



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 220 OF 2010

EVANSON KAMAU.....PLAINTIFF

VERSUS

RICATTI BUSINESS COLLEGE OF
EAST AFRICA LIMITED.....1ST DEFENDANT
CHARLES MUTUKU.....2ND DEFENDANT
MIKE MUTUKU.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Defendants' Notice of Motion application dated 23rd April 2013 and filed on even date was brought under the provisions of Section 1A of the Civil Procedure Act and Order 8 Rule 6 of the Civil Procedure Rules, 2010. The same sought the following orders:-
 1. **THAT, the Honourable court be pleased to strike out the Defendants/Applicants from the proceedings herein with costs.**
 2. **THAT, in the alternative and without prejudice to prayer 1 above, the Honourable court be pleased to strike out the Plaintiff's suit filed herein.**
 3. **THAT, the Plaintiff/Respondent do pay the costs of the suit and application.**

THE DEFENDANTS' CASE

2. The application was supported by the affidavit of Charles Mutuku, a Manager of the 1st Defendant and sworn on 23rd April 2013. The Defendants filed their written submissions dated 27th March 2015 on even date.
3. It was averred by the Defendants that the Plaintiff had fourteen (14) days from the 28th of January 2011 to file and serve his Amended Plaintiff. However, to-date, the Plaintiff has neither served an Amended Plaintiff nor served Summons To Enter Appearance upon them. In the circumstances, they had not entered appearance or filed any Defence.
4. It was their case that the order made on 28th January 2011 expired after fourteen (14) days and consequently there was no valid claim against them. Their contention was that the Plaintiff's

- failure to comply with the said order rendered his claim ineffective, null and void since the Amended Plaintiff had never been served and therefore the entire claim abated. Further, it was their case that the fact that they had no Defence on record was prejudicial to them.
5. In the circumstances foregoing, the Defendants urged the Court to find that it was in the interest of justice and fairness that the suit against them be struck out.

THE PLAINTIFF'S CASE

6. The Plaintiff opposed the application vide his Replying Affidavit that was sworn on 21st May 2013. He filed his undated submissions on 21st April 2015.
7. He confirmed that he had filed an application to amend the suit and that indeed the court had given him fourteen (14) days within which to file his amended Plaintiff. It was his assertion that the said Amended Plaintiff was filed on 1st March 2011 by his Advocates on record. According to him, this was well within the fourteen (14) days given by the court to file it. Further, he stated that his advocates informed him that the Defendants herein, were personally served with the suit papers.
8. It was his case that striking out of suit was an exercise that the court should only entertain if the suit has no merit at all even if it were to proceed to hearing. He urged the court to find that having complied with the court order it was only fair and just that the Defendants' application be dismissed.

LEGAL ANALYSIS

9. The Defendants brought the current application for striking out the Plaintiff's suit under Order 8 Rule 6 of the Civil Procedure Rules 2010. It provides as follows:-

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period. (Emphasis supplied)

10. The parties herein were in agreement that on 28th January, 2011 the court gave the Plaintiff fourteen (14) days within which to file and serve an amended plaintiff together with summons to enter appearance. The Defendants' case was that the Plaintiff did not abide with the orders and therefore his suit against them should be struck out. It was their submission that the consequences of non-service of summons and the amended plaintiff denied them an opportunity to file their defence and in the circumstances their rights to a fair trial had been undermined.
11. On the other hand, it was the Plaintiff's submission that he filed the Amended Plaintiff within the time given by the court. He attached a copy of the Amended Plaintiff which was filed in court on 1st March 2011. This was well over fourteen (14) days from the date of 28th January 2011. Therefore, the Plaintiff's position that he filed the Amended Plaintiff within the fourteen (14) days as ordered by the court cannot hold.
12. However, the Plaintiff's submission that Order 8 of the Civil Procedure Rules which deals with amendments to pleadings does not give any provision for service of summons after an amendment was correct. Indeed, a reading of the said Order 8 of the Civil Procedure Rules confirms the Plaintiff's argument.
13. Notably, it was not disputed that summons in this suit was first served upon the initial Defendant on 10th May 2010. This Defendant entered appearance on 21st May, 2010 and filed its statement of Defence on 24th October, 2010. In this case it was obvious that the 1st Defendant herein was aware of the suit. It had notice of the proceedings in court. The amendment of the Plaintiff was to substitute the initial Defendant with the 1st Defendant and to enjoin the 2nd and 3rd Defendants who were agents of the 1st Defendant as there was an error in the name of the party sued in the initial Plaintiff.
14. In fact the court record reveals that the 2nd Defendant swore an affidavit in support of the application to strike out the initial Defendant from the pleadings on the grounds that it was sued as

- a wrong party. It was therefore clear that the 2nd Defendant and by extension the other Defendants were all along aware of the proceedings herein.
15. The above notwithstanding, summons to enter appearance are meant to inform a defendant of a suit filed against it. After perusing the file, the court could not trace any Affidavit of Service evidencing of service of the Amended Plaintiff and Summons to Enter Appearance on the Defendants, as sued, as was contended by the Plaintiff. It was not enough for the Plaintiff to have claimed that his advocates served the 2nd & 3rd Defendants with the Amended Plaintiff and Summons To Enter Appearance without adducing any evidence to that effect.
 16. As the law mandates that a defendant ought to be served with Summons To Appearance before they enter appearance, the Plaintiff ought to have attached an Affidavit of Service to prove that the 2nd and 3rd Defendants had indeed been served with the said documents. In the absence of such proof, this court had no option but to find that the Plaintiff failed to serve the said Defendants with the Amended Plaintiff and the Summons To Enter Appearance.
 17. It was also the view of the court that the 1st Defendant ought to have been served with fresh Summons To Enter Appearance as it had initially been sued as Rocham Enterprises Limited t/a Ricatti Business College of East Africa. It was therefore unfair to have expected the Defendants to have filed their Amended Defence in time for the hearing when the Plaintiff had not served them with the Amended Plaintiff.
 18. Having said so, from the provisions of Order 8 Rule 6 of the Civil Procedure Rules as stated above, the court has discretion to extend such time within which a party can amend a pleading. In this case, the Amended Plaintiff was filed slightly over a month instead of the fourteen (14) days as had been ordered by the court. The period between the time the Plaintiff ought to have complied with the court orders and when he filed the Amended Plaintiff, though significant, was not one that had occasioned to or suffered by the Defendants. If there was any prejudice, the Defendants did not demonstrate the same.
 19. Be that as it may, as a perusal of the court file shows that no summons were issued in respect of the Defendants herein, suit against them cannot abate as they had seemed to suggest. Indeed, it was not clear from the court file whether the Plaintiff had applied and been notified of the issuance of the Summons To Enter Appearance by the court or whether the same were signed and/or issued. Appreciably, Order 5 Rule 1(6) of the Civil Procedure Rules clearly stipulates as follows:-

“Every summons, except where the court is to effect service, shall be collected for service within thirty (30) days of issuance or notification, whichever is later, failing which the suit shall abate.”

20. Issuance connotes that the said Summons To Enter Appearance had to be endorsed by the court, which was not evident from the unsigned and undated summons in the court file. As matters stand now, there were no summons in the court file which can be re-issued to enable the court determine the real issues in dispute and controversy between the parties. They can only be issued.
21. In the current matter, the Defendants had not raised an issue as to the merits or otherwise of the case. This was discernible from the fact that the application was not taken out under the provisions of Order 2 Rule 15 of the Civil Procedure Rules which empower the court to strike out pleadings that do not disclose a reasonable cause of action. Their main contention was that they were not served with the suit papers and therefore could not defend the case against them.
22. The court has already held that whilst the Defendants were not served with the Amended Plaintiff, the Plaintiff's failure to serve the said Amended Plaintiff could be cured and did not warrant the dismissal of the Plaintiff's suit. This court is called upon to do justice to both parties and in doing so it would be prudent to allow the case to be heard on its merits.
23. Indeed, an act of striking out of pleadings by the court should be exercised cautiously and with a lot of restraint. This position was reiterated in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musunga J (as he then was) had the following to say:-

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”

24. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions that were relied upon by the parties, the court came to the conclusion that this was not a suitable case where the suit should be struck out for want of service of Summons To Enter Appearance and Amended Plaintiff upon the Defendants more particularly as the 1st Defendant had since entered appearance herein albeit in another name. It would therefore be in the best interests of justice that the suit herein be sustained.
25. However, as the Plaintiff failed to comply with the court's directions regarding the filing of an Amended Plaintiff and failed to serve the same upon the Defendants, he cannot be allowed to go scot-free. It was the view of the court that an award of costs would be adequate to compensate the Defendants for the inconvenience that they had suffered as a result of the Plaintiff's inaction in the matter herein.

DISPOSITION

26. For the foregoing reasons, the upshot of this Ruling was that the Defendants' Notice of Motion application dated 23rd April 2013 and filed on even date was not merited. To further the ends of justice, the court hereby directs as follows:-

- a. **THAT the Executive Officer is hereby directed to issue Summons To Enter Appearance against the Defendants herein forthwith.**
- b. **THAT the Plaintiff shall serve the Defendants with Summons to Enter Appearance and the Amended Plaintiff within fourteen (14) days from the date of this Ruling as the court deemed it fit and proper to extend the time for the filing of the said Amended Plaintiff.**
- c. **THAT the Defendants are hereby granted leave to file and serve their Amended Defence within fourteen (14) days from the date of service of the Amended Plaintiff and Summons to Enter Appearance.**
- d. **THAT the Plaintiff is at liberty to file and serve his Reply to Amended Defence within fourteen (14) days from the date of service.**
- e. **THAT the Plaintiff shall bear the costs of the application.**
- f. **THAT the Plaintiff shall also bear the thrown away costs in the sum of Kshs 5,000/= for each Defendant for having failed to serve the Amended Plaintiff and Summons To Enter Appearance which sums shall be paid within fourteen (14) days from the date of this Ruling.**
- g. **In default thereof, the Defendants shall be at liberty to apply for other orders from the court.**

27. It is so ordered.

DATED and DELIVERED at NAIROBI 30th day of June 2015

J. KAMAU

JUDGE