



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**Civil Suit 47 of 2007**

**CHENGO KWICHA .....PLAINTIFF**

**VERSUS**

**SIDI KACHUKWA.....DEFENDANTS**

**R U L I N G**

This is a chamber summons application dated 8-8-07 made under Order VI Rule 13(1)d and Order VIII Rule 1 (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application seeks that the defendant's statement of defence herein be struck out and judgment be entered for the plaintiff as prayed in the plaint.

The application is premised on grounds that the defendant has failed to effect service of the statement of defence upon the plaintiff/applicant. An affidavit in support of the application is sworn by Roland Oyieko, in which that the suit was filed on 26<sup>th</sup> June 2007 and summons to enter appearance were issued on 28-6-07 and served on 5-7-07.

On 12-7-07 the defendant entered appearance through the firm of J. K. Mwarandu & Co. Advocates – defence was then filed on 16<sup>th</sup> July 2007 but both the memorandum of appearance and defence have not been served on the plaintiff's advocates on record. It is applicant's contention that since the filing of defence, more than three weeks have lapsed and this is beyond the mandatory seven (7) days within which the defence would have been served.

In response, the respondent filed a replying affidavit in which she states that the application is brought in bad faith as the plaintiff is aware that the defence raised will not only successfully resist the plaintiff's claim, but it will also have the plaintiff's suit struck off for being Res judicata as pleaded in paragraph 8 of the defence.

Respondent states that the delay of three weeks is not inordinate as plaintiff is now aware that defendant has entered appearance and filed defence.

Respondent explains that her advocates inadvertently forgot to serve the applicant's within the prescribed time and that this was not intentional or intended to delay the hearing of the suit.

It is argued that the defence raises triable issues and has a counterclaim and does not fall within any of the grounds set out under Order VI Rule 13(1) (a) to (d) of the Civil Procedure Rules.

At the hearing of the application, Mr. Michira who appeared for the applicant submitted that no attempts have been made at service and that it is not enough to say that the delay is not inordinate because counsel

does not have the leeway to delay and it does not validate the situation. Mr. Michira sought to rely on the decision in **HCC 296 of 2004 Joseph Kanake V Caltex Oil (K) Ltd** where the question of service of defence was clearly dealt with.

Order VI Rule 13(1) provides that at any stage of the proceedings, the court may order to be struck out or amended, any pleadings on the grounds that:-

- (a) It discloses no reasonable cause of action or defence.
- (b) It is otherwise an abuse of the court process and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the cause may be.

Order VIII rule 2 provides that

***“where a defendant has been served with a summons to appear, he shall, unless some other or further order be made by the court, file his defence within 15 days after he has entered an appearance in the suit and serve it on the plaintiff within 7 (seven) days from the date of filing defence.”***

Obviously it is this provision requiring service on the plaintiff which has not been complied with, and which gives rise to the current application.

Mr. Shujaa who appears on behalf of the respondent submitted that the omission to serve the defence within the prescribed period does not cause injustice to the plaintiff and that since plaintiff is now aware of the existence of the defence statement he will get an opportunity to reply if served. It is Mr. Shujaa’s contention that the defence which is already on record cannot be ignored by this court.

Since it raises services issues and that in any event the application only seeks to strike out the defence and not the counterclaim, so what happens to the counterclaim? He argues that striking out defence will not be doing justice to both parties and that the court has jurisdiction to admit the defence on record, especially where there is already a pending application for enlargement of time.

I have considered the cited case of **Joseph Kanake** – it is not lost to this court that there is a valid defence filed on record – the only omission is that it hasn’t been served on the plaintiff. The reason why the plaintiff must be served is so as to enable him to prepare his case during the hearing, and to know what to expect in the course of the hearing unlike the Kanake case, here the respondent has actually filed an application citing enlargement of time.

Rules of procedure are provided so as to make the whole court process smooth and practical affair for all the parties involved – they should not be used as a gag especially where a party has demonstrated steps taken to correct the procedural omission.

Indeed the court of appeal recognized that in the decision in **Kenya Railways Corporation V National Cereals and Produce Board Civil Appeal 62 of 1998** that:

***“a party who has appeared but is in default of pleadings should not be debarred from defending if he can indicate the existence of a defence which is not patently frivolous and which he wishes to put forward. Further, the doors of justice must not be closed to an innocent litigant because counsel made a blunder or committed an excusable mistake or innocent omission.”***

My finding is that the situation obtaining in the present scenario fits in with what the Court of Appeal observed and which reasoning I adopt. The plaintiff/applicant will not suffer any prejudice in being served the statement of defence late.

I have looked at the statement of defence and counterclaim and my opinion is that it will be unfair to condemn the defendant unheard. I therefore decline to grant the orders seeking for striking out of the statement of defence. However, the defendant must take steps to regularize the position within the next

14 (fourteen) days hereof. The respondent will bear the costs of this application.

Delivered and dated this 23 day of feb 2008 at Malindi.

**H. A. Omondi**

**JUDGE**