



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 370 OF 2010

JOHN WANDURI NJOROGE.....PLAINTIFF

VERSUS

ESTHER WANGUI NGUGI.....1ST DEFENDANT

CYRUS NJOROGE MWANGI.....2ND DEFENDANT

RULING

The Plaintiff has sought orders from this court that the 1st Defendant's Statement of Defence filed and served on 7th February 2012 be struck out, and that judgment be entered against the 1st and 2nd Defendants as prayed in the Plaint in default of defence. The Plaintiff in a Notice of Motion dated 12th February 2012 states that the 2nd Defendant has failed to file a defence within the time required by law, despite being served with the Plaint and summons to enter appearance. Further, that the Statement of Defence filed and served by the 1st Defendant on 7th February 2012 was filed inordinately out of time and is improperly before this court, as no leave to file out of time was sought by nor granted to the 1st Defendant

The Plaintiff also claims that the 1st Defendant's Statement of Defence is scandalous, frivolous and vexatious and is merely intended to prejudice, embarrass or delay the fair trial of this matter, and also contains an admission of a material fact. These grounds are deponed to in the supporting affidavit sworn by the Plaintiff on 14th February 2012, wherein he states that the 1st Defendant's Advocate was served with the Plaint herein and summons on 14th September 2010, and he attached a copy of the Plaint and summons with the acknowledgment of service. He further stated that the 1st Defendant filed a Statement of Defence on 7th February 2012, one year and five months later.

The Plaintiff avers that the 1st Defendant's defence is scandalous and intended to portray him as dishonest and a cheat when she alleges that the documents he holds were found not to be genuine by the City Council offices and the police at Buru Buru Police Station. Further, that he was never arrested as alleged by the 1st Defendant. The Plaintiff also states that the 1st Defendant has in fact admitted facts in support of the Plaintiff's claim when she states in the defence that the Plaintiff was in possession of the suit property.

The 1st Defendant opposed the Plaintiff's Notice of Motion in a Replying Affidavit sworn on 23rd March 2012. She admits therein that she did file her Statement of Defence on 7th February 2012, and states that

the reason was that there was an interlocutory application filed by the Plaintiff that was not concluded until 24th October 2011, and no leave was required to file the defence since no interlocutory judgment had been requested nor obtained by the Plaintiff. The 1st Defendant further stated that the statement of defence raises triable issues meriting a full hearing, and that the main concern of the court is to do justice to the parties.

The Parties were directed to file written submissions, and the Plaintiff's counsel in submissions dated 12th April 2012 argued that under Order 7 Rule 1 of the Civil Procedure Rules it is a mandatory requirement of the law that the statement of defence should be filed within 14 days of entering appearance, and that the same be served on the Plaintiff within 14 days of filing unless some other order is made by the court. Further, that leave to file the defence out of time is therefore also required by the provisions and that it is only the court that has the power to enlarge time under Order 50 Rule 6 of the Civil Procedure Rules, and even then only upon application and not *suo moto*.

The Counsel submitted that the reasons given for failure by the 1st Defendant to file her defence in time shows negligence and ignorance of the laws and procedures, and not inadvertence as alleged. He relied on the decisions in **Baber Mawji vs Sultan Lalji and 2 Others, Civil App. No Nai 236 of 1992**, in **Ketteman vs Hansel Properties Ltd (1988) 1 All E.R 38** and **Fransisca Adikinyi Bwire vs Samwel K. Mutwiri (2006) e KLR** for the position that the 1st Defendant should bear the consequences of failure to file the defence within time without any plausible explanation.

Counsel for the Plaintiff further submitted that the averments made in the 1st Defendant's defence were frivolous, vexatious and an abuse of the process of court, and amenable to be struck out under Order 2 Rule 15 of the Civil Procedure Rules. The counsel relied on the decision in **Termco Tank Kenya Ltd. vs Nyoro Construction Co. Ltd (2004) e KLR** in this respect. He also submitted that the defence was also frivolous as the 1st Defendant had admitted facts in support of the Plaintiff's claim, and he relied on the holding in **Countryside Suppliers Ltd. vs Tom O. K'Opere T/A T.O. K'Opere & Co. Advocates (2006)e KLR** to this effect.

Lastly, the Plaintiff's counsel, relying on the decision in **John Patrick Machira t/a Machira & Co Advocates vs Grace Wahu Njoroge (2006) e KLR** submitted that it was an abuse of the process of court for the 1st Defendant to deny the court's jurisdiction in her defence, after having been a willing participant in interlocutory proceedings before the court. On the 2nd Defendant's failure to file a defence, the Plaintiff submitted that the said Defendant had failed to comply with Order 7 Rule 1 despite being served with the Plaint and summons to enter appearance on 14th August 2010.

The 1st Defendant's counsel filed submissions dated 31st May 2012 wherein he argued that sufficient reasons had been advanced to explain why the Ist Defendant's defence was filed after the expiry of the 14 days statutory period. It was also argued relying on the decision in **Philip Chemwolo & Another vs Augustine Kubende, Nairobi Civil Appeal No. 103 of 1984** that the 1st Defendant should not be penalised for the mistakes made by her counsel, and that any prejudice suffered by the Plaintiff in this respect can be compensated by way of costs.

Further, that the overriding objectives of the court as captured in sections 1A and 1B of the Civil Procedure Act and under Article 159 (2) (d) of the Constitution is that the disputes should be determined on their merit. He also relied on the decision in **Trust Bank Ltd vs Amolo Company Ltd, Kisumu Civil Appeal No. 215 of 2000** in this respect. Counsel also relied on the decision in **Central Bank of Kenya vs Uhuru Highway Development Ltd and Others Civil Appeal 75 of 1998** for the position that mere lateness in filing a defence cannot be a reason for striking it out.

Lastly, the 1st Defendant's counsel submitted that the Ist Defendant's defence cannot be said to be scandalous, frivolous or vexatious, as it has a cause of action and it has been shown that the 2nd Defendant sold the property to both the Plaintiff and 1st Defendant. The counsel relied on the decision in **Patrick Kariuki Muiruri vs Barclays Bank of Kenya Limited, HCCC No. 1251 of 2005** for this

position.

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff and 1st Defendant. There are three issues for determination: The first issue for determination is whether the Defence filed herein by the 1st Defendant should be struck out for reasons that it was filed and served out of time, is scandalous, frivolous and vexatious and an abuse of the process of court. The second issue for determination is whether the 1st Defendant has admitted the Plaintiff's claim, and the final issue is whether judgment can issue against the Defendants herein.

The Plaintiff's Notice of Motion is brought under the provisions of Order 7 Rule 1, Order 10 Rule 3 and Order 2 Rule 15 (1) of the Civil Procedure Rules. Order 7 Rule 1 and Order 10 Rule 3 of the said Rules provide for the filing and serving of a Defence within certain timelines. Under Order 7 Rule 1 a defence should be filed within fourteen days after a Defendant has entered appearance and should be served on the Plaintiff within fourteen days from the date of filing the defence. Under Order 10 Rule 3 a defence that is not served within the prescribed time is liable to be struck out.

It is not contested that the Defence by the 1st Defendant was filed and served outside the time prescribed by Order 7 Rule 1 and is therefore liable to be struck out. The 1st Defendant has urged the Court to extend the time and admit the Defence, and has given reasons which he claims justify the delay in the filing and serving of his Defence. She has also relied on the overriding objectives of Article 159(2) of the Constitution and sections 1A, 1B, 3A of the Civil Procedure Act to urge the Court to hear the suit filed herein on merit and not to strike out his defence.

While this court is bound by the said overriding principles, they do not contain or prescribe specific relief that can be accorded to a party. It is upon a party to seek specific relief from the court, and to persuade the court that the relief is one which should be granted applying the said overriding principles. Such relief must be one that is provided by law, and which the court can grant either upon application or *suo moto*.

In the case of a defence filed and served out of time such relief is provided under Order 50 Rule 6 which allows the court to extend time for doing any act for which the law provides for time limits. The said provision provides as follows:

“ Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise. “

I respectively do not agree with the Plaintiff's submission that the court cannot enlarge time *suo moto*. The Civil Procedure Act, which is the parent Act under which the Civil Procedure Rules are made, provides as follows under section 95 with regard to the extension of time by the court:

“ Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

It is thus the case that the court can exercise its discretion to extend time *suo moto*. In addition a plain reading of Order 50 Rule 6 does not require that such extension can only be made upon application, and it is specifically stated in the rule that the court shall have power to enlarge time upon such terms as the justice of the case may require.

The question to be answered by the court therefore is whether its discretion should be exercised in favour of the 1st Defendant to enlarge time. It is indeed the case as argued by the 1st Defendant that there was an interlocutory application filed by the Plaintiff together with the Plaint on 30th July 2010. The 1st Defendant's Advocate entered appearance on 13th August 2010, and the 1st Defendant responded to the interlocutory application in an affidavit filed on the same date. I agree with the decision in **Philip Chemwolo & Another vs Augustine Kubende, Nairobi Civil Appeal No. 103 of 1984** that the error made by the 1st Defendant's Advocate in failing to file a Defence within the prescribed time should not be visited upon the 1st Defendant. I also find and that this error cannot be said to amount to negligent conduct as the 1st Defendant's Advocate was already litigating the interlocutory application.

The decisions relied upon by the Plaintiff are also distinguished on the ground that in **Baber Mawji vs Sultan Lalji and 2 Others, Civil App. No Nai 236 of 1992**, the Court of Appeal was dealing with a delay in filing a record of appeal and there were no existing proceedings between the parties, while the decision in **Ketteman vs Hansel Properties Ltd (1988) 1 All E.R 38** involved limitation of action and specifically whether the Plaintiff's action therein was statute barred. Different rules and principles of law applied in both cases.

For the reasons given in the foregoing I hereby extend the time and grant leave to the 1st Defendant to file and serve his Defence out of time *suo moto*, and hereby admit the Statement of Defence dated 3rd February 2012 and filed on 7th February 2012 by the 1st Defendant as part of the court record.

The second question to be answered by the court, is whether the 1st Defendant's Defence which has now been duly admitted, should be struck out under the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules. The said Rule provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground 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 to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In **D.T. Dobie & Company (Kenya) Ltd. v. Muchina** [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. It is evident from the pleadings filed by the parties that triable issues have been raised by both the Plaintiff and 1st Defendant, particularly the issue of the validity of the sale agreement they both allege to have entered into with the 2nd Defendant. This issue cannot be decided at this

interlocutory stage without the benefit of further evidence, and can only be decided upon after a full trial. It is therefore the finding of this Court that the 1st Defendant's Defence merits adjudication by this Court.

On the issue whether the 1st Defendant has admitted the Plaintiff's claim, it is my view that for admission to justify striking out a Defence, it must be a clear and unequivocal admission of the Plaintiff's claim. I am in this respect guided by the decision of Ringera J. (as he then was) in **Intercountries Importers and Exporters Ltd v Nairobi City Council (2002)1 KLR 9**. After perusal of the Defence dated 3rd February 2012, it is apparent that the 1st Defendant has specifically denied aspects of the Plaintiff's claim. In addition, the paragraph of the Statement of Defence relied upon by the Plaintiff to show admission namely paragraph 10 (ii) is averred by the 1st Defendant to be one of the particulars of fraud on the part of the 2nd Defendant and cannot consequently be an unequivocal admission of the Plaintiff's claim. I cannot therefore find that there has been admission of the Plaintiff's claim by the 1st Defendant in its Defence.

Lastly, on the issue whether the prayer for judgment can issue, the applicable rule in this respect in the case of the 1st Defendant is Order 36 Rules 1 and 2 which provide for summary judgment provide as follows:

“1. (1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit”

In **Richard H. Page and Associates Ltd vs Ashok Kumar Kapoor (1976-80) 1 KLR 1394** it was held by Chesoni J. (as he then was) that the ordinary time for making an application for summary judgment is after the Defendant has appeared, and when the defence has not been filed, but such an application may be made after the defence has been filed, in which case the Plaintiff must satisfy the Court that the delay is justifiable. It was also held by the Court of Appeal in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695** that an application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure. Such summary judgment is thus not available against the 1st Defendant as she has filed a Defence which this court has already found needs to be considered on its merit.

In the case of the 2nd Defendant, the applicable provision with regard to judgment is Order 10 Rule 9 of the Civil Procedure Rules which provides as follows:

“ Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”

Order 10 provides for the instances when interlocutory judgment or judgment on a liquidated claim can issue when a Defendant has not appeared or filed a defence. Order 10 Rule 4 of the Rules provides for summary judgment in the cases of liquidated demand. As the Plaintiff’s claim herein is for a permanent injunction, eviction and general damages, the Plaintiff should proceed to set the case against the 2nd Defendant pursuant to Order 10 Rule 9 of the Civil Procedure Rules for hearing for purposes of formal proof.

The Plaintiff’s Notice of Motion dated 12th February 2012 is therefore hereby denied for the reasons given in the foregoing. The costs of the Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th____ day of ____July____, 2013.

P. NYAMWEYA

JUDGE