



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
Misc. Case No.13 Of 2011

Armstrong Freddie Kasuku.....Plaintiff

Versus

Standard Chartered

Bank Kenya Limited.....Defendant

RULING

1. The Application before Court is the Notice of Motion dated 13th August, 2012. The Motion seeks the setting aside of the interlocutory judgment entered in favour of the Plaintiff on 23rd June 2013. The grounds for the Application were contained in the face of the Application. The Motion was supported by the affidavit of Josephine Ngunjiri sworn on 13th August, 2013.
2. It was contended that the interlocutory judgment entered in favour of the Plaintiff was irregular and unprocedural as the Defendant's Defence filed on 24th February, 2011 was still in force given that it had not been struck out. The Plaintiff also averred that the Deputy Registrar on being presented with the Request for Judgment dated 6th June, 2012 by the Plaintiff failed to observe the express provisions of Order 8 Rule 1(6). The Defendant conceded that the parties had recorded a consent on 7th May, 2012 with regard to the amended Pleadings but contended that the failure on its part to file an amendment defence in response to the amended Plaintiff meant that its original defence was still in force. The Defendant cited the case of **FESTUS MUTUA & 51 OTHERS –v- EVEREADY BATTERIES KENYA LIMITED (2004) eKLR** in support of its case.
3. The Defendant further contended that the interlocutory judgment in favour of the Plaintiff was for a substantial sum of Kshs.11,220,000/= which was prejudicial to the Defendant as the Plaintiff had already admitted being indebted to it. That the aforesaid amount was a claim for economic loss which was specifically denied in the Defence dated 24th February, 2011, that the same was not a liquidated demand and needed to be ascertained through formal proof. For the foregoing reasons, the Defendant urged the Court to allow the Application and grant the orders sought for the interest of justice.
4. The Application was opposed by the Plaintiff through a Replying Affidavit sworn on 23rd May

2013. It was contended by the Plaintiff that the Motion was bad in law and without merit, the parties had been granted leave to amend their pleadings within specific timelines, that the Plaintiff amended his Plaintiff with regard to paragraphs 11A, 16A, 16B and 16C. That new and substantive prayer (hh) was also particularized in terms of the claim for Kshs.11,220,000/=. The Plaintiff therefore contended that with the aforesaid amendments and the consent order issued by this Court, the Defendant was enjoined to file an Amended Defence within 14 days of being served with the Amended Plaintiff.
5. It was submitted that when the Defendant failed to do so, the Plaintiff had the option of applying for an Interlocutory Judgment under Order 10 Rule 6 of the Civil Procedure Rules 2010, which he did. With regard to the sum of Kshs.11,220,000/= being an unliquidated sum for Economic Loss, the Plaintiff contended that he had every intention of listing the same for formal proof given that the Interlocutory Judgment was not a final judgment as such. The Plaintiff therefore maintained that the interlocutory judgment in his favour was sound and ought not to be disturbed. He urged the Court to exercise its discretion cautiously and dismiss the application.
 6. Having carefully considered the Affidavits on record, the submissions by counsel and the various authorities, the issues that arise for my determination are whether the Plaintiff obtained a valid Judgment by reason of the Defendant's failure to file an Amended Defence to the amended plaintiff in spite of its original defence being on record.
 7. A brief background to this matter reveals that the Plaintiff and the Defendant had a bank-customer relationship. The Plaintiff operated several accounts with the Defendant Bank whereby the Plaintiff took up the accorded facilities which consisted of both overdraft and loans secured between 2000 and 2004. However, a dispute arose between the parties which prompted the Plaintiff to file this suit vide a Plaintiff dated 18th January, 2011. The Defendant filed its defence on 24th February, 2011 denying the Plaintiff's claim. On 28th March, 2012, the Plaintiff applied to amend his Plaintiff whereby on 7th May, 2012 a consent Order was issued at the behest of the parties as follows;

“By Consent, the application for amendment be allowed:-

1. ***The Plaintiff do file and serve the amended Plaintiff within 14 days.***
2. ***The Defendant do file and serve the amended Defendant within 14 days of service.***
3. ***Costs in the cause “***
8. Pursuant thereto the Plaintiff amended his Plaintiff and filed and served the same on 17th May, 2012. The Defendant did not file any amended Defence whereby the Plaintiff requested judgment under Order 10 Rule 4 of the Civil Procedure Rules on 6th June 2013. According to the Court record, on 23rd July, 2012 the Deputy Registrar of the High Court entered Judgment as prayed for the failure by the Defendant to file a defence to the Amended Plaintiff. It is that judgment that the Defendant has sought to set aside on the ground that the same was entered when a Defence was still on record.
9. In an application of this nature the court has wide discretion which however should be exercised judiciously and not capriciously. I have compared the salient features between the Original Plaintiff and the Amended Plaintiff. It is quite clear that the Plaintiff has further particularized his claim and specifically so, amplified his claim for Economic loss as is evident in paragraph 16. However, I note that the issue of economic loss was also denied by the Defendant through its Defence under paragraph 15. The Defence can therefore not be described as a sham or a frivolous one. I am therefore not in agreement with the Plaintiff's contention that the Amended Plaintiff brought in a new claim which required a new defence given. This is so considering that the Defendant had specifically denied causing the Plaintiff “any” economic loss in its original Defence.
10. Secondly, under Order 8 Rule 1(6) of the Civil Procedure Rules 2010, it is provided that:-

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

From the above, it is clear that since the Defendant failed to amend his defence as given in the Consent Order, after the lapse of 14 days after the service the Amended Plaintiff, the Defendant was barred from amending its Defence. Nonetheless, its Defence dated 24th February, 2011 stood and was still on record. It is quite explicit that where a party fails to amend a Pleading after an Order of amendment has been given by the Court, the order ceases to have effect and the Party is taken to rely on the Original Pleading.

11. I agree with the holding of **Musinga J** (as he then was) in the case of **FESTUS MUTUA & 51 OTHERS (SUPRA)** where he stated that;

“It is ...wrong and illegal on the part of the deputy registrar to purport to enter judgment against the defendant on account of its failure to file an amended defence when there is a valid defence on record.....A Judicial Officer ought to be very cautious before he enters any kind of judgment for whatever reason and should not allow himself to be put under the pressure by any person to deal with a matter in unwarranted haste as that may easily, cause him to overlook important legal provisions”

12. For the foregoing reasons, I hold the view that it was wrong for the Plaintiff’s Advocate to request for Judgment in default of the Defence yet the original Defence was still on record and had not been struck out. The Plaintiff’s argument that he has a valid Judgment that should not be disturbed is erroneous and cannot stand.

13. Accordingly, I hold that the Defendant’s Notice of Motion dated 13th August, 2012 is meritorious and is allowed. The Judgment entered on 23rd July, 2012 is hereby set aside. Costs shall be in the cause.

DATED and DELIVERED at Nairobi this 26th day of July, 2013

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A. MABEYA

JUDGE