



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 486 of 2006

JASON WELLINGTON OLUGA.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL1ST DEFENDANT

NATIONAL BANK OF KENYA.....2ND DEFENDANT

RULING

The plaintiff filed this suit against the defendant seeking judgment for:-

- (i) Special damages
- (ii) General damages
- (iii) Exemplary and punitive damages
- (iv) Costs
- (v) Interest on (i), (ii), (iii) and (iv)
- (vi) Any other or further relief that this Honourable Court deems fit and just to grant

The first defendant was served with summons to enter appearance and file defence on 18th August 2006 but did not enter appearance nor filed a defence within the statutory period.

On 6th September 2006 the plaintiff filed this application by way of Chamber Summons under Order IXA Rule 7 of the Civil Procedure Rules seeking the following orders:-

1. That this honourable court do grant leave for judgment to be entered against the first defendant.
2. That costs be provided for.

The application is based on the ground that the first defendant has not entered appearance nor filed defence on 30th August 2006. Then on 31st August 2006 a defence was filed. This Chamber Summons for leave that judgment be entered against the first defendant on the ground that the first defendant had failed to enter appearance nor file a defence on 6th September 2006. The first defendant did not file any

papers in opposition to this Chamber Summons. This application came up for hearing on 20th February 2007. It should be pointed out that when this application came up for hearing the 1st defendant had already entered appearance and filed a defence.

Mr. Orenge the learned counsel for the applicant urged the court to grant orders as prayed in his Chamber Summons dated 6th September 2006. He further submitted that since the 1st defendant had been served with this application and had not complied with the provisions of Order L Rule 16 of the Civil Procedure Rules he cannot be heard. Order L Rule 16 provides:

“16 (1)” Any Respondent who wishes to oppose any motion or any other application shall file and serve on the applicant a Replying Affidavit or a Statement of Grounds of Opposition, if any, not less than three clear days before the date of hearing.”

Mrs. Natone the learned state counsel for the 1st defendant sought leave to address the court on a point of law and leave was granted. She submitted that since at the time appearance was entered and defence filed no final nor interlocutory judgment had been entered, the 1st defendant was within the law when he entered appearance and filed a defence and the same are properly on record.

She referred the court to Order IX Rule 1 of the Civil Procedure Rules which provides:

“IX (1)” A defendant may appear at any time before final judgment and may file a defence at any time before interlocutory judgment is so entered, at any time before final judgment.”

I agree with the learned state counsel that is the law. The court cannot ignore the defence already filed. In **THE CENTRAL BANK OF KENYA VS. UHURU HIGHWAY DEVELOPMENT LTD** and others – civil appeal no. 75 of 1998 (UR) the court quoting the case of **GIBBINGS VS. STRONG (1884) CH D 66** with approval said:

“On a motion for judgment for want of defence if defence has been put in though irregularly, the court will not disregard it, but will see whether it sets up Grounds of Defence which if proved will be material and if so, will deal with the case in such manner that justice can be done.”

And in **GUPTA VS. CONTINENTAL BUILDERS LTD [1978] KLR 83** at page 87 Madan JA (as he then was said:

“The appellant has appealed to this court against this ruling. The first thing to say is that this was an application for Summary Judgment. If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter Summary Judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected peremptorily.”

In this case when this application for leave for judgment to be entered against the first defendant on the ground that the defendant had not filed a defence, there was already a defence on the file.

I have perused the defence filed herein by the first defendant and I am satisfied that it raises triable issues.

In view of the foregoing reasons, the prayers sought in the plaintiff’s Chamber Summons dated 6th September 2006 are dismissed.

Costs be in the suit.

Dated at Nairobi this 23rd day of March, 2007.

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J.L.A. OSIEMO

JUDGE