

REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Environmental & Land Case 360 of 2007

FUNGUO ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

ROBERT MUTHAMA.....DEFENDANT

RULING

The Plaintiff has brought an application dated 7th September 2012 under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, seeking that this Court interprets its order of 24th February 2012, and proceeds to enter default judgment against the Defendant. The grounds for the application are that the order granted on 24th February, 2012 has been wrongly interpreted by the Deputy Registrar, crystallizing in the denial of a default judgment. Further, that it was impossible to fix this cause for hearing within sixty (60) days, as the court had already appreciated an intended amended plaint which would have to go through the motions, and that the Plaintiff did not go to slumber or at all and has moved this suit since the said order.

The Plaintiff's Advocate, Njugi Gachogu, gave an account of the background to the application in a supporting affidavit sworn on 7th September 2012. The facts in summary are that this Court on 24th February 2012 found that reasonable cause had been shown that prevented the dismissal of the case herein for want of prosecution, and ordered that the suit be set for hearing within sixty days, in default of which it would stand dismissed. The Plaintiff's Advocate argues that an amended plaint was subsequently filed, served and default judgment requested all within the sixty (60) days, and has annexed a bundle of documents to this effect. However, that the said judgment has been declined by the Deputy Registrar on the ground that the suit should have been fixed for hearing within sixty (60) days.

It is the Plaintiff's Advocate's argument that the sixty days were meant to observe movement in the suit, and not limited to the fixing of this suit for hearing. Further, that in any event, the amended plaint having been appropriately served and a defence thereto having not been filed, this suit ought to be allowed to take its lawful cause as against being technically wished away.

I have perused the court record and find that the Plaintiff's Advocate did plead to the need to file an amended Plaint in the replying affidavit that he swore on 16th February 2012, in response to the Notice to Show Cause why the suit should not be dismissed. An Amended Plaint dated 15th January 2012 was subsequently filed in Court on 10th April 2012. An Affidavit of Service sworn by one Bernard Musyoka on 18th April 2012 was also filed on 11th May 2012 attesting to service of the said Amended Plaint on the Defendant's Advocates. The Plaintiff's Advocate subsequently requested for default judgment on 24th April 2012 upon the Defendant failure to file a Defence. The Court did confirm from the Court record that the Defendant has never filed a Defence and that interlocutory judgment had earlier been entered on 25/1/2008.

It is my opinion that setting a suit for hearing necessitates undertaking the necessary steps that are required before a suit can be found to be mature for hearing, including in this case the filing and service of the amended Plaint. In the circumstances of the present case it was also found necessary to request for interlocutory judgment rather than proceed to full hearing, and all these acts were undertaken within the sixty days ordered by the Court. The Court is given powers and the discretion under sections 1A, 1B and 3A of the Civil Procedure Act to facilitate the expeditious disposal of suits in the interests of justice, and in exercise of the powers therein I do find that there was compliance with this Court's order of 24th

February 2012 and the suit herein was set for hearing within the sixty days.

On the order sought that default judgment be entered against the Plaintiff, I note from the Affidavit of Service filed in court that the Amended Plaint was served on the firm of Mutito & Thiongo Advocates, yet the court record and the Amended Plaint itself indicate that the Defendant's Advocate are Ajaa Olubayi & Company Advocates. I therefore decline to grant the said order and instead order that the said Amended Plaint be properly served on the Defendant's Advocates on record, before further action can be undertaken in this matter.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____15th____ day of____February____, 2013.

P. NYAMWEYA

JUDGE