



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 52 OF 2015

KHUNAIF TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

SPIRE BANK LIMITED FORMERLY EQUITORIAL COMMERCIAL

BANK LIMITED.....DEFENDANT

RULING

1. The application dated 3rd May, 2017 was brought under the provisions of Sections 1A, 1B, 3A, 3B and 95 of the Civil Procedure Act and Order 7 rule 1 and Order 51 of the Civil Procedure Rules, 2010. It seeks the following orders:-

(i) Spent;

(ii) That the applicant/defendant herein be granted leave to file a defence in this suit and the annexed draft defence deemed (sic) as duly filed and served upon payment of requisite court fees; and

(iii) That the costs of this application be in the cause.

2. The application is supported by the affidavit of Josephine Musembi sworn on 3rd May, 2017 and the grounds in support of the application. The plaintiff filed a replying affidavit on 26th May, 2017 sworn by Nuru Ali Islam Jeizan, to oppose the application. It also filed grounds of opposition on the said date. The defendant filed a supplementary affidavit on 16th June, 2017 to respond to the issues raised in the replying affidavit.

3. Mr. Masore, Learned Counsel for the defendant submitted that Section 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules grant courts discretionary powers to enlarge time within which a party can file a particular pleading or document. Counsel cited the case of **Teresa Ojiambo vs Francis Mwaura Ikinu** [2017]eKLR where Gacheru J held that restraint ought to be invoked in terminating a suit and the court's aim should be to sustain a suit and that the foregoing applies *mutatis mutandis* to statements of defence and counterclaim.

4. He referred to paragraph 3 of the defendant's affidavit where the deponent gives the reason for the delay in filing the defence as being due to an application which the plaintiff had filed, which was dismissed by this court. Counsel added that the defendant was undergoing restructuring which was still ongoing as at the time of hearing the present application.

5. It was submitted for the defendant that the defence raises triable issues. Counsel urged the court to read the same and the supporting documents thereto. He contended that the plaintiff are not opposed to the amount claimed in the counter-claim. In his view, there will be no injustice occasioned on the part of the respondent, if the suit goes to full trial. He prayed that the application be allowed with costs.

6. Ms. Kyalo did not highlight her written submissions but stated that she relied entirely on the same.

ANALYSIS AND DETERMINATION

The issue for determination is if the defendant should be granted leave to file its statement of defence out of time.

7. The defendant in arguing his application cited the provisions of Section 95 of the Civil Procedure Act which empower courts to extend time for doing any act allowed by the Act. It states as follows:-

“Where any period is fixed or granted by the court for the doing of any act prescribed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. He also relied on the provisions of Order 50 rule 6 of the Civil Procedure Rules which provides that:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

9. The main reason given by the defendant, which is a company, for not having filed the statement of defence on time is that it has been undergoing restructuring and there was an application that had been filed by the plaintiff.

10. The plaint in this case was filed on 17th April, 2015 together with the requisite documents. An application seeking injunctive orders was filed by the plaintiff on the same day. Counsel for the parties thereafter appeared in court on 5th May, 2015, 17th February, 2016, 26th July, 2016 and on 30th August, 2016 when the application dated 17th April, 2015 was heard. It was determined on 12th October, 2016 when the court declined to issue injunctive orders.

11. It is worth noting that the defendant herein on 21st May, 2015 filed a lengthy, detailed affidavit running to 29 paragraphs in response to the application dated 16th April, 2015 that was filed by the plaintiff in its quest for injunctive orders. Attached to the said affidavit was a bundle of annexures to support the position taken by the defendant in opposing the application therein. On 19th October, 2015, the defendant filed written submissions to the application dated 17th April, 2015. The plaintiff filed its written submissions on 17th February, 2016.

12. The above chronology of events shows that this file has been active. As submitted by Counsel for the plaintiff, it has taken the defendant two (2) years to file the present application.

13. The defendant in its affidavit states that after the court declined to grant injunctive orders, it sold the motor vehicles the subject of the suit and that a substantial amount of money remains unpaid. A copy of a draft defence and counter claim are attached to the said affidavit. Order 7 rule 1 of the Civil Procedure Rules provides as follows:-

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

14. In paragraph 6 of her affidavit, the plaintiff's deponent states that the purported authority given to the defendant's deponent was given by Spire Bank Limited which is not a party to this suit and is not under the company seal. I have looked at the annexure marked as JM1 in which the defendant gives Josephine Musembi the authority to swear the verifying affidavit and other affidavits in respect to this case. It was granted by Spire Bank Limited. It is duly sealed with the company seal of the said bank. The defendant filed a supplementary affidavit on 16th June, 2017 to clarify that the defendant had changed its name from Equitorial Commercial Bank Limited to Spire Bank Limited. A certificate of change of name was also attached thereto and marked as JM-2, to confirm that the defendant herein changed its name to Spire Bank Limited.

15. The explanation given by the defendant as to why it was late in filing its statement of defence is quite lame and invalid as it was involved in different court processes from the time the suit was filed to the date of the ruling of 12th October, 2016.

16. The plaintiff on its part has not shown that it will suffer any prejudice if the defendant is allowed to file its defence out of time. In its submissions, its Counsel made reference to the timelines given to defendants in the filing of statements of defence. The plaintiff's submissions also indicate that the defendant is expected to explain the cause of the delay. The defendant was also said not to have disclosed the amount of money it raised from the sale of the motor vehicles that it repossessed. Ms Kyalo sought orders for the supplementary affidavit to be struck out for being filed without leave of the court.

17. It is clear that the defendant and his Advocate have not acted with zeal in participating in the processes of the court due to the inordinate delay in filing of the statement of defence. If this court was to proceed on a technicality, it would decline to grant the defendant the prayers sought, as it is very clear that the defendant has been in slumber for 2 years in so far as the filing of a statement of defence is concerned. As for the supplementary affidavit, the same was deemed as being properly filed on 24th July, 2017. The issue of the money that the defendant raised from the sale of the motor vehicles that were repossessed is a matter that can be pursued by a request for particulars.

18. Section 1A of the Civil Procedure Act provides that:-

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.” (emphasis added).

19. In light of the overriding objective of the Civil Procedure Act, this court will give the parties herein a level playing field. I therefore make the following orders:-

(i) The application dated 3rd May, 2017 is hereby allowed. The defendant is hereby granted 14 days from today to file its defence and counter-claim;

(ii) The plaintiff will within 14 days of service file a reply to the defence and counter-claim, if any;

(iii) Due to failure on the part of the defendant in filing a defence and counter-claim within the time provided, it will pay the plaintiff thrown away costs of Kshs. 50,000/= within 15 days from the date of this ruling.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of March, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Githinji for the defendant

No appearance for the plaintiff

Mr. Oliver Musundi - Court Assistant