



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 39 OF 2016

ASHOK K. SHAH PLAINTIFF

VERSUS

HON. SAMBA ARATI DEFENDANT

RULING

1. This ruling is in respect of two applications. The application dated 21st July, 2016 was filed by the Plaintiff. The application seeks orders that:

“1. That the statement of Defence herein dated 16th June, 2016 and filed in court on 28th June 2016 be struck out.

2. That interlocutory judgment be entered in favour of the Plaintiff against the Defendant and the suit be set down for assessment of damages.

3. That the costs of this application be awarded to the Plaintiff.”

2. The application is predicated on the grounds stated in the application and is supported by the affidavit of Sarah Amondi Jumma, the Plaintiff’s advocate. The Plaintiff’s contention is that the Defence filed herein was filed out of time and without the leave of the court.

3. In the replying affidavit, the Defendant has deponed that he was not served with the Summons to Enter Appearance but nevertheless came to learn of the matter and instructed his advocate to enter appearance. That the advocate delayed in filing the defence by a period of about 14 days.

4. The Defendant filed the application dated 21st October, 2016 which seeks the following orders:

“1. This Honourable Court be pleased to enlarge time for filing of the defence herein by the defendant.

2. The defendants statement of defence dated 16th June 2016, filed on 28th June 2016 and served on 29th June 2016 be deemed as duly filed and served.

3. Cost of this application be in the cause.

4. Any such other and further orders as this Honourable Court may deem just to grant in the

circumstances.”

5. The Defendant’s advocate has stated in the affidavit in support that the delay in filing the defence was due to inadvertence from his office. It is further stated that Defendant was not served with the Summons to Enter Appearance and that no judgment has been entered herein.

6. The application is opposed. It is stated in the replying affidavit that the defence was filed after the expiry of the prescribed period and without the leave of the court. It is further stated that the Plaintiff is ready to consider conceding to an application for the enlargement of time within which to file the Defence on condition that Ksh.30,000/= throw away costs are paid by the Defendant.

7. Under Order 50 rule 6 of the Civil Procedure Rules, the court has the power to enlarge the time fixed for doing any act or taking any proceedings under the said Rule provided that such enlargement is made upon such terms as the justice of the case may require. Striking out a case is a drastic remedy which ought to be exercised sparingly when it is clear that there is abuse of the process of the court. A defence on record, however irregularly brought to the notice of the court ought to be considered. The court should also consider whether the Plaintiff can be compensated by way of costs. (See for example **Pithon Waweru v thuku Mugria [1983] eKLR** and **DT Dobie & Co. (Kenya) Ltd v Joseph Mbaria Muchina & another [1980] eKLR**)

8. Turning back to the case at hand, it is not in dispute that the Defence was filed late. However, the averment by the Plaintiff that he was not served are given credence by the affidavit of the process server, Christopher Githui sworn on 22nd June, 2016. In the said affidavit, the process server has deponed that he served the summons on one Nyamasege Mogaka who is described as the Defendant’s Personal Assistant. There was no personal service contrary to the provisions of Order 5 rule 8. It was not demonstrated by the process server that it was not practical to serve the Defendant personally.

9. The delay in filing the defence has also been blamed on the inadvertence on the Defendant’s advocate’s office. No details have been given regarding the said inadvertence. However, the delay was for a period of about two weeks. The delay was not inordinate.

10. In the upshot, the application dated 21st July, 2016 is dismissed. Costs in cause.

11. The application dated 21st October, 2016 is allowed as prayed.

Dated, signed and delivered at Nairobi this 16th day of Nov., 2017

B.THURANIRA JADEN

JUDGE