



REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 91 of 2012

PATRICK WAFULA KABURU.....PLAINTIFF

VRS

JAPHETHER WAMALWA KILUI.....1ST DEFENDANT

JACKSON WETOSI.....2ND DEFENDANT

ANDREW MOITA SIMIYU.....3RD DEFENDANT

PETER WAFULA KITUYI.....4TH DEFENDANT

ROSE NANG'UNDA.....5TH DEFENDANT

WILLIAM WAFUBWA KHAEMBA.....6TH DEFENDANT

SOLOMON WEPUKHULU.....7TH DEFENDANT

JOHN WAFULA.....8TH DEFENDANT

RULING

The application

[1] The application dated 21st November, 2012 seeks among other things:

1. That the interlocutory judgment herein and all consequential orders be set aside.
2. That the defendants be granted leave to defend the suit.

[2] The major grounds for the application are:

2. a) That the defendants' constitutional right to be heard is paramount.
3. b) That failure to enter appearance and file defence within the prescribed time is a procedural technicality that is depreciated by Article 159 of the Constitution.
4. c) That the defendants have a good defence
5. d) That allowing the application will not occasion any prejudice on the plaintiff.

Respondent opposes application

[3] The Respondent has vehemently opposed the application on the following grounds:

- a) That the defendant have not adduced any reason to show why they did not enter appearance and file defence after being served with plaintiff's pleadings
- b) That service has not been denied
- c) That procedural requirement to enter appearance and file defence within the prescribed time is not a mere technicality
- d) That failure to enter appearance and file defence is a renunciation of the right to be heard.
- e) That the defendants' right to be heard does not taken away the right of the plaintiff to be heard *ex-parte*.
- f) That the defendants do not have a good defence.

1.

[4] There are other grounds raised by the Plaintiff/Respondent which go to the substance of the case but I will not address them at this stage in order that no prejudice is suffered by any party.

COURT'S DETERMINATION OF THE CASE

[5] The Defendants/Applicants have a right to be heard and so is the Plaintiff/Respondent. A plaintiff is entitled to benefit from the procedural requirement under the Civil Procedure Rules that once the defendant is served with summons to enter appearance and has not entered appearance or filed a defence, he should apply for judgment in default of appearance or defence under Order 10 of the CPR. The Plaintiff/Respondent accordingly applied for interlocutory judgment on 8/10/2012 but unfortunately judgment was not entered by the court as required by the law. This omission does not however prejudice the right of the Plaintiff/Respondent or favour the Defendants/Applicants in any way as the obligation to enter appearance, file defence and serve those pleadings within the prescribed time is a legal one under the Civil Procedure Rules. The consequences of default in any of the requirements are set in law and apply to the Defendant. That is the security created by law for the Plaintiff. The application to be allowed to defend the suit is therefore in order.

[6] That notwithstanding, according to Order 10 and Order 49 of the CPR, once a request for judgment is filed by the plaintiff in the prescribed form in Appendix A, the court should enter judgment against the defendant, in case of the High Court the Registrar should enter the judgment.

[7] From the record, I see that the Defendants/Applicants filed appearance on 5/11/2011. The Plaintiff/Respondent fixed the case for hearing and served hearing notices on the Defendant/Applicants.

[8] In the circumstances of the case, I am convinced that the question would be whether, in the interest of justice, it is just to allow the Defendants/Applicants to file their defence. As I have noted the Plaintiff/Respondent invited the Defendants/Applicants for the hearing of the case on 8th November, 2012. The Defendants/Applicants attended court in response to the hearing notice served on them. At that attendance, Mr. Mukholi, although he was not formally on record, applied to be allowed to file an application for the Defendants/Applicants to be allowed to defend the case.

THE DECISION

[9] Consequently, it is in the best interest of justice that the Defendants/Applicants are allowed to defend the case. I therefore order that the Defendants/Applicants to file and serve their defence within 14 days from the date of this ruling.

Dated, signed and delivered in open court at Bungoma this 30th day of January, 2013.

F. GIKONYO
JUDGE
30/1/2013

Before: Gikonyo, Judge

Wangila for Mukhooli for defendants

Plaintiff in person absent

Court Assistant: Alusa

COURT: Judgment read in open court.

F. GIKONYO
JUDGE