



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL SUIT NO. 5 OF 2014**

**MERRY BEACH LIMITED .....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED .....1ST DEFENDANT**

**GIANLUIGI CERNUSCHI .....2ND DEFENDANT**

**RULING**

The application dated 7th August, 2014 seeks the following orders;

**“a) The 1st Defendant's Statement of Defence dated 15th April, 2014 be struck out and interlocutory judgment be entered for the Plaintiff.**

**b) The costs of this application be provided for”**

The application is brought under Section 1A, 1B, 3A and Order 7 Rule 5 of the Civil Procedure Act. It is supported by the affidavit of Walter Kilonzi sworn on 8th August, 2014. Mr. Kinyua, Counsel for the Applicant submitted that the 1st Defendant has contravened the provisions of Order 7 Rule 5.

Under Order 7, the Defendant was supposed to file its defence together with witness statements and all documents it shall rely upon but that has not been done. Sections 1A and 1B of the Civil Procedure Act provides for the overriding interest. The intention is for expeditious determination of cases. The 1st Defendant has refused to file the required documents. This refusal cannot be treated as a technicality.

Counsel for the applicant further contends that a pre-trial conference has to be held 30 days after close of pleadings. The Plaintiff could not list the suit for pre-trial as the pleadings have not been closed due to the none filing of the relevant documents by the 1st Defendant. The Plaintiff does not know what evidence the 1st Defendant shall adduce. Counsel urged the court to strike out the replying affidavit or ignore its contents as it was filed out of time. The 1st Defendant was granted 14 days to file a replying affidavit on 29th September, 2014 but the same was filed in November, 2014. The 1st Defendant is intentionally alleging the hearing of the suit. No leave to file the replying affidavit out of time was sought.

Defendant has not provided them. The 1st Defendant has made reference to another suit but that cannot be the reasons for the filing of the necessary documents.

Miss Kaguri, Counsel for the 1st Defendant opposed the application. Counsel relies on the grounds of opposition and replying affidavit in response to the application. Counsel urged the court to exercise its discretion and extend the time for filing the replying affidavit and grounds of objection. Miss Kaguri

contends that the plaintiff made reference to Malindi Civil Suit No. 110 of 2012. The 1st Defendant wanted to get the pleadings for that suit as it is not a party to it: the Defendant has filed its defence and indicated particulars of fraud and breach of contract. These issues need to be fully canvassed. This will ensure that the Defendant is accorded a fair trial as enshrined in Article 50 of the Constitution. The concerned bank account dates back to 2009 when the current application was filed, the 1st Defendant could not file its documents. The Plaintiff ought to have listed the matter for a pre-trial so that directions could have been given. The 1st Defendant requires 30 days to file its relevant documents.

Mr. Kinyua further submitted that the application is not for summary judgment but for striking out of the defence so that interlocutory judgment can be entered. The Plaintiff requested for specific cheques but the 1st Defendant has not provided them. The 1st Defendant has made reference to another suit but that cannot be the reasons for the filing of the necessary documents.

Miss Kaguri, Counsel for the 1st Defendant opposed the application. Counsel relies on the grounds of opposition and replying affidavit in response to the application. Counsel urged the court to exercise its discretion and extend the time for filing the replying affidavit and grounds of objection. Miss Kaguri contends that the plaintiff made reference to Malindi Civil Suit No. 110 of 2012. The 1st Defendant wanted to get the pleadings for that suit as it is not a party to it: the Defendant has filed its defence and indicated particulars of fraud and breach of contract. These issues need to be fully canvassed. This will ensure that the Defendant is accorded a fair trial as enshrined in Article 50 of the Constitution. The concerned bank account dates back to 2009 when the current application was filed, the 1st Defendant could not file its documents. The Plaintiff ought to have listed the matter for a pre-trial so that directions could have been given. The 1st Defendant requires 30 days to file its relevant documents.

The application is brought under Order 7 rule (5) of the Civil Procedure Act which provides as follows:

**“The defence and counterclaim filed under rule 1 and 2 shall be accompanied by -**

**(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim**

**(b) a list of witnesses to be called at the trial;**

**(c) written statements signed by the witnesses except expert witnesses; and statutory**

**(d) copies of documents to be relied on at the trial.”**

It is the Applicant's contention that the suit could not be fixed for pre-trial conference as the pleadings have not closed since the 1st Defendant has not filed its witness statements and other documents. Mr. Kinyua contends that Order 11 on pre-trial conference cannot apply if a party has not complied with Order 7. Under Order 11, Appendix B provides for a standard questionnaire for pre-trial conferences: Some of the issues to be dealt with during a pre-trial conference include whether a party has given full disclosure of documents to the other party, whether inspection of documents has been done, whether a party has filed and exchanged all witness statements among other things. Order 11(2) empowers the court to order for the filing and service of any necessary particulars during a pre-trial conference. The court can also give any equitable directions to facilitate expeditious disposal of the suit. Order 11(2) (O) (I) enables the court to strike out the suit or the defence.

Given the provisions of Order 7 and 11 of the Civil Procedure Rules, it is clear that non filing of witness statements and other documents by a party does not stop the holding of a pre-trial conference. The intention of a pre-trial conference is to find out whether the suit is ready for hearing and to sort out all preliminaries. At that stage, a party can request for compliance with the other rules such as the filing of other documents. It would have been easy for the Plaintiff to list the suit for a pre-trial conference and raise the issue of witness statements and exhibits or documents. The court could have given the 1st Defendant time to file such statements or documents. This would have been in line with the overriding objective of expeditious disposal of suits as opposed to filing an application for striking out the defence.

It is clear that Order 7 is couched on mandatory terms. However, it is not provided under Order 7 that if a party fails to file witness statements or documents then its defence should be struck out. It is possible that the Defendant intends not to call any witness or rely on any document. It is upon the Plaintiff to prove his case. Whether the Defendant does not intend to call any witness is a matter to be dealt with at the pre-trial conference.

This suit was filed on 28th February, 2013. The 1st Defendant filed its defence on 15-4-2014. There is no affidavit of service indicating when the 1st Defendant was served. In any case there is no request for judgment against the 1st Defendant. The Plaintiff filed its reply to the 1st Defendant's defence on 21st July, 2014. On 11th August, 2014 the current application to strike out the defence was filed. The pleadings therefore closed fourteen (14) days after the service of the Plaintiff's reply to the 1st Defendant's defence as per Order 2 Rule 13: under Order 2 Rule 13, the pleadings closes 14 days after service of the reply to a defence, or service of the defence or defence to counterclaim notwithstanding. That any order or request for particulars has been made but has not been complied with. The Plaintiff gave notice to the 1st Defendant on 17th July 2014 requesting for witness statements and documents. There is no affidavit of service to show when the 1st Defendant was served with the reply to the defence.

The reply to the defence as herein indicated was filed on 21st July, 2014: under Order 11, a pre-trial conference is to be fixed 30 days after close of pleadings. Assuming the reply to the defence was served on the same date of filing, ie. 21st July, 2014, then pleadings closed on 3rd August, 2014: A pre-trial conference was to be held thirty days thereafter and this would have fallen in September, 2014. The current application was filed on 11th August, 2014 even before the time for a pre-trial conference was due.

Under Order 2 Rule 13, the closure of pleadings is not determined by the filing of witness statements or documents to be relied upon. That is why Order 11 provides for whether a party has supplied witness statements have to be filed together with the plaint or defence, this does not mean that failure to do so leaves the pleadings open. Witness statements can even be filed when the suit is proceeding. This can happen when a party intends to call for a further evidence from a witness who was not included in a party's list of witnesses.

I do find that non compliance with the provisions of Order 7 does not call for the striking out of a defence: Counsel for the Applicant did not attack the defence itself and this shows that the defence could be raising triable issues. Striking out the defence for non filing of witness statements and documents has the same effect as striking out a defence for other reasons such as failure to raise triable issues. The end result is that the Defendant could not be heard or heard without calling tis defence when the suit is listed for formal proof.

The Plaintiff herein moved with unnecessary speed to file the current application. It would have been wise if the Plaintiff had listed the matter for a pre-trial conference so as to seek further directions from the court. The application herein was rushed even before the pleadings closed as there is no evidence as to when the reply to the defence was served. I need not dwell on the issue of the filing of the replying affidavit or grounds of opposition as I am satisfied that the application dated 7th August, 2014 lacks merit and the same is hereby dismissed.

For purposes of expeditious disposal of the matter, the 1st Defendant is given thirty (30) days hereof to file its witness statements and any relevant documents. Costs shall follow the outcome of the main suit.

Delivered and dated on this **11th** day of **December, 2014** in the presence of:

**Said J. Chitembwe**

**JUDGE**