



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1407 of 2005

1. Land and Environmental Law Division
2. Civil Practice and Procedure
- a) Interlocutory Judgment entered against a counter-claim
3. Subject of main suit: Land LR209/10172/5

LR 209/10172/8

- a) Plaintiff builds two blocks of flats and occupation of the flats made without the consent of the City Council
- b) Enforcement orders issued
- c) Plaintiff files suit. Defendant files defence and counter claim.
- d) Defendant prays for Interlocutory Judgment duly granted by Deputy Registrar 8 March 2006.
- e) Several suit filed and pending between parties related to his case

Hccc1312/05

Hccc1407/05

Hccc891/05

Hccc1005/05

4. Application 20 March 2006

- a) Application to set aside

Interlocutory Judgment

I: Reasons

- i) The court had ordered status quo be maintained between parties.

ii) Plaintiff in the process of consolidating the various files,

defendant took advantage and entered Interlocutory Judgment through the deputy registrar. Order 48 Civil Procedure Rules.

II: Reply

i) There is no justifiable reason for failure to enter defence to the counter-claim

5. Held:

i) The Kenyan courts have no jurisdiction to enter Interlocutory Judgment in default of filing defence to counter claim.

iii) Interlocutory Judgment be and is hereby set aside.

6. Case law

a) Kariuki & Gatheca Resources Ltd v Gichanga Chui and Another Hccc735/06

b) Kahura Bus service & Praful Patel (1979) KLR 213

7. Advocates

R.M. Njiru for Njiru Mbogo & Co. Advocates for the plaintiff /applicant- present

W.A.Otieno holding brief for E.M. Omotii & Co. Advocates for the defendant/respondent - present

DEVLAN CO. LTD.PLAINTIFF

VERSUS

NARIOBI CITY COUNCILDEFENDANT

RULING

1: Background to the application of 20 March 2006 Seeking the setting aside of an Interlocutory

Judgment in default of a defence to a counter Claim being filed.

1. The applicant herein is the plaintiff in this matter. There are several suit related to this case being Hccc1312/05, Hccc1409/05, Hccc891/05 and Hccc1005/05.

2. The issue between the applicant/plaintiffs (Devlan Co. Ltd) and the defendants (the City Council of Nairobi) is the issue of a building occupation certificate. The defendants allege that the plaintiffs failed to obtain occupation certificate and thus issued an enforcement order. The plaintiff protested and filed suit.

3. Whilst parties were ordered to maintain status quo through interim temporary injunction orders (Njagi J 24 November 2005, Ojwang J, 8 December 2005, Mugo J – 20 January 2006), the plaintiff persued consolidation of related suits . During this time, the defendants are said to have taken advantage and applied for and did obtain Interlocutory Judgment against the plaintiff on the counter-claim.

4. The plaintiff filed an application of 20 March 2006 seeking orders to have the said Interlocutory Judgments orders set aside.

II: Application 20 March 2006

5. The application of 20 March 2006 seeking the setting aside of the Interlocutory Judgment entered by the Deputy Registrar of the High Court of Kenya

nisterial Powers given under order 48 Civil Procedure Rules was due to the reference application by the defendant.

6. In reply the defendant/respondent that the plaintiff/applicant had no good reasons for not filing their defence on a counter claims. They therefore caused the orders to be correctly cited.

III: Finding

7. The explanation given by the plaintiff applicant for not entering a defence to the counter claim is that parties were still perusing the issue of consolidation of the matters.

8. The law nonetheless does not permit Interlocutory Judgment to be entered or a counter-claim. Though there are conflicting decision on this point I did state in the case of Kariuki & Gathecha Resources Ltd v Gichanga Chui & Another

Hccc735/005 (unreported)

That the Kenya courts have no jurisdiction to enter Interlocutory Judgment in default of filing defence to a counter claim.

I relied on the case law of Kahura Bus Services v Praful Patel (1979) KLR 213 Harris J that Kenya law does not "specifically plead that if a party fails to file defence to a counter claim they are placed in the same position as a defence party who had no defence filed."

9. I hereby allow this application and set aside the Interlocutory Judgment on grounds that the Kenyan Law does not permit Interlocutory Judgment to be entered on a counter-claim in default of filing defence to the counter claim.

10. I award costs to the plaintiff applicant who is the defendant the counter claim.

Dated this 30th day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

R.M. Njiru for Njiru Mbogo & Co. Advocates for the plaintiff /applicant- present

W.A. Otieno holding brief fore.M. Omotii & Co. Advocates for the defendant/respondent - present