



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 450 OF 2012

JOHN MUEMA MUTUKUPLAINTIFF

VERSUS

STEPHEN NZIOKA KINGOOI..... DEFENDANT

RULING

The plaintiff /applicant John Munene Mutuku Muema has filed a notice of motion dated the 19/12/12. The application is brought under order 1 rule 3 of the Civil Procedure Rule. It seeks the following order.

- a. That the memorandum of appearance filed on the 12/10/12 be struck out.
- b. That the defence dated 26/10/12 filed on the 14/11/12 be struck out.
- c. That judgment be entered for the plaintiff against the defendant for shillings 1321000/- mesne profits from July 2012 up to December 2012 and thereafter the defendant do pay the suit of Kshs. 22,000/- per month mesne profits to the plaintiff until he vacates the premises in L.R 209/136/313 as prayed in the plaint.
- d. That the defendant be evicted forthwith from the rented premises in plot no. 209/136/313 lower Kirinyanga road.
- e. That costs of the suit as well as the application be awarded to the plaintiff.

The application is based on the grounds that:

1. The memorandum of appearance filed in court on the 12/10/12 has never been served on the plaintiff's advocate to date.
2. The defence filed on the 14/11/12 was served on the plaintiff's advocate on 1/11/12 out of time by 14 days.
3. The defence is a sham.

The defendant/ respondent is Stephen Nzioka Kingooi. The application was served on the respondent on the 24/1/13 as per the affidavit of service sworn by Robert K Mutuku . Though served the defendant/respondent did not attend the hearing of the application under consideration. The application is supported by the supporting affidavit of John Muema Mutuku the plaintiff. He states as follows: he is the head tenant of Spare parts premises in L. R. 209/136/313 lower Kirinyanga road in Nairobi from Charles Gikonyo Ngatia . That the defendant has been his subtenant in the premises paying him ksh.22,000/-. The tenancy has been a controlled tenancy within the meaning of section (2) of the Landlord & Tenant Shops Hotels and Catering establishment Act Cap 301. That on the 5/4/12 he had the defendant served with a notice to terminate the tenancy which was to be effect on the 1/7/12 as he wanted to carry on business in the premises. That the defendant did not file a reference to the Business Premises Tribunal under section 6 (1) of the Act before the notice took effect on the 1/7/12 and therefore the notice to terminate the tenancy took effect on the 1/7/12 under

section 10 of Cap 301. That the defendant was served with the summons in this case on the 25/9/12 which required him to enter his memorandum of appearance within 15 days of service of the summons upon him. That

The applicant has attached a lease dated the 11/12/09 that shows that he is a tenant in L.R No. 209/136/313. The applicant has attached the landlord's notice to terminate dated 4/4/12 and the affidavit of service dated the 5/4/12 that shows that the applicant identified the respondent and he was served with the termination notice. At paragraph 2 of the affidavit of service the server states that on the 25/9/12 the defendant was served with the plaint, replying affidavit list of documents and the statements. The applicant states that the respondent filed his memorandum of appearance 2 days out of time, 2 days is not inordinate delay. Further the provisions of article 159 (2) (d) of the Constitution states that the **justice shall be administered without undue regard to procedural technicalities**. Section 1A of the Civil Procedure Rule states **that overriding objective of the Act and the rules are made to facilitate the just expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act**. Sub section (2) of the section 1A provides that **" the court shall in the exercise of its powers under this Act or the interpretation of any of its provisions seek to give effect to the overriding objective specified in subsection (1)**.

With these provisions in mind, I therefore decline to strike out the memorandum of appearance filed in Court on the 12/10/12. Not serving a memorandum of appearance is no good reason to strike out it either. On striking out the defence filed on the 14/11/12 I again reiterate the objectives of section 1A of the Civil Procedure Act. 17 days is not inordinate delay. The applicant is not stating that the defence raises no triable issue. His only reason is that the defence was filed 17 days out of time. The overriding objective of the Civil Procedure Act must always be upheld. They are to facilitate the just expeditious proportionate and affordable of the civil disputes. I also note that the application is brought under order 1 rule (3) which deals with **who may be joined as a defendant**. I will not penalise the applicant for citing the wrong provisions of the Civil Procedure Rule. I however decline to grant prayer (a) and (b) on the reasons stated . On prayer (c) and (d) these are prayers that cannot be granted at this interlocutory as the applicant needs to adduce evidence to prove his claim for mesne profits. Let the applicant set claim his suit for hearing so that the issues between them are solved once and for all. Cost shall be in the cause.

Orders accordingly.

R.E. OUGO

JUDGE

Dated, signed and delivered this 21st Day of May 2013

In the presence of:-

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

.....Court Clerk