



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 719 of 2003

PETER KAMAU IKIGUPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA1ST DEFENDANT

PETERSON OGINO ONGARO.....2ND DEFENDANT

RULING

The plaintiff filed a notice of motion under **Section 3** and **Section 3A** of the **Civil Procedure Act** seeking an order of the court to strike out the defence dated 7th November, 2007 which was filed by 2nd defendant. The plaintiff further sought judgment be entered against the 2nd defendant. The grounds in support of the application are stated on the face of the application. The plaintiff contends that the 2nd defendant filed the said defence in utter breach of the court order issued by Warsame, J. on 30th October 2007. It was further the plaintiff's contention that the said defence was filed beyond the ten (10) day period which the court had granted the 2nd defendant. The plaintiff further contends that the 2nd defendant failed to pay thrown away costs of Kshs.15,000/= which were ordered paid by the court. The application is supported by the annexed affidavit of Peter Kamau Ikigu, the plaintiff.

The advocate for the 2nd defendant, Simon Ndege swore an affidavit on behalf of the 2nd defendant in response to the plaintiff's application. In the said affidavit, the deponent concedes that the 2nd defendant filed the defence outside the period that the court had extended. He conceded that the costs ordered paid were paid four (4) months after the said order of the court. He however explained that the 2nd defendant had cogent reasons for failure to abide by the orders of the court as regard the time which the 2nd defendant was required to have complied with the said order of the court. He deponed that there had been mis-communication between the 2nd defendant and his counsel. He deponed that the 2nd defendant was a resident of the United Kingdom and during the material period, the 2nd defendant had relocated from his last known address. The deponent was not therefore able to communicate with his client. He deponed that the 2nd defendant later communicated with him by phone on 11th February 2008 and gave him instructions which enabled the deponent to give effect to the order of the court. He deponed that the non-compliance with the order of the court was not deliberate and was caused by breakdown in communication between the 2nd defendant and the advocate. He urged the court to extend time to enable the 2nd defendant comply with the order of the court issued on 30th October 2007.

At the hearing of the application, I heard the rival submissions made Mr. Khalwale, counsel for the plaintiff and Mr. Onkoba, counsel for the 2nd defendant. The two counsels basically reiterated the contents of the application and the affidavits filed in support of their respective clients' cases. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the

prayers sought in the application. Certain facts are not in dispute in this application. It was not disputed that the 2nd defendant failed to comply with the order issued by Warsame, J. on 30th October 2007. The 2nd defendant was required to file a defence and pay thrown-away costs of Kshs.15,000/= to the plaintiff within ten (10) days from the date of issuance of the said order. Although the 2nd defendant purported to have filed the statement of defence in court, it was clear from the court record that no such defence was formally filed.

The statement of defence was stamped by the court registry indicating the amount which was required to be paid before the said defence could be filed. The 2nd defendant was required to pay a sum of Kshs.75/= being the requisite filing fees. No such fee was paid. The 2nd defendant purported to file the said statement of defence without paying any filing fees. The said statement of defence does not have a stamp as proof that it had been received by the court. It is trite that for any pleading to be deemed to have been properly filed, court fees must be paid. I therefore agree with the plaintiff that the 2nd defendant failed to comply with the order of the court issued on 30th October 2007 that required him to file a defence within ten (10) days of issuance of the said order.

The 2nd defendant was allowed to file his defence out of time after he had successfully argued his application to set aside the ex parte judgment which had previously been entered against him. The 2nd defendant became aware that the plaintiff would challenge his failure to comply with the order of the court when he was served with present application. The 2nd defendant made no effort to remedy the situation by filing an appropriate application to extend time by which to comply with the said order of the court. During the hearing of the application, the 2nd defendant made a feeble plea to the court to extend time by which he could comply with the order of the court. In the absence of an application for extension of time, this court cannot be of any help to the 2nd defendant. Although the 2nd defendant made effort to pay the thrown-away costs ordered by the court, his failure to file a defence within the period extended by the court sealed his fate.

The upshot of the above reasons is that the plaintiff's application having merit is hereby allowed. The statement of defence dated 7th November, 2007 which was irregularly placed in the court file by the 2nd defendant is hereby struck out with costs to the plaintiff. The plaintiff shall be at liberty to take any action that he deems appropriate in the circumstances.

DATED at Nairobi this 7th day of **May, 2008**.

L. KIMARU

JUDGE

Ruling delivered in the presence of Mr. Igala for Khalwale for the applicant and Mr. Onkoruba for the respondent in open court on behalf of Hon. Justice Kimaru.

M. A. WARSAME

JUDGE

7/05/08