a proper question to be tried as to the liability of the Third Party before giving the method to be adopted by the Defendant and the Third Party whether it should be determined in the course of trial of the suit or otherwise. “

9. In this instant case no directions were taken. The next thing is to ascertain whether this has prejudiced the plaintiff’s case in any way. In the Court of Appeal case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR Kiage JA observed that;

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...

10. Similarly in the same case Ouko JA observed that ;

“It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities....”

11. This court associates itself with the above sentiments and finds that non-compliance with the provisions of Order 1 Rule 22 Civil Procedure Rules is an irregularity which is curable as it does not prejudice the plaintiff in prosecuting its case. Sections 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution mandates the court to strive and sustain suits rather than strike out pleadings on pure procedural technicalities. It is trite that striking out of pleadings is draconian move that ought to be used only as a last resort. This should however not be construed to mean that procedural impropriety should be ignored as the court still has to consider if any prejudice will be occasioned to any party in coming up with its verdict.

12. On the issue of whether the defence filed by the third party is in respect to the plaintiff’s claim rather than the defendant’s defence, this court is of the view that it cannot direct the parties on how they should draft their pleadings. The general rule is that a party who has entered appearance will not be barred from defending their case. I therefore find no reason whatsoever to strike out the third party’s defence simply because it is a defence against the plaintiff’s case rather than the defendant’s case.

13. In conclusion I find that the irregularity occasioned by non-compliance with Order 1 rule 22 of the CPR does not prejudice any party. I recommend that the defence dated 10th July 2019 be deemed as duly filed. I further direct that at the hearing, the case(s) between all the parties shall be canvassed at the same.

Dated, signed and delivered in open court at Nairobi this 25th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Osodo for Owino for the plaintiff.

Mr. Nyanyuki for the Third Party

No appearance for Mr Mbabu for the defendant

Court Assistant – Sylvia