



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 200 of 2007**

**BETHWEL MUTAI.....PLAINTIFF**

**VERSUS**

**CHINA ROAD & BRIDGE CORPORATION.....DEFENDANT**

**RULING**

Before me is an application to strike out the defendant's written statement of defence and for an order that interlocutory judgment be entered against the defendant in the sum of Kshs. 668,383.00. The application is expressed to be brought under the provisions of Order VI Rule 13 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all enabling provisions of the Law.

The reasons for the application are as follows:-

- (i) That the defendant has not entered appearance as ordered by the court.
- (ii) That the Written Statement of Defence filed on 16<sup>th</sup> October 2008 was filed outside the prescribed time.
- (iii) That the said defence is therefore invalid and amounts to an abuse of the process of the court.

The application is supported by an affidavit sworn by the plaintiff. The affidavit is an elaboration of the above grounds. The application is opposed and there are Grounds of Opposition filed by counsel for the defendant. The defendant contends that the application is bad in Law, frivolous and an abuse of the process of the court. The defendant further contends that its written statement of defence raises several triable issues which should go to full trial.

The application was canvassed before me on 12<sup>th</sup> March 2009 by Dr. Khaminwa, Learned counsel for the plaintiff and Mr. Were, Learned counsel for the defendant. Counsel reiterated the positions taken by their respective clients in their affidavit and Grounds of Opposition respectively.

I have considered the application, the affidavit in support thereof, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of this matter. As can be seen from the grounds of the application, there are two reasons for the application. The first reason is that the defendant has failed to enter appearance as ordered by the court. The second reason is that the written

statement of defence having been filed outside the prescribed time, is invalid and amounts to an abuse of the process of the court.

There is no dispute that the defendant has not entered appearance at all. It is common ground that on 29<sup>th</sup> September 2008, on the defendant's application, I set aside a default judgment which had been entered against it and ordered that the defendant enters appearance and files its defence within 15 days of the said order. In the event, only a defence was delivered on 16<sup>th</sup> October 2008. The defendant has therefore clearly not complied with the order of 29<sup>th</sup> September 2008.

Pursuant to that order, the defendant had upto 14<sup>th</sup> October 2008, to deliver its defence. When the defendant filed its defence on 16<sup>th</sup> September 2008, it was two days too late. The defendant has not attempted to explain that delay. It has also not sought leave to enlarge the appointed period. In the Grounds of Opposition filed by the defendant's advocates, the defendant has chosen to challenge the plaintiff's application on the primary grounds that the application is bad in Law, frivolous and an abuse of the process of the court. The application according to the defendant, is bad in Law because the provisions of the Law cited are non-existent and the appropriate rules applicable have not been invoked. The short answer to the defendant's objection is found in Order L Rule 12 of the Civil Procedure Rules. I cannot therefore refuse the plaintiff's application merely because the provisions under which the application has been made have not been stated. In any event the plaintiff has cited Order VI Rule 13 which deals with striking out pleadings. He has also invoked the inherent jurisdiction of the court and expressly cited all enabling provisions of the Law. In my view, the failure to cite the particular relevant sub-rule and the citing of a non-existent rule is not fatal to the plaintiff's application. The plaintiff is guilty merely of a procedural lapse which can be ignored.

Having rejected the defendant's technical objection, the defendant did not have an answer to the plaintiff's argument that the defence was filed outside the time prescribed in the order of 29<sup>th</sup> September 2008. In the result as leave to enlarge time has not been sought, the said written statement of defence is improperly filed and is struck out.

Having struck out the defence the defendant cannot invoke the provisions of Order IX Rule 2 (4) of the Civil Procedure Rules which read as follows:-

**“2 (4) Where a defence contains the information required by Rule 3, it shall where necessary be treated as an appearance.”**

Rule 3 of Order IX makes provision for the defendant's address for service. In the premises, the defence cannot be treated as an appearance.

The plaintiff had also prayed for interlocutory judgment against the defendant for the sum of Kshs. 668,383/=. I am afraid that order is not available to the plaintiff in this application. As I have struck out the defendant's written statement of defence, the plaintiff is at liberty to move the court for judgment and for assessment of damages appropriately.

In the result an order shall issue striking out the defendant's written statement of defence. The plaintiff shall have the costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF APRIL 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Dr. Khaminwa for the plaintiff and Mr. Were for the defendant.

**F. AZANGALALA**

**JUDGE**

**22<sup>ND</sup> APRIL 2009**