



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 279 of 2011

BENHAM INTERNATIONAL SUPPLIES LIMITED.....PLAINTIFF

-VERSUS-

PAUL NDEGWA MWANGI & 9 OTHERS.....DEFENDANTS

RULING

The Plaintiff application dated 2nd July 2012 expressed to be brought under Sections 1B and 3A of the civil Procedure Act and Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules seeks the following orders:-

1. That the 3rd Defendant's statement of defence filed on 19th June 2012 is an abuse of the court process.
2. That the 3rd Defendant's statement of defence filed on 19th June 2012 discloses no reasonable cause of action or defence on law.
3. That the 3rd Defendant's statement of defence filed on 19th June 2012 be struck out.
4. That the costs of the application be provided for.

The application is premised on the grounds that the 3rd Defendant's statement of defence is an offensive pleading having been filed after the expiry of the time prescribed by the law and no leave was sought for the enlargement of time. The Plaintiff further contends that the 3rd Defendants defence does not disclose any triable issue and lacks any merit and is intended to delay the plaintiff's case.

The application is supported by the affidavit of **GRACE WANJIRU THUNGU** learned ~Counsel for the Plaintiff who depones that the 3rd Defendant in addition to Defendant Nos. 1, 2, 4, 5 & 6 were all served with copies of summons to enter appearance, the copy of the plaint, and the copy of the court order made by the court on 25th July 2011 on 30th July 2011 as per the affidavit of service sworn by Ethan Kamau on 8th August 2011. The deponent of the supporting affidavit further depones that save for the 3rd Defendant who filed a belated memorandum of appearance and statement of defence on 19th June 2012 (after more than 10 months from date of service) through his Advocates M/s G. W. Wakahiu & Company Advocates no other defendant entered appearance or filed any defence.

Before the 3rd Defendant filed his defence the suit had come up for formal proof before Hon. Justice Kimondo on 21st May 2012 when none of the defendants appeared and the matter was adjourned to proceed for hearing on 21st June 2012 with the court directing that the defendants be served with a

hearing notice. On the 21st June 2012 the matter was again listed for hearing before Hon. Justice Kimondo and the Plaintiff was represented by Counsel on record while the 3rd Defendant was represented by Mr. Gichigi Advocate of Wakahiu & Company Advocates who had filed a defence only 2 days earlier.

The validity of the defence that had been filed out of time was put to question and the court adjourned the hearing to enable the parties consider their options and take any appropriate and necessary. This prompted the plaintiff to file the instant application. The application came before me for hearing on 29th November 2012 and even though a hearing notice had been served upon M/s G. W. Wakahiu & Co. Advocates for the 3rd Defendant I directed that hearing notice be served on the 3rd Defendant personally for hearing of the application on 23rd January 2012 since in the filed Return of Service the process server had indicated the said firm claimed they were no longer on record for the 3rd Defendant.

On 23rd January 2013 there was no appearance for the 3rd Defendant though he had been served as per the Return of Service filed in court and the application by the plaintiff was thus unopposed. The court reserved the ruling to be delivered on 18th February 2013.

The court on the basis of the material before it is called upon to determine whether the filing of the defence by the 3rd Defendant out of time without enlargement of time constituted abuse of the court process.

Further the court is invited to determine whether the defence lacks any merit and/or raises no reasonable defence to the action and should be struck out.

To enable the court to make a determination of the issue it is necessary to consider and review the appropriate legal provisions:-

Order 1(1) provides as follows:-

“When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein”

The summons to appear served on the 3rd Defendant and indeed on all the other defendants herein was on the following terms:-

“Whereas the above named plaintiff has instituted a suit against you upon the claim, the particulars of which are set out in the copy plaint with annexure attached hereto.

YOU ARE HEREBY REQUIRED within Fifteen (15) days from the date of service hereof to enter an appearance in the said suit.

Should you fail to enter an appearance within the time mentioned above, the plaintiff may proceed with the suit and judgment may be given in your absence”.

The 3rd Defendant in the instant suit filed an appearance on 19th June 2012 while the summons were served on him on 30th July 2011 and therefore the purported memorandum of appearance was clearly out of time. In the instant suit the Plaintiff had already applied for interlocutory judgment and the matter had already been set down for formal proof. In this court's view such memorandum of appearance could only be filed with leave of the court whereby the court would have been invited to enlarge the period for filing a memorandum of appearance.

As regards the statement of defence filed on behalf of the 3rd Defendant on 19th June 2012 to the extent that the memorandum of appearance was not filed within the prescribed time the statement of defence filed simultaneously with the memorandum of appearance was equally out of time and could not be properly filed without leave of the court.

The court has looked at the filed defence on behalf of the 3rd defendant and finds that the same is not filed in compliance with order 7 rule 5 of the Civil Procedure Rules 2010 which provides thus:-

“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 witnesses except expert witnesses; and

(d) Copies of documents to be relied on at the trial.

The statement of defence by the defendant though filed by Counsel who ought to be in the know as regards the requirements did not satisfy the conditions under order 5(b) (c) and (d) as there was no list of witnesses or witness statements and nor were there any copies of documents that the defendant would rely on at the trial.

The failure to comply with order 7 Rule 5 of the Civil Procedure Rules made it difficult to assess the merits and/or demerits of the defence.

The court in the premises finds that the filing of the memorandum of appearance and statement of defence by the 3rd Defendant was in total disregard of the court process and procedures and that even though the court is enjoined under Section 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya and Article 159 of the Constitution of Kenya to do justice without undue regard to technicalities it must be always borne in mind that in every dispute there are two parties and each one of them is craving for justice. The Rules of procedure are intended to the extent possible to provide a level playing field for all parties in the sense that the rules of engagement are predetermined and are known to all the parties.

Order 2 Rule 15 of the civil Procedure Rules pursuant to which the plaintiff’s application is made provides thus:-

(1) “At any stage of the proceedings the court may order to be struck out or amended any pleading on the grounds that:-

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court, and may order the suit stayed or dismissed or judgment to be entered accordingly, as the case may be”

As I have held both the memorandum of appearance and the defence were filed out of time and at a time that the plaintiff had moved the court to formally prove its case I further find that to allow the defence to stand would prejudice, embarrass and or delay the fair trial of the action and that the filing of the statement of the defence at the time it was done and in contravention of order 7 Rule 5 of the civil Procedure constituted abuse of the process of the court.

For all the above reasons I am persuaded the 3rd defendant’s memorandum of appearance and statement of defence are for striking out and I order them struck out from the record.

I award the costs of the application to the plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants