



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Case 466 of 2009

GENSON MICHENI MUNGATIA PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA 1ST DEFENDANT

MUNGANIA TEA GROWES SACCO

SOCIETY LTD.. 2ND DEFENDANT

RULING

1. The Application before Court is that this suit having come for hearing before me on 6 March 2012 (there having be Memorandum of Appearance entered herein by both the Defendants but no Defences filed), default Judgement be entered herein against both Defendants. This followed upon a letter dated 5th March 2012 addressed to the Deputy Registrar of this Court by Mr. Mbuvi for the Plaintiff, in which he requested the Court to enter judgement in his client's favour in default of defence. Earlier on 7 February 2012, Mr. Omogeni came before me appearing for the 1st Defendant stating that he had not filed Defence on behalf of his client as the witness statements to accompany the Defence were not ready. He requested a period of two weeks to file the same. As Mr. Mbuvi was happy to indulge Mr. Omogeni, I directed that the 1st Defendant do have until the 21st February 2012 to file its Defence herein.

2. In his said letter addressed to the Deputy Registrar of this Court dated 5 March 2012, Mr. Mbuvi detailed that both Defendants had been served with the Summons and the Plaint herein. Although a copy of the Summons dated 2nd July 2009 is on the Court file, there is no evidence that the same has been served. As far as I can make out from the file, the Plaintiff, at the same time as he filed his Plaint herein, also filed a Chamber Summons dated 3rd July 2009 under Certificate of Urgency. On 8 July 2009, Lady Justice Khaminwa certified the Application as urgent and granted interim orders restraining the Defendants from in any way interfering with the Plaintiff's premises Meru/Chuka/Magomoini LR 777 until the inter partes hearing which the Judge set for 24 July 2009. The Judge also ordered the Plaintiff to serve the papers on the 1st Defendant for the inter partes hearing on a priority basis.

3. On the Court file is an Affidavit of Service sworn by one Raphael M. Kilonzo on the 23rd July 2009 and filed herein on 24 July 2009. It details that the deponent received from the firm of Katunga Mbuvi & Co. Advocates on 10 July 2009:

“Original copy and copies of certificate of urgency, chamber summons Application dated 8th July 2009 and court order dated 9th July 2009”.

It does not detail that the deponent, as the process server, served either the Plaintiff or the Summons on the 1st Defendant or its advocates. Apart from that Affidavit of Service, there is no other such Affidavit appearing on the Court file. It appears obvious to this Court that the Summons and Plaintiff herein have not been served on either of the Defendants. It is apparent that what has been served on the 1st Defendant are the papers in connection with the Chamber Summons dated 3rd July 2009 and the advocates representing the 1st Defendant have filed Memorandum of Appearance in response to that Application. Indeed, the 1st Defendant filed a detailed Replying Affidavit to the said Chamber Summons on 22 July 2009. Further, from the record, the Amended Plaintiff was filed on 7 November 2011 seeking to enjoin the 2nd Defendant as a party to this suit. Such Amended Plaintiff would seem to have been served upon the 2nd Defendant because why would the firm of Kiautha Arithi & Co., Advocates enter a Memorandum of Appearance for the 2nd Defendant on the 22 December 2011?

4. By **Order 8 Rule 1 (1)**, a party may, without leave of the Court, amend his pleadings once at any time before the Pleadings are closed. **Order 2 Rule 13** details the close of pleadings as follows:-

“2. 13. The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or if neither is served fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with”.

Obviously, the Plaintiff filed its Amended Plaintiff herein on 7 November 2011 as it did not consider that the Pleadings had closed, otherwise he would have made an Application to file the same out of time.

5. Under **Order 7 Defence and Counterclaim, Rule 1** as to the filing of Defence is explicit:-

“7. (1) Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”.

Neither Defendant has filed a Defence herein either to the Plaintiff or to the Amended Plaintiff. That must be because they have not been served with the Summons to Appear. To my mind, service of Summons in a suit is an essential nay compulsory step in the whole process of litigation before courts of first instance. Clearly in this case, that step has not been undertaken through no fault of the Defendants. It is obligatory for the Plaintiff (but, in some cases, the Court) to arrange service of the Summons upon the Defendant(s). Without such service and the Defendants being given an opportunity to respond to the Plaintiff’s case, judgement in default simply cannot be entered.

6. The conclusion to what is detailed above is that this Court rejects the application of the Plaintiff to enter Judgement herein by default with costs to the Defendants. The Plaintiff is directed to regularize the position so far as this suit is concerned as quickly as possible otherwise it stands a very good chance of being dismissed.

DATED and DELIVERED at NAIROBI this 26th day of March 2012.

J. B. HAVELOCK

JUDGE