



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE 278 OF 2017

DINIT VIRCHAND MALDE (Suing as Executor of the will of

Laitaben Kantilal Shah...DECEASED).....PLAINTIFF/APPLICANT

VERSUS

SPIRE BANK LIMITED (Successor in the title to the

Southern Credit Banking Corporation)...DEFENDANT/RESPONDENT

R U L I N G

This is a ruling on Notice of Motion dated 23rd August 2017 brought under Order 51(1) and under Order 10 Rule 6 of the Civil Procedure Rules 2010 and under Section 3A of the Civil Procedure Act . It seeks to strike out the Memorandum of Appearance dated 1st August 2017 and the Statement of Defence dated 16th July 2017. It also seeks to have default judgement entered in favor of the Applicant against the Defendant to produce the accounts on the sale of property no. LR 209/75/15 sold on the 26th September 2007.

Grounds on the face of the application are as follows:-

1. That the defence and Memorandum of Appearance and Defence were filed out of time and without leave of the court.
2. That the Defendant fraudulently interfered with the court records by backdating the court stamp

The application is supported by affidavit of Stanley Kerandi Manduku, the Advocate for the Plaintiff herein sworn on 23rd August 2017. He averred that the plaint was filed on 5th July 2017 and request for interlocutory judgment was filed on 31st of July 2017. Interlocutory judgment was not entered by the Deputy Registrar as requested prompting the Plaintiff's Advocate to write a letter dated 4th August 2017 to the Deputy Registrar stating the irregularities and making inquiries as the had Defendant purported to file a Memorandum of Appearance out of time and without leave of court. He averred that the Registrar declined to enter appearance for unknown reasons and directed the Plaintiff to file an application to strike out the Memorandum of Appearance.

He averred that the said Statement of Defence was filed past fifteen(15) days allowed by Order 7 Rule 1 after entry of appearance .he added the defence is dated 15th August 2017 but curiously and fraudulently purported to be filed on 16th July 2017. That the Defendant further served the Plaintiff outside the time. He averred that the Defendants have fraudulently interfered with court records twice instead of filing an application for leave to file their documents out of time or requesting the Plaintiff's Advocate indulgence on any delays. He averred that the actions of the Defendants are in abuse of the court process and the Memorandum of Appearance and the Statement of Defence ought to be struck out as they are not properly on record and the Defendant has not taken any steps to regularize the same.

In response the Defendant filed two replying affidavits one sworn by Keziah Rutto on the 11th September 2017 and the second sworn by Duncan Masime who are Advocate and clerical officer respectively. Duncan Masime averred that on the 31st July 2017 after confirming that no interlocutory judgement had been entered, filed a Memorandum of Appearance dated 31st July 2017 on the 1st August 2017. The Memorandum of Appearance was then served to the Plaintiff's advocate on the 14th August 2017 who failed to express any protest in acknowledgement of the court document.

He averred that he filed a Statement of Defence dated 15th August 2017. It was only after being served with the Notice of motion that he noted the inadvertent mistake on the part of the court registry official at the registry who stamped the statement of defence on 16th July 2017 instead of 16th August 2017 and it was a genuine error.

The Defendant's advocate averred that it is contentious and improper for the advocate to make such accusations and that a candid explanation as to the filing of statement of defence has been explained by the respondent's clerical officer Duncan Masime in an affidavit where he has indicated that it is a genuine error on the part of the court registry and not a fraudulent act as purported by the applicant. She averred that the defence has triable issues which include suit being time barred, how much is owing and whether the suit is resjudicata in view of the following files:-

1. HCCC NO.543 OF 2005 Laitaben Kantilal Vs Southern Credit Banking Corporation Limited,

2. Nairobi Court of Appeal Cause No.85 of 2008 Bijal Virchand Malde vs Southern Credit Banking Corporation Limited

3. HCCC. NO.224 OF 2008 Kempaper Limited Vs Southern Credit Banking Corporation Limited.

She refuted the Plaintiff's claim that defence as filed is an assembly of mere denials and prayed that the Defendant be granted an opportunity to participate in the proceedings. She added that this court is enjoined by Section 1A and 1B of the Civil Procedure Act to further overriding objective which is the just determination of proceedings. She urged court to dismiss the application herein.

In Submission counsel the Plaintiff restated the ground on the face of the application and the averments; he cited the case of **Magunga General Stores vs Pepco Distributors Ltd (1986-89) EA 334** where the court of appeal held that

"a mere denial is not sufficient defence and a Defendant has to show that there is a good defence. Plaintiff submitted that the application should be allowed so the Defendant may give account of sale of the suit property".

In response to Plaintiff's submission the Defendant reiterated averments in the two affidavits filed. The Defendant submitted that the error is on part of court registry and cited the case of **D.T Dobie & Company Limited Vs Joseph Mbaria Muchina & Another (1980) eKLR** where the court held that it is difficult to see what is the cause of action upon pleadings as they stand; and agreed with the decision of Denman J. in **Kellaway vs Bury (1892) 66 L.T. 599 at PP.600 and 601** where he held that the court must see that the Plaintiff has no case at all.

Issues for determination

- 1. Whether the memorandum of appearance and defence were filed out of time,*
- 2. Whether the defence on record has triable issues,*
- 3. Whether the application should be allowed or not.*

I have considered rival submissions by both parties herein. I have also perused the court proceedings and the documents filed.

On the first issue, time for filing pleadings is very critical and should not be taken for granted. Order 7 Rule 1 of the Civil Procedure Rules provide that Defendant should file memorandum of appearance within 14 days from the date service of summons to appear and file defence within 14 days from the date of filing memorandum of appearance. From perusal of documents herein, I note variance on the date on the document is 31st July 2017 while the receiving stamp is dated 1st August 2017. Defence is dated 1st August 2017 and receiving stamp is dated 16th July 2017. The question that arises is how a document can be dated 1st August 2017 and filed 16 days before? To ascertain the correct date, the most reliable document would be the filing receipt. A document cannot be deemed as filed before it is paid for. On perusal of court record I note that the fee payment receipt is dated 16th August 2017. A document is deemed to have been filed on the date of payment. The defence was therefore filed on 16th Aug 2017 and there must be an error on date 17th July 2017. The error attributed to the registry may be deliberate or inadvertent if deliberate, it amounts to criminal act which require investigation. As at now, the issue has not been investigated to ascertain whether offence of fraud was committed. The receipt for filing Memorandum of Appearance is also dated 1st August 2017. I find that it was filed on 1st August 2017.

From the foregoing it is evident that the Memorandum of Appearance and Defence were filed out of time and no leave for enlargement of time was sought. The two documents are therefore improperly on record.

I now wish to consider whether the defence filed has triable issues. On this issue I do agree with the holding in the case of **Kenya Trade Combine Ltd Vs Shah, Civil Appeal No.193 of 1999** where the court of held as follows:-

"In a matter of this nature, all the 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."

I have perused and considered the defence file and note that there are triable issues which can only be determined after a full hearing. From the foregoing I find it appropriate to exercise my discretion and grant the Defendant an opportunity to be heard. I do decline to allow the application but do allow the Memorandum of Appearance and Defence to be deemed as duly filed on condition that the Defendant pays the Plaintiff thrown away costs of kshs 20,000; to be paid within 30 days from today's date failure which the Memorandum of Appearance and Defence be expunged from the record and judgment be entered as requested by the Plaintiff against the Defendant.

Dated and Delivered at Nairobi this 11th day of April, 2018

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....**COURT ASSISTANT**

.....**COUNSEL FOR PLAINTIFF/APPL.**

.....**COUNSEL FOR DEFENDANT/RESP.**