REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL SUIT NO. 729 OF 2010

WHITE HORSE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

THUITA KIIRU WAINAINA.....1ST DEFENDANT
PAUL WAINAINA KIMANI.....2ND DEFENDANT

RULING

On 3rd November, 2010 the plaintiff filed this suit against the defendants seeking a liquidated sum of **Kshs.15,000,000/=** plus interest and costs. The defendants are partners in the firm of **Kiiru, Wainaina & Company Advocates**. The sum claimed is part of an amount that had been paid to the said firm as stakeholders in a sale transaction in respect of a parcel of land known as **L.R. No. 1870/V/6**. For some reason the sale could not proceed and the defendants were called upon to refund the said sum but they did not.

On 15th December, 2010 the 1st defendant filed a statement of defence and stated, *inter alia*, that:

(a) the partnership between him and the 2nd defendant was limited to sharing of the overheads of the firm.

(b) the sum of Kshs.15,000,000/= was paid to the 2nd defendant who deposited it in a bank account that he exclusively operated.

The 2nd defendant filed his statement of defence on 10th May, 2011 and in paragraphs 7, 8, 9 and 10 thereof stated that:

"7. That the 2nd defendant was handling this matter and therefore the 1st defendant's name should be expunged from these proceedings as he was not involved in handling this matter and was not aware of the same as the vendor was the client of the 2nd defendant.

8. The 2nd defendant paid out monies to various parties on instructions of the vendor and shall at the appropriate time join in the vendor and the various beneficiaries as third parties in this suit for the court to be able to determine who is liable to refund the money herein.

9. The plaintiff was aware that the deposit had been utilized in full and that is why it went ahead to give more money in this matter contrary to the express provisions of the sale agreement.
10. The 2nd defendant confirms that he is not holding any money as stakeholder and the plaintiff and all parties concerned in this matter and in the sale transaction are aware."

On 29th September, 2011 the plaintiff filed an application under **Order 36 Rules 1 & 2** of the **Civil Procedure Rules, 2010** for orders:

"1. THAT, judgment be entered in favour of the plaintiff as prayed for in the plaint dated 13th October, 2010.

2. THAT, the costs of the application be awarded to the plaintiff."

The plaintiff stated that the defendants are truly and justly indebted to her and do not have any defence to the suit.

The 1st defendant filed a replying affidavit and reiterated the contents of his defence. He further stated that the aforesaid transaction was entirely handled by the 2nd defendant and as such it is only him who could substantially respond to the issues raised by the plaintiff. He contended that the statement of defence raises triable issues.

The 1st defendant did not file any replying affidavit and his application seeking an adjournment to enable him file one was not granted.

Mr. Issa for the plaintiff made brief submissions in support of his client's application. He stated that no partnership deed had been exhibited by the 1st defendant to demonstrate that the defendants were only sharing overheads of the firm as alleged. In his view, the defendants are jointly and severally liable to repay the entire sum of Kshs.15,000,000/= together with interest.

Mr. Njenga for the 1st applicant submitted that his client's statement of defence raises triable issues. Counsel further submitted that under **Order 36 Rules 1 & 2** of the **Civil Procedure Rules, 2010** it is clear that summary judgment can only be sought where the defendant has appeared but not filed any defence. In this matter, counsel contended, the defendants had long filed their respective statements of defence before the application for summary judgment was filed. In his view therefore, the plaintiff's application is bad in law and ought to be struck out with costs.

Mrs. Kinyanjui for the 2nd defendant supported the submissions made by Mr. Njenga in respect of the provisions of **Order 36 Rules 1 & 2**. She further submitted that the statement of defence filed by the 2nd defendant raises triable issues.

In reply, Mr. Issa submitted that under **Order 36 rules 1 and 2** of the **Civil Procedure Rules, 2010,** a plaintiff may apply for summary judgment even after a defence has been filed. In his view, it is not expressly stated that after the defendant has filed a statement of defence summary judgment cannot be sought. He referred to **Order 36 rule 5** which provides that if it appears to the court that the defence set up in the affidavit by the defendant applies only to a part of the plaintiff's claim or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted. He urged the court to find that the defence raised herein discloses no triable issues.

I think this application turns on the correct interpretation of **Order 36 rules 1 and 2.** The said rules provide as hereunder:

"1 (1) In all suits where a plaintiff seeks judgment for –

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

(c) 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,

<u>where the defendant has appeared but not filed a defence</u>
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."

The new **Order 36** was formerly **Order 35.** Under the old rules rule 1 thereof provided that:

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

for

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

(b) …….

<u>where the defendant has appeared the plaintiff may apply for judgment</u> for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."

Under both the old and the new rules the defendant may show either by affidavit or by oral evidence or otherwise that he should have leave to defend the suit. There is however a distinction between the provisions of **rule 4** in that under the new rules it is only after a defendant has been granted leave to defend the suit that he can file his defence within fourteen days of the grant of the leave unless the court otherwise orders. Under the repealed rules, **rule 4** was to the effect that:

"If a defendant who has not already filed his defence is granted leave to defend he shall file his defence within fourteen days of the grant of the leave unless the court otherwise orders."

That in essence means that under the repealed rules the defendant may have filed his defence even at the time when the court is considering the application for summary judgment.

Under the **Civil Procedure Rules, 2010, Order 36 rule 1** makes it explicitly clear that summary judgment can only be sought where the defendant has entered appearance but has not filed a defence. Where a defendant has filed a statement of defence and the plaintiff verily believes that the defence discloses no triable issues the option open to the plaintiff is to apply for striking out of the defence. A plaintiff may only apply for summary judgment where he believes that the defendant cannot possibly defend the suit and once the application is made the onus is on the defendant to demonstrate to the court by affidavit or by oral evidence or otherwise that he should be allowed to defend the suit. The court will then consider the contents of that affidavit or the oral evidence and if it agrees with the defendant it will direct the defendant to file his defence within fourteen days of the grant of the leave or

within such other time as the court may order.

As rightly pointed out in **Odunga's Digest on Civil Case Law and Procedure**, Supplement No. 1 at page 7:

"It would be an absurdity to give a defendant who has already filed a defence leave to defend. In those circumstances the appropriate remedy is to apply for the striking out of the defence. If it were otherwise, then what would be the position of the defence already filed on the entry of summary judgment? Would it not follow that the court would have to strike out the defence as well thus invoking the two jurisdictions in the same application?"

In this matter, the application for summary judgment was filed on 29th September, 2011 when the Civil Procedure Rules, 2010 were already in operation. As at the date of filing the application for summary judgment the defendants had already filed their statements of defence. It follows therefore that the plaintiff had lost the opportunity to apply for summary judgment.

I need not comment on the merits or otherwise of the statements of defence, that will have to be done at the appropriate time but for now I am satisfied that the plaintiff's application offends mandatory provisions of **Order 36 rule 1**. The application is struck out but the costs thereof shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:
Muriithi – Court Clerk
Mr. Issa for the Plaintiff
Mr. Njenga for the Defendants