



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 191 of 2007

JOHN MIRITI KIRAITHE.....PLAINTIFF

VS.

KABUBURA KIBURURU MUCHIRI...DEFENDANT

RULING

This matter was heard by Kubo, J who however, retired before delivering the ruling. Subsequently, the file was referred to his Lordship the Chief Justice who then directed that the same be placed before me for appropriate directions. Having noted that the only issue remaining was the writing of the ruling, I considered it appropriate to proceed under Order XVII rule 10 of the Civil Procedure Rules which enables me to write and deliver this ruling.

The plaintiff herein by a chamber summons dated 20th September, 2007 and filed on 21st September, 2007, moved the court for an order that the defence dated 21st August, 2007 and filed on 23rd August, 2007 by the defendant be struck out and judgment be entered for the plaintiff as prayed for in the plaint.

The reasons advanced for such an order are that the defendant was duly served with summons to enter appearance and filed a memorandum of appearance on 7th August 2007. The defendant thereafter filed a defence on 23rd August, 2007 but the same was not served upon the advocate for the plaintiff until 7th September, 2007.

It is the plaintiff's case that the said defence was not served within seven (7) days after filing the same as required under the rules. It is also the plaintiff's case that the defence is frivolous and vexatious and will delay the fair trial of the action to the prejudice of the plaintiff. It is also alleged in the grounds set out that the defence is an abuse of the court process.

The application is brought under order VIII rule 1(2) and Order VIA rule 13 (1) (b), (c), and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules.

It is true that where the defendant has been served with summons to enter appearance, he shall, unless some other or further order is made by the court, file his defence within fifteen (15) days after he has entered an appearance and serve the plaintiff within seven days from the date of filing the defence. This is as provided for under Order VIII rule 1(2). The plaintiff's application is premised on Order VIA rule 13 aforesaid.

There has been an objection that has been raised by the defendant that that order does not exist in aid of the orders sought by the plaintiff. Despite that observation by the defendant, the plaintiff's counsel did not seek to clarify or amend the chamber summons upon which the orders are sought.

I have looked at Order VIA and noted that the same has only eight (8) rules. It is true therefore that, Order VIA rule 13 does not exist. This qualifies the application to be struck out summarily. But I wish to observe that the correct order should have been Order VI rule 13 of the Civil Procedure Rules.

Even if the said application were to be said to be under the correct order and rule, I do not think that the order sought by the plaintiff would have been granted. I say so because, whereas it is true that the defence was filed way out of the seven days after the same was filed, the plaintiff has not alleged any prejudice that has been occasioned thereby. In addition, section 3A of the Civil Procedure Act confers upon this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is within my inherent powers therefore, to order,

which I hereby do, that the defence though served out of time is properly before the court.

I have also looked at the record before me and noted that the parties herein appeared before Angawa J on 12th July, 2007 where they recorded a consent order that an injunction be granted preventing the plaintiff from dealing in and or disposing of the suit premises until the hearing and determination of this suit.

Clearly therefore, the parties intended by their own consent that, this suit should go for full trial. If I were to grant the orders sought by the plaintiff, I will be in effect driving the defendant out of the seat of judgment summarily without a hearing. I have looked at the defence filed and related the same to the plaint on record and with profound respect find that, there are serious triable issues that must go for full trial.

It cannot be said therefore that, the defence is frivolous or vexatious. Neither can it be said that it is an abuse of the process of the court. In the end I must find, as I hereby do, that the application is misconceived and must be dismissed with costs to the defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 12th day of **October, 2009.**

A. MBOGHOLI MSAGHA

JUDGE