



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 192 of 2011

ABDALLA ALI BAJABER

..... PLAINTIFF

VERSUS

MANGALE DZOMBO NGOKA ..... 1<sup>ST</sup>  
DEFENDANT

KENGA GIBSON KAHINDI ..... 2<sup>ND</sup>  
DEFENDANT

RULING

(1) The Plaintiff filed a Complaint dated 30<sup>th</sup> June 2011 seeking principally an order for specific performance of an agreement for sale of the suit property Kadzonzo/Kawala Adjudication Section B Plot No. 18 entered between him and the Defendant on 17<sup>th</sup> December 2010 and consequential orders for injunction against the Defendants restraining dealings with the suit property and directing the Commissioner of Lands/Registrar of Lands not to allow any dealings adverse to the Plaintiff's title or ownership of the suit property. An interlocutory application for injunction pending hearing was filed alongside the Complaint on 6<sup>th</sup> July 2011, and interim orders were obtained, and extended by the court from time to time. This application for interim injunction is however not the subject of this ruling.

(2) By a Notice of Motion dated 22<sup>nd</sup> September 2011 under sections 1A and 1B of the Civil Procedure Act and Order 7 rules 5 and Order 51 rule 1 of the Civil Procedure Rules, the Plaintiff sought orders as follows:

1. ***“THAT the Defendant/Respondent Statement of Defence be declared irregular, unlawful, incompetent and or fatally defective.***
2. ***THAT the Defendant/Respondent's Statement of Defence be struck out for failing to comply with the mandatory provisions of the Civil Procedure Rules, 2010.***
3. ***THAT judgment be entered in favour of the Plaintiff/Applicant as prayed for in the Complaint.***
4. ***THAT the costs of this application be provided.***

(3) For the Defendants, the 2<sup>nd</sup> Defendant filed a replying affidavit sworn on 28<sup>th</sup> November 2011 in opposition to the Plaintiff's application. The parties' counsel thereafter made oral submissions on the application and ruling was reserved. The court regrets that owing to heavy load and competing official assignments, the court was not able to deliver its ruling earlier.

(4) There was no dispute that the Defendants had filed their defence on 25<sup>th</sup> August 2011 about 6 weeks after the filing of the Memorandum of Appearance on the 15<sup>th</sup> July 2011 and that the defence was not accompanied by the documents required under Order 7 rule 5 of the Civil Procedure Rules. The dispute related only to the effect of the default.

(5) Counsel for the Plaintiff, Mr. Taib, read into the Defendants' delay an attempt to derail the fair trial of the dispute submitting that:

***“The Defendants have not complied with mandatory provisions of Order 7 rule (1) and (5) of the Civil Procedure Rules. The defence [was filed] one month late. The procedures must be followed. The procedure is the handmaiden of justice. The Defendants seek to derail the expeditious disposal of the suit under sections 1A and 1B of the Civil Procedure Act. I rely on KCB v. KPCU Court of Appeal Civil Application NO. 85 of 2010 at p. 7 on the overriding objective of civil litigation. Advocates must lay a basis for the invocation of the principles. The overriding objective is not meant to cover intentional acts of subverting or delaying the trial of cases. The Defendants have failed to comply with Order 7 rule (1) and (5) of the Civil Procedure Rules. I pray for the striking out of the defence and orders [to be] granted as prayed.”***

(6) Counsel for the Defendant, Mr. Mtana, contended that there are triable issues and that the Defendant could still file the documents under Order 7 rule (5) of the Civil Procedure Rules before the Court's directions at the pretrial conference were given. Counsel submitted that:

***“Order 7 rule 5 (b) of the Civil Procedure Rules has a proviso that the statements under paragraph (c) may be provided at least 15 days prior to the trial conference. The Defendants have opportunity before the Trial Conference to file the statements and the list of witnesses. The new procedure rules are to assist the court in expediting hearing not to shut out litigants from participating in the trial. The Plaintiff has not filed its questionnaire and pretrial directions have not been given. Issues have not been settled. It would be draconian to strike out the [defence]. The subject matter is land which the Plaintiff seeks to restrain the Defendant from selling. There are serious triable issues which the court should investigate. The Defendants are within time to file the documents and the court then fixes the case for trial. The defence was not filed out of time. The court has the right under Order 11 of the Civil Procedure Rules to direct parties to file pleadings which are procedural in nature. The litigant should not be shut out from participating in the trial. The Defendant has annexed the documents it intends to file in readiness for the pre-trial conference. I pray that the application be dismissed.”***

(7) I have perused the defence on record. I find that the true dispute between the parties is the construction of their agreement with regard to the payment of the full purchase price for the suit property: whether upon correction by the Registrar of the Adjudication records to indicate the Plaintiff as the owner of the suit property, as contended by the Defendant, or upon the issuance of title deed, as contended by the Plaintiff. Both parties seek specific performance of the contract, only in different terms. I find that there is a triable issue as to the true construction of the terms of the contract for the sale of the suit property dated 17<sup>th</sup> December 2010. The issue for determination herein appears to be whether the failure to file the defence within time and to lodge accompanying documents is fatal to the Defendants' defence.

(8) Does the existence of a triable issue excuse late filing of the defence and the default in filing verifying affidavits, list of documents and witness statements as required by Order 7 rules (1) and (5) of the Civil Procedure Rules? It does not, in my view; all pleadings should disclose a triable issue, otherwise they would be open to striking out for want of reasonable cause of action or defence under Order 2 rule 15 of the Civil Procedure Rules. The existence of a triable issue is a factor to be considered in an application for striking out of pleadings for want of reasonable cause of action or defence. It does not of its own excuse the late filing or defects in compliance with the Rules. However, courts may find it easier to excuse defaults where there are triable issues for determination. I agree with the decision of Nyamu, JA in **K.C.B v. K.P.C.U., C.A.C.A. No. 85 of 2010** cited by the Plaintiff's counsel that an advocate [or a party] who seeks to rely on the overriding objective principle must in each case lay a basis for invoking the sections, taking into account the unique circumstances of each case.

(9) What are the circumstances in this case justifying the invocation of the overriding objective principle? The Defendants' counsel does not explain the delay in filing the defence by about 45 days between the date of the Memorandum of Appearance of 15<sup>th</sup> July 2011 and the 25<sup>th</sup> August 2011 when the defence was filed. In fact, the advocate denied that there was any delay. However, Order 7 rule (1) of the Civil Procedure Rules provides that:

***“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 14 days after he has entered appearance in the suit and serve it on the Plaintiff within 14 days from the date of filing the defence and file an affidavit of service.”***

The Defendants' counsel while submitting on the proviso as to the supply of statements of witnesses under sub-rule (c) of Rule 5 Order 7 at least 15 days before the pre-trial conference, did not explain the failure to lodge together with the Defence and Counter-claim of 25<sup>th</sup> August 2011, an affidavit, a list of witnesses and copies of documents as required under sub-rules (a), (b) and (d) of Rule 5, which are not covered by the proviso for late filing. There was total failure to observe the procedure rules and the default was not explained. There is also no attempt to seek leave of the court to regularize the situation. An application for extension of time to do any act under the Rules is required to be by Notice of Motion under Order 51 rule 1 of the Civil Procedure Rules. This has not been done and the averment of paragraph 8 of the 2<sup>nd</sup> Defendant's affidavit in reply bespeaking such application is incompetent, and it only relates to the list of documents and witness statements in any event:

***“8. That reply to 5 to 10, the Defendants are ready to comply with the Civil Procedure Rules, 2010 and have already made their statements, list of documents and hereby pray this Honourable court to grant leave to file the same so as both parties can be heard to prevent justice. Annexed hereto are copies of Defendants' statement, list of witnesses and list of documents, marked as “KGK 1.” (sic)***

(10) I find that the Defendants' counsel has conducted the Defendants' case since the filing of the Memorandum of Appearance on 15<sup>th</sup> July 2011 to the argument before the court without due regard to the rules of procedure which required him on behalf of the Defendants to file a verifying affidavit in support of the Counter-claim, a list of witnesses, the witness statements and copies of document to be relied on together with the Defence and Counter-claim which was required to be filed 14 days after the Memorandum of Appearance. In default of all this, counsel should have sought by formal application the leave of court to enlarge the time prescribed for the doing of the said acts. He did not do so. Counsel was on record as acting for the Defendants, the latter relied on his apparent skill in judicial practice to conduct their case in accordance with the process of the court. Having failed to do so, counsel must be taken, on the principle of mistake by counsel, to be solely responsible for the errors and defaults in the presentation of the Defendants' case. However, in accordance with accepted practice of the courts the mistake of counsel should not be visited upon innocent parties whom they represent. I have not seen or heard anything in the argument or in the pleadings and affidavits before the court to suggest that the Defendants were in any way responsible for the defaults of their counsel and I therefore excuse them from blame.

(11) I take the view that the defects in the Defendants' case may be overlooked in accordance with the Article 159 principle of substantial justice without undue regard to technicalities of procedure because:

(a) the various defaults in the presentation of the Defendants' defence and counter-claim were attributable to the Defendants' counsel's neglect in reading and applying the rules of court applicable to the situation;

(b) although the Plaintiff has taken out the pretrial questionnaire, the case has not been fixed for pre-trial directions and so no hearing date for the suit has been fixed and the position may be rectified before hearing of the suit.

(c) there is a triable issue for investigation by the trial court as to the construction of the agreement for sale with respect to the payment of the full purchase price to support each side's case for specific

performance.

(d) striking out of the defence would not lead to a final judgment as the matter, being principally for non-pecuniary claim for specific performance and injunction, would require, in the absence of the defence, to be set down for hearing in accordance with Order 10 rules 9 and 10 of the Civil Procedure Rules.

(12) Accordingly, for the reasons set out above, I make the following orders on the Plaintiff's application dated 30<sup>th</sup> June 2011:

(a) The Plaintiff's Notice of Motion dated 30<sup>th</sup> June 2011 is dismissed.

(b) The Defendants' counsel, M/s Mwahunga Mtana & Co. Advocates, will pay to the Plaintiff the costs of the Notice of Motion dated 30<sup>th</sup> June 2011 as it is their default that has led to the Plaintiff's application herein.

(c) In the interests of an expedited hearing of the matter, the parties may fix hearing date at the Registry on priority basis.

**Dated and delivered this 11<sup>th</sup> day of December 2012.**

**EDWARD M. MURIITHI**  
**JUDGE**

In the presence of:

No appearance for the Plaintiff'

Mr. Kithi for Mtana for the Defendants

Mr. Buoro - Court Clerk