



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL SUIT NO. 3 OF 2014

(Formerly HCCC No. 85 of 2013 High Court of Kenya, Nakuru)

GEMSTAVIV LIMITED.....PLAINTIFF

-VERSUS-

KAMAKEI OLE KARIA.....1ST DEFENDANT

FREDRICK LENKANONI NAMPOSO.....2ND DEFENDANT

ANTONY NAMPOSO.....3RD DEFENDANT

CHARLES MANOTI4TH DEFENDANT

P. M. MENGI.....5TH DEFENDANT

THE REGISTRAR OF LAND – NAROK.....6TH DEFENDANT

RULING

1. Before me are two Notices of Motion, filed on 18th December 2013 and 5th March 2014 respectively. Both were filed by the Plaintiff against the 5th and 6th Defendants hence only the parties to the Notices of Motion have filed submissions. There is a default judgment on record against the 1st Defendant and a pending request in respect of the 5th Defendant.
2. The Notice of Motion filed on 18/12/2013 is brought under Order 10 Rules 4 and 8 of the Civil Procedure Rules and seeks leave to apply for judgment in default against the 6th Defendant and further that that the annexed request for Judgment be deemed as duly filed. The main ground in support of the application is that 6th Defendant had failed to enter appearance or file defence despite having been served with the summons to enter appearance.
3. The 5th and 6th Defendants did file a defence consequent to the filing of this application. The defence is dated 17/2/2014 and date stamped 25/2/2014. This action prompted the Plaintiff's Notice of Motion filed on 5/3/2014 seeking to have the said defence struck out. The application is expressed to be brought under Order 2 Rule 15 (1) (b), (c) and (d) and Order 6 Rule 1 and 2 and Order 50 Rule 6, of the Civil Procedure Rules. The main grounds upon which the application is brought are that the said defence is irregular, of no legal effect, a sham and an abuse of Court process. Both applications are supported by affidavits sworn by the Plaintiff's advocate, Kennedy O. Ochieng.

4. The 5th and 6th Respondents filed grounds of opposition on 16/7/2014 which state inter alia:-
 - a. **“THAT the motion is based on selective application of the Civil Procedure Rules governing pleadings generally.**
 - b. **THAT the same is an act of desperation alluding to technicalities rather than the merits of the suit.**
 - c. **THAT applicant acknowledges the memo of appearance and defense in place of barring the issue of technicalities.**
 - d. **THAT the said defense raises triable issues which ought to be ventilated by way of evidential value.**
 - e. **THAT there can be no distinction between the 5th and 6th defendants in execution of their statutory mandates”.**
5. The Motions were canvassed by way of written submissions. Briefly, the plaintiff’s submissions assert that the plaintiff’s claim is a liquidated demand as contemplated in Order 10 Rule 4 of the Civil Procedure Rules. It is argued that the plaintiff lost the sum stated in the plaint through a fraudulent transaction and that the application is properly before the court. With regard to the second application the plaintiff contends that the 5th and 6th Defendants are in blatant breach of the Civil Procedure Rules by their action of filing their defence out of time and without the leave of the Court.
6. Further the plaintiff points out that the impugned defence was not compliant with Order 7 Rule 5 of the Civil Procedure Rules which requires inter alia, that a list of witnesses, written statements by witnesses and copies of documents to accompany the defence. Reliance was placed on the case of **Bentham International Supplies Limited -V- Paul Ndegwa Mwangi & Another [2013] eKLR** where the court found that a defence filed in breach of Order 7 Rule 5 of the Civil Procedure Rules constituted an abuse of process and it was struck out. Similarly, Kasango J. in **Daniel Wambua Ndabi -V- Peter Luka Ndutu [2004] eKLR** struck out a defence filed outside the stipulated time and entered an interlocutory judgment.
7. A further challenge on the defence filed by the 5th and 6th Defendants was that the same does not disclose a reasonable defence and raised no triable issues as it consists of mere denials. The Plaintiff cited the decision of Kimaru J in **Kanji Valji & Another -Vs- Dimken (K) Limited [2008] eKLR** in support of this submission.

For their part, the 5th and 6th Defendants submitted that their defence was filed before the application for leave to enter judgment could be argued and that Order 10 Rule 11 of the Civil Procedure Rules empowers the court to vary or set aside a default judgment.

8. Further the Defendants contest the Plaintiff’s assertion that their claim is a liquidated demand and contend that the claim arose out of alleged forgery, fraud and criminal conspiracy. They assert that the leave sought ought not to be granted. The Defendants relied on the case of **Godfrey Githinji Kamiri -Vs- Attorney General [2012] eKLR**.
9. Admitting that the defence was filed outside the time stipulated the defendants however argue that the same raises triable issues including, the statutory duties of the 5th and 6th Defendants, and authentication of the alleged fake title. The Defendants called to aid the statement by Nyamweya J. in the case of **Godfrey Githinji** that the court has discretion to allow a defence filed out of time to stand where judgment has not been entered. They also cited **Lucy Mweru Njoroge -V- Iyego Rwathia Company Limited [2013] eKLR**. The Defendants have urged the Court to eschew technicalities in the spirit of Article 159 (2) (d) of the Constitution so that justice can be done.

10. There is no dispute that the 5th and 6th Defendants were duly served with summons to enter appearance and that their defence was filed outside the stipulated period. However, contrary to the assertions of the Plaintiff, to date no judgment has been entered against the 5th Defendant.

In respect of the 5th Defendant therefore there was no judgment on record at the time the defence was filed and with regard to the 6th Defendant, the plaintiff's application for leave to apply for judgment had not been heard.

11. Logically, the plaintiff's second application should be disposed of first in light of the fact that there is a defence on record whether regular or irregular. Order 6 Rule 1 and 2 of the Civil Procedure Rules provides for the time and mode of entering appearance. What the 5th and 6th Defendants filed on 19/11/2013 was a Notice of Appointment of advocates. The Notice does not comply with the Form No. 12 of Appendix A to the Civil Procedure Rules. However it contains all the details required under Order 6 Rule 3 (1), (2) and (3) of the Civil Procedure Rules as regards information required to be contained in a memorandum of appearance, primarily the address of the defendant and his advocate.

12. Indeed even where a defence is filed in place of a memorandum of appearance, Order 6 rule 2 (4) provides that:

“Where a defence contains the information required by rule 3 it shall where necessary be treated as an appearance”.

In the instant case both the Notice of Appointment and impugned defence contain all the information required under Order 6 rule 3 of the Civil Procedure Rules. Hence the plaintiff cannot rely on the absence of a filed memorandum of appearance as a basis for its application.

13. With regard to the defence filed out of time, I agree with the plaintiff that the Defendants ought to have sought the court's leave under Order 50 rule 6 of the Civil Procedure Rules, as the 4th Defendants have done through their pending application filed on 24/7/2014. This accords with the provisions of Order 7 rule 1 of the Civil Procedure Rules giving discretion to the Court with regard to the period of filing of the defence. In my view the fact that a defence is filed out of time without leave of the court constitutes an irregularity and not necessarily an abuse of the court process. The absence of a default judgment on record against the 5th defendant at the time the defence was filed negatives the assertions of abuse.

14. The court however is obligated to consider the defence no matter how irregularly placed on record. This question ties up with the issues raised by the Plaintiff's first application and will be considered concurrently. The Plaintiffs have argued that the defence filed is a sham and does not comply with the provisions to Order 7 rule 5 of the Civil Procedure Rules. The plaintiff's first application is brought under Order 10 rule 4 and 8 of the Civil Procedure Rules.

15. Order 10 rule 4 Civil Procedure Rules provides:

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs”.

16. It is the Plaintiff's position that its claim qualifies as a liquidated demand hence the application for leave to request judgment is merited. The 5th and 6th Defendants are opposed to this submission and point out that the issues raised in the plaint include forgery, fraud and conspiracy. Equally, in submissions the plaintiffs have conceded that “the Plaintiff parted with Kshs 8,942,500/= in a fraudulent transaction”.

17. A perusal of the averments in the plaint discloses the true nature of the Plaintiff's claim. At paragraph 16 for instance, the Plaintiff avers that the 1st to 4th Defendants engaged in a fraudulent conspiracy by pointing out the wrong property to the plaintiff in order to "swindle" it of its money. It would appear from the averments in paragraphs 6, 7, 9, 19, 20 that the plaintiffs consider the 5th and 6th Defendants liable with regard to their alleged confirmations relating to the suit land, thus paving way for the alleged fraud to be perpetrated.

18. Evidently, the plaint while expressly citing fraud and misrepresentation and criminal activities on the part of some of the Defendants fails to specifically particularize the fraud or misrepresentation as required under Order 2 Rule 10 (1) of the Civil Procedure Rules. In spite of this, it is my considered view that the Plaintiff's claim as pleaded does not qualify as a liquidated claim especially as against the 5th and 6th Defendants, who on the face of it were not privy to the agreement between the Plaintiff and other Defendants.

The claim against the 5th and 6th Defendants therefore falls under Order 10 rule 9 of the Civil Procedure Rules which states:

"Subject to rule 4, in all suits not otherwise specifically provided by this Order, where any party served does not appear the plaintiff may set down the suit for hearing".

19. Moreover, the 5th and 6th Defendants have put a defence on record. A pleading may be struck out under Order 2 rule 15 of the Civil Procedure Rules if it discloses no cause of action or defence in law, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the full trial or if it is otherwise an abuse of the court process. The plaintiff has asserted that the defence filed does not disclose a reasonable defence as it consists of mere denials. The 5th and 6th Defendants disagree and highlight the issues raised by the defence concerning authentication of titles by the said Defendants. Firstly, the defence on the face of it takes issue with the status of the 5th Defendant and his relationship to the 6th Defendant. Additionally, the defence counters the allegation that the said Defendants authenticated a "fake" title. It is averred in the alternative that the authentication was carried in a procedural manner.

20. A Defendant will be allowed to defend even if his defence raises only one triable issue. As juxtaposed against the averments of the plaint, the defence of the 5th and 6th Defendants to my mind cannot be described as one devoid of triable issues or as a frivolous pleading which constitutes an abuse of the court process.

It is true however that the said defence does not comply with Order 7 rule 5 of the Civil Procedure Rules. This objection however was raised in the submissions and was not among the grounds cited in either of the subject applications. The 5th and 6th Defendants did not directly answer the challenge albeit calling to their aid the provisions of Article 159 (2) (d) of the Constitution. This Article does not obviate the need to comply with the rules of procedure. Rather it discourages undue regard for procedural technicalities.

21. In view of all the foregoing, this court is not satisfied that the two plaintiff's applications should be allowed. The same are dismissed. However, in view of the admitted default on the part of the 5th and 6th Defendants I will award the costs of the applications to the plaintiff in any event.

22. Further, I would direct that the plaintiffs do file an amended plaint which discloses the true nature of its claim as against the 5th and 6th Defendants and the capacity in which they are sued. In particular, the amended plaint shall spell out the respective particulars of fraud or misrepresentation pleaded against the defendants. This will enable the court to determine the real question in controversy. The amended plaint will be filed and served on the 2nd to 6th Defendants within 14 days of this ruling.

23. As regards the 5th and 6th Defendants the court directs that they file and serve documents in

compliance with Order 7 rule 5 of the Civil Procedure Rules within 14 days of this ruling.

Delivered and signed at Naivasha this 19th day of February, 2015

In the presence of

For Plaintiff

For Defendants

Court Clerk Stephen

C. W. MEOLI

JUDGE