



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 20 of 2004

CAROL WAIRIMU PLAINTIFF

VERSUS

SAMUEL NDUNG’U THUKU..... DEFENDANT

RULING

By chamber summons dated 13.12.06 brought under rule 20 of the Matrimonial Causes Rules made under the Matrimonial Causes Act, Cap.152, the defendant applied for the following orders:-

1. That leave be granted to M/s D.P. Kinyanjui & Co. Advocates to come on record on behalf of the defendant/applicant.
2. That the defendant’s memorandum of appearance be deemed as duly filed and served.
3. That costs of this application be provided for.

The grounds upon which the application is based are:-

- i. On 16.06.05 the Hon. Lady Justice Aluoch gave directions for the above cited suit to proceed as undefended.
- ii. The defendant filed memorandum of appearance and defence on 05.05.06 and 10.05.06, respectively, which was 11 months after directions had been given.
- iii. The defendant wants an opportunity to defend the claim by the plaintiff.
- iv. The defendant/applicant has a good, solid and meritorious defence against the plaintiff’s claims.
- v. Accordingly, it is only just and fair that the defendant/applicant should be heard on its said defence.
- vi. The application will not occasion any prejudice to the plaintiff/respondent for the reason that the same would proceed to hearing on its substantive merits.

The application is supported by the defendant’s affidavit sworn on 13.12.06.

At the initial hearing of the application on 12.07.07, the defendant/applicant was represented by learned counsel, Mrs G.W. Kinyanjui while the plaintiff/respondent was represented by learned counsel, Mr D.G.K. Mwaura.

Defendant's/applicant's counsel told the court that the suit was filed on 21.10.04 but that the defendant/applicant became aware of it on 10.05.06 when getting up for Nairobi Children's Magistrate's Court Civil Case No.417 of 2004 involving the same parties. It was the defendant's/applicant's case that he had Wachira Waithaka & Co. Advocates acting for him in this case and the children's court case; that he supplied the pleadings he had been served with in both cases to the said advocates and assumed the advocates had taken necessary action but that those advocates did not do so. The current defendant's/applicant's advocates said they then perused the file in the present case and discovered that directions had been taken in this case on 16.06.05 in absence of defendant so they filed memorandum of appearance on 10.05.06. Since rule 20 of the Matrimonial Causes Rules provides that no pleading shall be filed out of time without leave after a step in default has been taken, the defendant filed the present application requesting this court to exercise its inherent jurisdiction and grant the defendant leave to come on record on behalf of the defendant and for the defendant's memorandum of appearance filed on 10.05.06 to be deemed as duly filed.

Defendant's/applicant's counsel said the defence raises triable issues, that defence can be filed at any time before judgment and that the court should allow the present application.

On the other hand, plaintiff's/respondent's counsel pointed out that there is an affidavit of service by Harrison Makau sworn on 18.03.05 to the effect that he served copies of the summons, plaint and verifying affidavit in this case upon the defendant personally on 18.01.05 after the defendant was introduced to him by Mrs Christine the receptionist at the defendant's SAM – TECH COMPUTER SERVICES business on 7th floor of Posta Sacco Plaza. Plaintiff's/respondent's counsel pointed out that it was on the basis of the evidence of such service that on 16.06.05 the High Court (Aluoch, J – as she then was) agreed for this matter to proceed as an undefended cause.

Regarding defendant's/applicant's contention that the pleadings in this case were served together with pleadings in Children's Case No. 417 of 2004, plaintiff's/respondent's counsel submitted that that is not so. He pointed out that the children's case was filed on 04.10.04 while the present suit was filed on 21.10.04, i.e. 18 days later, and essentially that service of documents relating to the two suits took place on different dates and that there was no excuse for the alleged mix-up of the two sets of documents.

Plaintiff's/respondent's counsel basically accused the defendant/applicant of unreasonable delay in taking action towards defending the plaintiff's suit and urged that his chamber summons dated 13.12.06 be dismissed.

I have given due consideration to the rival submissions of the parties.

The court record establishes that the suit herein was filed on 21.10.04. Harrison Makau, process server filed an affidavit of service on 16.06.05 to the effect that he served the papers for this suit on the defendant on 18.01.05. He did not know the defendant personally but the receptionist, Mrs Christine at the defendant's place of business introduced the defendant to him. The defendant has accepted being so served but added that the said suit papers were served together with papers for the children's case. He blames his then advocates, Wachira Waithaka & Co. Advocates to whom he handed over the suit papers for not taking necessary action in this case. The present application was filed on 13.12.06, i.e. over 2 years after the suit was filed.

The defendant's/applicant's new advocates' memorandum of appearance is dated 04.05.06. The court stamp supposed to show date of filing of the memorandum of appearance is hardly legible but filing appears to have been done on 05.05.06, i.e. about 20 months after the suit was filed. The draft defence is dated 10.05.06 and appears to have been filed the same day. The present application was, however, not filed until 13.12.06, i.e. about 7 months later. No cogent explanation has been given for the 7 – month delay between the filing of memorandum of appearance plus draft defence in May, 2006 and the filing of

the application in December, 2006.

Rule 20 of the Matrimonial Causes Rules is in the following mandatory terms:

‘20. No pleading shall be filed out of time without leave after a step in default has been taken.’

The step in default in this case is the fact that the plaintiff appeared before Aluoch, J (as she then was) on 16.06.05 for directions following non-response by the defendant to the suit. The plaintiff asked that the matter proceeds by way of *viva voce* evidence and the Judge directed that hearing dates be taken at the Registry. Hearing was initially fixed for 16.02.06. It would have proceeded as an undefended cause that day but it could not proceed on the basis that the plaintiff had an emergency and was unable to attend court that day. At the rescheduled hearing on 14.12.06 the plaintiff was represented by learned counsel, Mr D.G.K. Mwaura while Mrs G.W. Kinyanjui appeared for the defendant to prosecute present application.

The defendant contends that the application will not occasion any prejudice to the plaintiff for the reason that the application would proceed to hearing on its substantive merits.

According to the plaintiff’s replying affidavit sworn on 09.03.06, the children’s case was filed on 04.10.04 and served on the defendant on 08.10.04. The emerging scenario in this case is that the plaintiff has deponed that the suit papers for this case were served upon the defendant on 18.01.05 while the suit papers for the children’s case were served upon the defendant on 08.10.04. The defendant has, however, deponed that both sets of suit papers were served on him together. I note from Harrison Makau’s affidavit of service sworn on 18.03.05 that the service he says he effected upon the defendant on 18.01.05 relates only to papers for the present suit. In view of this, I accept the plaintiff’s affidavit evidence that service of the sets of papers for the two suits took place on different dates. In the premise, I find the defendant to have brought the chamber summons application dated 13.12.06 with soiled hands. That disentitles the defendant from the exercise of the court’s discretion in his favour and I decline to grant his application.

The upshot is that the chamber summons dated 13.12.06 is hereby dismissed.

Orders accordingly.

Delivered at Nairobi this 4th day of March, 2008.

B.P. KUBO

JUDGE