



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Civil Suit 136 of 2008**

**JOSEPH KIPCHUMBE KIRUI )  
JOSEPH CHERUIYOT BOIT ) ..... PLAINTIFFS/APPLICANTS**

**VERSUS**

**PARMET OLE KISEET ..... DEFENDANT/RESPONDENT**

**RULING**

The plaintiffs' application dated 28<sup>th</sup> November, 2008 seeks to strike out the defendant's Memorandum of Appearance and Statement of Defence dated 11<sup>th</sup> and 20<sup>th</sup> November, 2008 respectively. Consequent to grant of that prayer, the court has been urged to enter judgment as prayed in the plaint.

The application was brought under **Order VI rule 13 (I) (b) (c) and (d)** of the **Civil Procedure Rules**.

The application was made on the grounds that:

- **Although the defendant filed a memorandum of appearance on 13<sup>th</sup> November, 2008 and a statement of Defence on 20<sup>th</sup> November, 2008, the same were not served upon the plaintiffs' advocate within 7 days from the date of filing as required under Order VIII Rule 1 (2) and Order IX Rule 2 (3) of the Civil Procedure Rules.**
- **The defence is a sham and is calculated to embarrass, prejudice and/or delay the expeditious disposal of the matter.**
- **The defence is an abuse of the court process.**

What is the plaintiff's claim against the defendant and what defence has been advanced to that claim?

The plaintiffs entered into a sale agreement with the defendant vide which the defendant agreed to sell 6.08 hectares of his parcel of land known as **L.R. NO. TRANSMARA/KIMINTETE 'D'/440**, hereinafter referred to as "**the suit land.**" The sale agreement was executed on 13<sup>th</sup> August 2007 and the purchase price was Kshs. 630,000/=. The defendant was paid a total of Kshs. 530,000/= and according to the sale agreement, the balance of Kshs. 100,000/= was to be paid immediately after the defendant transferred the suit land to the plaintiffs.

The defendant however failed to perform his part of the agreement by declining to accompany the plaintiffs to the area Land Control Board with a view to obtain the requisite consent. He also failed to execute the transfer documents.

Clause 7 of the agreement provided as follows:

**“7. Any party in default shall be liable to the other as follows:**

- (a) pay twice the consideration price.**
- (b) Pay for general damages.**
- (c) Pay interest for (a) and (b) at prevailing current market rate.**
- (d) Any other relief as deemed just and fit to grant.”**

On 18<sup>th</sup> January, 2008 the plaintiffs’ advocates wrote to the defendant and pointed out that he was in breach of the sale agreement and demanded that he fulfils his part of the bargain, failing which they would file suit against him and invoke the provisions of **clause 7** aforesaid. That notwithstanding, the defendant did not act as required.

The defendants now pray for a declaration that the contract between themselves and the defendant has been repudiated due to breach on the part of the defendant.

They also pray that the defendant pays them a sum of Kshs. 1, 260,000/= being the default amount specified in clause 7 of the sale agreement together with interest at 35% or the prevailing market rate from the date of contract to date plus costs of the suit.

The defendant stated in his statement of defence that he had not breached the sale agreement but it was the plaintiffs who were in breach. He did not state how the plaintiffs had breached the sale agreement.

The defendant did not file any replying affidavit to refute the factual statements made by the plaintiffs’ counsel in his affidavit in support of the application. There is therefore no denial that the Memorandum of Appearance and the statement of defence were not served within the required period of time.

The defendant’s counsel filed a strange document which he entitled:

**“GROUND OF POSITIONS”** (SIC)

He stated thereunder as follows:

- “1. The applicants’ application as filed is flivorom vexation, (sic) bad in law and only meant to embarrass and delay this matter.**
- 2. The order sought cannot be granted under the provisions the law under which the said application is brought. (sic)**
- 3. The Memorandum of Appearance and defense (sic) were duly filed and the delay to service (sic) was not innodinate (sic) and serve was**

**largely contributed by the applicants counsel.**

**4. It is proper and for the interest of justice that the application herein be dismissed.”**

Let me start with the statement of defence. The plaintiffs filed a very detailed plaint which set out particulars of breach of the sale agreement and particulars of fraud on the part of the defendant. The defendant merely denied those allegations and alleged that it is the plaintiffs who had breached the sale agreement but did not elaborate as to how they had breached the same.

**Order VI rule 8** of the **Civil Procedure Rules** requires every pleading to contain the necessary particulars of any claim or defence pleaded. Particulars of the alleged breach of contract or willful default on the part of the plaintiff should have been expressly stated so that the court can consider the same and determine who between the parties was in breach of the contract of sale. The statement of defence is vague and evasive. I agree it is a sham and calculated to delay expeditious disposal of the suit. Such a statement of defence ought to be struck out.

Secondly, the statement of defence was served more than seven days from the date of filing, contrary to **Order VIII rule 1 (2)** of the **Civil Procedure Rules**. That is not denied. No effort was made to file an application for extension of time.

There is no prescribed penalty for default in serving a defence within seven days of filing the same. In my view, the court, in considering an application to strike out a defence solely because of late service, has discretion to act one way or the other. However, discretion has to be exercised judicially. It is not enough for counsel to just state that the delay was not inordinate without first explaining what caused that delay, even if it was for one day. Secondly, I would have been sympathetic with the defendant if the statement of defence was a serious one, not a sham and vague defence as the one on record.

In **WILFRED ODHIAMBO MUSINGO –VS- HABO AGENCIES LTD.**, Civil Suit No. 2047 of 2000 at Milimani Commercial Courts (unreported) Ringera, J. (as he then was), held that where a document is required to be served within a prescribed period and is not so served and the court has not made any order extending such period of service, such a document ought to be struck out.

In **ABDUL AZIZ NGOMA –VS- MUNGAI MATHAYO & ANOTHER** [1977] KLR 16, the East African Court of Appeal struck out an appeal as being incompetent on the ground that the Memorandum and record of appeal were not served on the respondents within seven days of filing as required by its Rules.

I am persuaded that the statement of defence herein is for striking out which I hereby do.

Having struck out the statement of defence, I enter judgment for the plaintiffs against the defendant in terms of prayers (a) and (b) of the plaint. As regards the rate of interest at 35% sought in prayer (c), the same is unconscionable. It

cannot be the prevailing market rate. The plaintiffs did not tell the court what the prevailing market rate is. A court cannot go out of its way to start enquiring from banks what the prevailing market rates are. Where a party is seeking a rate of interest that is higher than the usual court rates, he should not only justify the same but should also provide sufficient evidence, for example, by way of quotations from various banks as would inform the court what the prevailing market rates are. The plaintiffs did not do so. The defendant will therefore pay interest on the sum of Kshs. 1,260,000/= at court rates from the date of filing this suit until full payment of the same. The plaintiffs will also have costs of the suit.

**DATED, SIGNED AND DELIVERED AT KISII THIS 10<sup>TH</sup> DAY OF DECEMBER, 2009.**

**D. MUSINGA  
JUDGE.**

**10/12/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Otieno for the Applicant

Mr. Bwondika for the Respondent

**Court:** Ruling delivered in open court on 10<sup>th</sup> December, 2009.

**D. MUSINGA  
JUDGE.**