



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 377 of 2003**

**KINYANJUI NG,ANG,A & TWO OTHERS.....PLAINTIFF**

**VERSUS**

**WALLACE GATHUA KANGETHER &TWO OTHERS.....DEFENDANT**

**RULING NO 2.**

A perusal of the record reveals that this court became seized of this file for the first time on 11/06/2008. On this day, this court was informed that the 3<sup>rd</sup> defendant had entered appearance on 12/06/2003 but had never filed a defence. Where as the 4<sup>th</sup> did not enter appearance or file defence. The court was informed that there is a judgement in default of defence entered against the 3<sup>rd</sup> defendant on 15/7/2003, and against the 4<sup>th</sup> defendant on 17/7/2006. The court, was also informed that the matter was coming on this day, for the hearing of the formal proof, as against the defaultees and main hearing as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants who had entered appearance and filed defences.

After due representations were made by parties present, and on board, it was decided to put off the matter from hearing on that date, firstly, because counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants then appearing had just come on record, and needed time to peruse the file and then prepare for trial. There were other issues to be attended to by the counsels, and for this reason, the parties recorded a consent summed up for purposes of the record as:-

- *“The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants were granted leave to file amended defenses to the further amended plaint, within 30 days from that date, and then do discovery. The 3<sup>rd</sup> defendant was given leave to put in an application to set aside the interlocutory judgement against him. The plaintiff was awarded costs of 8,200.00 to be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants.”*

It is following that consent, that the 3<sup>rd</sup> defendant presented his application dated 22<sup>nd</sup> August 2008 and filed on 25<sup>th</sup> August 2008 seeking among others the setting aside of the interlocutory judgement herein.

On 22/9/2008, parties agreed to file written skeleton arguments, which were duly filed, and on 26/11/2008 both parties agreed to stand by the highlights in the submissions. There after the court, embarked on the writing of the ruling on its merits, but in the process, discovered the said application had been misdescribed in that, it did not indicate in its heading which party was applying and which ones were responding. By reason of this mis description, this court, struck out the application dated 22/8/2008, and filed on 25/8/2008 with leave to the applicant to file a properly described application, adopt their earlier submissions, on the same, and then have the court, rule on the same on its merit. The ruling that struck out the said application was given on 18/12/2008.

On 29/4/2009, parties appeared once more before this court, purported to amend the application which had infact, been struck out, and then the court, purported to reserve the same for ruling. It is in the process of perusing the file in the cause of the preparation of the ruling, that the court, discovered that infact the application reserved for ruling is the one which had been struck out on 18//12/2008. The applicant had not complied with the order of 18/12/2008 for filing a fresh application with properly described heading of the parties indicating clearly which of the parties was applying and which of the

parties was responding to the application.

It therefore follows that as explained herein, when the matter came up on 29/04/200 for hearing, this court, in advertently did not peruse the record or its earlier ruling to confirm what had transpired on the record, earlier on and the directions given in its ruling of 18/12/2008 on the way forward in this matter. The failure to so check and confirm is what led to the mistaken belief that the application filed on 25/8/2008 had not in fact been dealt with. The same mistake led to the court, allowing both parties to purport to amend the heading of the said application not knowing that the application had in fact been struck out by the orders of this very court made on 18/12/2008. Had this fact not been in advertently overlooked, the amendment would not have been effected, and the same application would not have been reserved for ruling.

By reason of what has been stated above, the said amendment, and reservation of the said application for ruling were in fact in vain as explained, because, as long as the orders of 18/12/2008 stand, that application stands struck out. That being the case, a struck out application is incapable of being amended and reserved for ruling. The entire exercise was an exercise in futility.

The orders of this court, on amendment and reservation are accordingly ordered vacated by this court's exercise of its inherent jurisdiction donated to it by section 3A of the CPA, which power can be invoked by a litigant or by the court, on its own motion. This court, has invoked the same on its own motion. Parties are advised to comply with the directions given in the ruling of 18/12/2008. Since both parties were at fault, there will be no order as to costs.

**Dated, Read and delivered at Nairobi this 22<sup>nd</sup> day of May 2009.**

**NAMBUYE**

**JUDGE**