



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 318 OF 2014

ROOFS & BUILDING MAINTENANCE LTD PLAINTIFF

VERSUS

DAVID KINUTHIA KIMANI 1ST DEFENDANT

GEORGE KIHARA NJIHIA 2ND DEFENDANT

RULING

1. The **Notice of Motion** Application before the court is dated 31st March 2015 and filed herein on 2nd April 2015 by the Plaintiff. The Applications seeks to secure the following;
 - a. *That 1st Defendant/Respondents' defence dated 24.10.2014 and filed on 27.10.2014 be struck out.*
 - b. *That Judgment be entered against the 1st Defendant/Respondent as prayed in the plaint.*
 - c. *That costs of this application be provided for.*
2. The Application is premised on the grounds that the 1st Defendant's defence was filed out of the time prescribed by the Law and without leave of this court and that it is in the interest of justice to have the said defence struck out and judgment entered against him. The application is supported by Affidavit of Geoffrey Njoroge Mburu, sworn on 3rd March 2015. The deponent describes himself as a director of the Plaintiff/Applicant Company, and is conversant with the matter before the court.
3. The application is opposed by the 1st Defendant/Respondent vide a Replying Affidavit sworn on 7th May 2015 and filed herein on 8th May 2015 by Vivianne Wachanya, advocate for the 1st Defendant. The 2nd Defendant is not interested in the application.
4. The Plaintiff and the 1st Defendant agreed to file submissions to the application. I have carefully considered the Application, Opposing Affidavits and the Submissions. In my view the only issue for determination is whether or not the 1st Defendants defence should be struck out for being filed out of time and without the leave of the court.
5. The 1st Defendant's counsel has admitted in their Replying Affidavit that the defence was filed out of time due to the fact that proper instructions had not been received from the 1st Defendant to enable them put up a suitable defence, and that the delay in filing the defence was not intentional. That notwithstanding the counsel said that the delay was only for 6 days which should not be used to strike out the defence. Counsel also submitted that there is no provision in law for striking out a

- defence for failure to file it on time, and that the Applicant ought to have applied for default judgement instead of filing the present application which in their view is bad in law, frivolous and vexatious and should be dismissed with costs.
6. The Applicant cannot be faulted for bring this application. There is a reason as to why there are timelines for carrying out certain activities. Those timelines are necessary, and amount to orders of the court, and must be strictly adhered to. A party who fails to honour these timelines must provide a good enough reason that a court can believe, in order to excuse the default. For whatever reason a party defaults in adhering to a lawful deadline of procedure, the law affords the party in default the right to appear before the court to seek the leave of the court to do the required action out of time. This means that a defaulting party cannot, upon default, purport to proceed with the required action without the leave of the court, or indeed without letting the court know that there was a default. These timelines are not issues or matters of procedural technicalities. They are the mechanism through which substantive justice is delivered, and they demand strict adherence without qualification. It therefore does not matter that the delay herein was only for 6 days. It would still matter if the delay was for only 1 day.
 7. It is true also that the plaintiff ought to have applied for judgment in default upon failure by the 1st Defendant to file a defence in time. The fact that the Plaintiff did not do that does not deny the Plaintiff the right to have the defence herein struck out for being on record illegally and without the leave of the court.
 8. Having said the above, this court now specifically notes the impact of Order 11 of the Civil Procedure Rule (or Gazzetted Pretrial Directions for this Division) and section 1A and 1B of the Civil Procedure Act. Pre-trial conferencing under order 11 enables the parties within 10 days the close of proceedings to bring up Pre-trial questionnaires through which parties would identify necessity for any interlocutory applications and a time frame for the expeditious disposal of the suit. Order 11 also gives this court a wide discretion which would speed up the matter in the interest of the overriding objective of sections 1A and 1B of the Civil Procedure Act. Under Order 11 the court can strike out any pleadings at case management stage, or even save a case from inevitable collapse if the end of justice requires the court to do that. If the parties in this matter were cognisant of Order 11, or the gazetted Pre-trial directions of this court, this application would have been considered upon the close of pleadings in October 2015, and the matter before the court could have been concluded in a hearing. So the effect of the current application is merely to delay the process of hearing of the suit. The 1st Defendant delayed to filed the defence by 6 days. However, the Plaintiff by this application has stalled the process by 18 months.
 9. Going back to the issue before the court, it is the finding of this court that the 1st Defendant defaulted in filing his defence, and did not seek the leave of the court to file the same. It therefore means that the 1st Defendant's defence dated 24th October 2014 and filed herein on 27th October 2014 is not properly on record and is herewith struck out by the order of this court.
 10. Arising from the need to do justice in accordance with the overriding objective of the Civil Procedure Act, the Defendant is hereby given the leave to apply to file his defence out of time within 21 days of this ruling. After the expiry of the said 21 days the Plaintiff shall be at liberty to apply for judgment in default of defence.
 11. The costs of this application shall be for the Plaintiff.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 29TH DAY OF APRIL 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Ndege hb Njenga for Plaintiff

Mr. Jelle hb Njenga for 1st Defendant

Mr. Wetangula hb Serem for 2nd Defendant

Teresia – Court Clerk