



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 399 OF 2013

HON. NJOROGE BAIYA.....PLAINTIFF VERSUS
THE STANDARD GROUP LTD.....DEFENDANT

RULING

1. By a Notice of Motion dated 21st April, 2015, the Plaintiff seeks that the Defence on record dated 23rd October, 2013 be struck out and the suit proceeds for formal proof.
2. The application is premised on the grounds on the face of the application and the Supporting Affidavit of the Plaintiff. It is contended that the Defendant was on 17th November, 2014 ordered to file its list of witnesses, witness statements and other supporting documents within thirty (30) days of the pre-trial but that the Defendant has failed to comply with that order. It was therefore contended that such a defence should not be allowed to set off his claim.
3. In response thereto, Nduru Gichamba, who is an advocate having the conduct of this matter on behalf of the Defendant, filed a Replying Affidavit on 3rd July, 2015. He contended that the delay in filing the said documents was neither intentional nor contumelious and that the striking out of a suit for failure to comply with Order 11 of the Civil Procedure Rules should not be exercised without giving the Defendant an opportunity of remedying the delay. He stated that filing documentation would be a duplication since the Plaintiff has filed similar documents. He further stated that the defence raises triable issues and should go for hearing and determination.
4. The power to strike out pleadings has been held to be employed only as a last resort and even then, only in the clearest of cases. Since the enactment of Section 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, courts strive to sustain rather than to strike out pleadings.
5. It is not in dispute that the court did on 17/11/14 direct that the Defendant do file and serve its witness statements and documents within 30 days. By the time the present application was being filed in April, 2014, more than five (5) months later, the Defendant had not complied with that order. In Order 11 Rule 3(2), the court is given wide powers on how to manage trials. It is provided, inter alia, that:-

“(2) In addition to any other general power the court may at the case conference –

- a.
- b.
- c.
- d.
- e.
- f. ***make any procedural order***

- g.
- h.
- i.
- j. ***give any suitable directions to facilitate expeditious disposal of the suit or any outstanding issues,***
- k.
- l.
- m.
- n.
- o. ***make any such order as may be appropriate including-***
 - i. ***striking out the action or defence***
 - ii.
 - iii.
 - iv.”

6. It is clear from that provision that the court has the jurisdiction to strike out a pleading if a party fails to comply with pre-trial directions given by the court. In the present case, although a timetable was given by the court for compliance, the Defendant has failed to heed. As a result, it has led to the delay of the trial of this court. That is in breach of Article 159 (2) (b) of the Constitution and Section 1A (3) of the Civil Procedure Act. The only defence raised is that the Defendant need not file documents as the document to be relied on by the Defendant is the same article which the Plaintiff has already produced and that there is no need of duplication of the documents by the Defendant filing its own set.
7. That seems to be a plausible explanation. However, although a list of witnesses were filed on 24/10/13, their statements have never been filed and no explanation has been advanced for the failure to file any in compliance of the order of the court of 17/11/14. To my mind, that is in utter breach of the court order and is not only contumelious but also extreme contempt of court. The Defendant’s action has led to the delay in having this matter prosecuted. That is in breach of Article 159 2(b) of the Constitution and the order of 17/11/14.
8. In order to do justice to the parties, I am minded not to strike out the Defence but to order that the Defendant will not be allowed to rely on any evidence at the trial save for that already on record. Further, no witness statements will be filed nor witnesses called by the Defendant at the trial having deliberately refused to file statements of such witnesses as directed by the court on 17/11/14.
9. Accordingly, the application is dismissed with costs to the Applicant with directions that the Defendant will not be permitted to call any witnesses at the trial. I accordingly grant the certificate that the suit is now ripe for trial and the parties should take a hearing date at the registry for trial.

It is so ordered.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 18th day of September, 2015.

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JUDGE