



CLEMENT OTIENO OKUMU.....PLAINTIFF

V E R S U S

1. BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT
2. PARESHKUMAR NANJIBHAI.....2ND DEFENDANT
3. BHUDIA ARJAN HARJI.....3RD DEFENDANT

RULING

Through a Notice of Motion dated 28th November 2011 the 2nd and 3rd Defendants have asked this Court to review and/or vary the orders made by Ojwang, J (as he then was) in a Ruling delivered on 15th November 2011.

The Court is told by the 2nd Defendant in his affidavit of 28th November 2011 that-

- “4. That the 2nd and 3rd Defendants filed their Defence on 18th November 2008 and served the same upon the Plaintiff’s Advocates on 19th November 2008. Annexed hereto and copy of the 2nd and 3rd Defendants marked as (“AO2”).***
- 5. That it is apparent from the face of the Ruling that the Honourable Judge failed to see copies of the 2nd and 3rd Defendants in the court file. (sic)***
- 6. That the Court having failed to see copies of the 2nd and 3rd Defendants Defence, proceeded on the premises that the 2nd and 3rd Defendant had not filed their Defences and made a finding that pleadings had not closed.”***

Order VI Rule 11 of the previous Edition of the Civil Procedure Rules provides for close of pleadings as follows-

“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.”

Reference is made to the previous version of the Civil Procedure Rules as the Judge was considering an application made under that previous regime.

The full purport and effect of these provisions was fully appreciated by the learned Judge as can be seen in the following passage of his decision-

“On the side of 2nd and 3rd Defendants, similarly, it is contended that full service of pleadings did take place; and therefore pleadings closed and, by Order VI, Rule II, the Plaintiff ought to have taken action to fix the main cause for hearing. Just as the Plaintiff contends, 2nd and 3rd Defendants have

not produced a return of service to validate their averment regarding closure of pleadings. After considering the submissions, and also discounting those essentially technical points that should not trump the Court's criterion of merits, as contemplated in Article 159(2) (d) of the Constitution of Kenya, 2010, I have come to the conclusion that, though the application is potentially meritorious, it can only be entertained after proper service of pleadings, and after it is certain that the pleading stage has closed.

The 2nd and 3rd Defendants had not demonstrated, to the satisfaction of the Judge, that they had served their Defence upon the Plaintiffs. So the time for reckoning the close of pleadings had not started to run. That was the plain and straightforward holding of the Judge. What is critical for purposes of Order VI Rule 11 is service of the reply or Defence to counterclaim or of service of Defence. The failure by the 2nd and 3rd Defendant to prove service of their Defence upon the Plaintiff dealt their application a fatal blow. It was not enough (***as they have also done here***) for the Defendants to simply show to the Court a copy of their Defence with the reverse allegedly stamped as received by the Plaintiffs firm. Service of process is proved by an affidavit of service. That is what Order XLVII Rule 2 read together with Order V Rule 15 of The Former Edition of The Civil Procedure Rules required.

I find no merit in the application and I would dismiss it with costs. Parties herein may now wish to turn their energies towards having this matter heard on merits.

Dated and delivered at Mombasa this 30th day of August, 2012.

**F. TUIYOTT
JUDGE**

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Dated and delivered in open court in the presence of:-

No appearance for the Plaintiff/Respondent

Mohammed for Abed for the Defendants/Applicants

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**