



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 97 OF 2010

ERIC KYALO MUTUA T/A MUTUA & CO. ADVOCATES.....PLAINTIFF

VERSUS

STEPHEN KING'OO MBUTI.....DEFENDANT

RULING

Coram: Mwera J.

Ogola for Plaintiff

In person Defendant

Court clerk Njoroge

The suit herein was filed on 22.2.10 - a defamation claim. The summons to enter appearance, plus a copy of the plaint, was served on the defendant. An affidavit of service was not readily traced on the file but service must have been on/about 11.3.10 when the defendant filed a notice to enter appearance.

The file has a request dated 13.4.10 to enter judgement against the defendant for failure to file his defence. Such judgement was entered on 23.4.2010.

On 03/12/10 the defendant had seemingly come to know that a default judgement had been entered against him. So he filed a chamber summons for orders:

- i) that the judgement of 13.4.10 be reviewed and set aside; and
- ii) the defendant be given more time to file defence.

The reasons given were that after entering appearance the defendant could not trace the file in the registry so as to file his defence. He did so last on 26.10.10 – but judgement had been entered already. There is no

evidence on record that this application was served. There are no recorded proceedings about it. It thus remains pending. Then on 11.1.11 the plaintiff took 16.6.11 for formal proof.

Come that 16.6.11 and the defendant showed up. He had filed another summons on 14.4.11 seeking some payments from an account of a party called Malili Fund – not a party here. The application appeared irrelevant. So when told that the formal proof was likely to go on because he had not filed a defence, the defendant responded:

“Defendant: I did not know that I was to come and defend myself. I did enter appearance.”

The defendant is acting in person. So the court perused form CIVIL 1B – Summons to Enter Appearance. It tells the defendant that the plaintiff has instituted a suit against him as per the copy of plaint annexed to the form. Then states:

“You ARE HEREBY REQUIRED within 15 days from the date of service hereof to enter appearance in the said suit.”

The defendant is therein cautioned that if there is failure to enter appearance within the stated time, the plaintiff may proceed with the suit and judgement may be given in his absence. There is nothing advising/requiring the defendant to file a defence after entering appearance!

Appreciating the contents of CIVIL 1B, which do not warn a defendant, here one acting in person, that failure to file a defence will also mean the plaintiff proceeding with the suit and obtaining judgement, this court was left with the defendant’s submission before it (above), and his pending chamber summons of 03.12.10, that he expected to be called upon, by letter or whatever, to file his defence after he entered appearance. This should be taken as a reasonable expectation of a layman. After all he should not be expected to be acquainted with the process by which lawyers, well acquainted with Civil Procedure Rules, file defences as a matter of course and practice.

Accordingly this court, in its discretion and to do justice in this matter with no party being prejudiced, directs that formal proof will not proceed and the defendant has 14 days to file and serve his defence. Soon after, the parties to prepare suit for trial in accordance with Civil Procedure Rules 2010. Costs in the cause.

While on it, could it not be prudent to suggest that the Rules Committee (or the registrar) who designed CIVIL 1B for use, do revise it adding something to the effect that a party who enters an appearance should consider to follow it up with filing a defence in the stated time? That should be sufficient to put litigants, especially a defendant acting in person on notice that failure to file a defence will mean a judgment being entered against him/her.

Orders accordingly.

Delivered on 1.7.11

**J. W. MWERA
JUDGE**