REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 65 OF 2014

PETRA DEVELOPMENT SERVICES LTD................PLAINTIFF

VERSUS

1. EVERGREEN MARINE (SINGAPORE) PTE LTD

2. GULF BADAR GROUP (KENYA) LIMITED......DEFENDANT

R U L I N G

1. By a Notice of Motion dated 3/3/2017, the defendants have sought leave of the court to call two witnesses on their behalf during formal proof aimed at assessing the quantum of damages.

2. That application has been informed and necessitated by the fact that the defendant failed to enter an appearance and file a defence within time and an default interlocutory judgment was entered against it on the 22/8/2014. There were attempts by two application dated 21/8/2014 and 2/9/2014 to set aside the default judgment, but the applications were heard together and dismissed on the 19/2/2016. That state of affairs leaves the pleadings by the plaintiff in the plaint unchallenged and the only reason the court has to continue entertaining the parties is that as pleaded the claim is for both liquidated and non-pecuniary claims. Otherwise had it been for only prayer (f) or had the plaintiff sought to withdraw the other prayers, there would be a final judgment for the liquidated claim and there would be no justification at all to call evidence in the matter.

3. The application is premised on the contention by the defendant that there being a chance for the plaintiff to formally prove its case, a formal proof is a hearing like any other and even though the defendants did not file any statement of defence, they are all the same entitled to call and lead evidence.

4. The plaintiff did oppose the Application on the basis that upon an interlocutory judgment, where there is not defence filed, the pleading by the plaintiff is deemed unchallenged and therefore without a pleading, a party has nothing to prove by calling witnesses and leading evidence.

5. Having read the papers filed by both sides including submissions and authorities, the only issue I consider to have crystalized for my determination is whether a defendant who has not filed a defence or whose defence has been struck out has the right, at formal proof, to call witnesses and lead evidence.

6. To answer that question one had to interrogate the purpose and use of evidence in Civil Litigation. By definition[1] evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. I get that to say that a party must allege a fact before mandated and obligated by law under the evidence Act [2] to prove its allegations. My appreciation is that under section 107, 108 & 109, the defendant has no duty to prove or disprove anything unless there be filed by it a pleading that allege facts which fact then crystalize into an issue for determination by the court.

7. Put in the context of this matter, where the defendant has filed no defence, I am not convinced that there is a right on the defendants to disprove the plaintiffs allegations which stand uncontroverted by failure to file a defence [3]. The law as I understand it, in adversarial system of litigation, like ours, is that a fact alleged by a party and which the opposite party does not admit must be specifically denied unless there is a joinder implied by the law.

8. A lot of submissions have been offered by the defendant while quoting several decisions by the superior courts of this county to the effect that a formal proof is a hearing like any other and that an interlocutory judgment does not IPSO facto entitle a plaintiff to a final judgment as pleaded. That position of the law to me merely means that the fact that a plaintiff applies for and obtains an interlocutory judgment does not lessens its burden to prove its case.

9. The situations envisaged are not difficult to fathom. They include where the plaintiff obtains an interlocutory judgment but fails to call evidence or call evidence that disproves its case or just deficient to prove the case. In such circumstances the plaintiff shall have failed on its onus to prove his case and the suit must fail even after an interlocutory judgment.

10. It has also been submitted and very vehemently by Mr. Wafula while relying on the decision in ***Habulhahim Company Ltd vs Barclays Bank of Kenya Ltd [2016] eKLR*** that even at formal proof the defendant retains the right to participate at trail to ascertain the quantum of damages payable. That statement of the law is indeed very accurate but it must also be understood in its proper context. Nobody bars a defendant from participating at trial by formal proof merely because the plaintiff holds an interlocutory default judgment. The defendant is at all times a party to the proceedings save that it has opted either by design or default not to file a defence and therefore waived the right to lead evidence. His participation at that time is however limited to ensuring that the law is complied with as far as evidence led is availed in compliance with the law, he has the right to test the credibility and aunthencity of the plaintiffs evidence by cross examination and can guide the court by citing to court why the claim may be bad in law, say by way of being statute barred or that the court has no jurisdiction or just that an aspect of the prayer is forbidden by the law.

11. I have in mind a situation like under the Land Control Act, where if the plaintiff was to claim damages for breach of contract for sale of an agricultural land which has become void by want of consent of the land control board, defendant many by design fail to file a defence and at formal cite to court the provisions of section 7 and contend that the court can only grant a refund and no more. The strategy may also be a way of reducing costs, where the defendant appreciates liability but deliberately saves on costs by not filing a defence.

12. The other submissions offered by the defendants in support of the application is that under both Article 50(2) and 159 of the Constitution nothing stops them from calling evidence. In my humble view and finding, article 50(2) is concerned with criminal trials and not civil litigation. I opt to say no more.

13. On article 159, one can only resort to that pronouncement by the Supreme Court in ***Nicholas Kiptoo Korir, Arap Salat vs I.E.B.C.*** and & others when the court said:-

> **"….. I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"**

14. In the context of this matter, the purpose of pleadings is geared towards achieving fair trial bereft of ambush. There is a compelling reason that a litigant sets out its facts of attack or defence and serves the adversary. It is the alleged facts that help the parties know what claim or defence await them at trial. That is the just and fair opportunity the constitution grants for litigants to present one's story before the court as envisaged under article 50(i). To allow a party to lead evidence based on no pleading and to purport to prove a fact that has not been alleged would be to allow and encourage trial by ambush and therefore encourage unjust and unfair proceedings.

15. All the foregoing lead me to the conclusion that there is no foundation or legal justification to allow a defendant to call witness to lead evidence where there is no defence filed. To do that would be worse than allowing a party to depart from its pleadings which is prohibited by the law. I therefore find no merit in the application dated 3/3/2017 which I now order dismissed with costs to the plaintiff.

Dated and Delivered at Mombasa this 28th day of May 2018.

P.J.O. OTIENO

JUDGE

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[1] **Section 3, Evidence Act, Cap 80**

[2] **Section 107, 108 and 109 Evidence Act**

[3] **Order 2 Rule 13 (3): There cannot be no joinder to issues on a plaint or counterclaim**