



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 10 of 2007

BAKARI ALI OGADA & 245 OTHERS.....PLAINTIFF

VERSUS

REKHA CHANDIDAS.....1ST DEFENDANT

GAUTAM CHANDIDDAS.....2ND DEFENDANT

RULING

Before me is an application by the plaintiffs seeking primarily that the defences filed by the defendant be struck out and judgment be entered against the defendant as sought in the Amended plaint. The application which is supported by an affidavit sworn by Peter O. Ngoge the plaintiffs' advocate is premised on the main grounds that the Civil Procedure Act and Rules do not allow the filing of two defences in one matter; that the first statement of defence was not served within seven days contrary to the provisions of Order VIII Rule 1 (2) of the Civil Procedure Rules; that the two defences are an abuse of the process of the court; that the defences are scandalous, frivolous or vexatious and may embarrass or delay the fair trial of this action; and that it is difficult to know when pleadings closed.

The application is opposed and there are two replying affidavits sworn by Nazima Malik the defendant's advocate and another by one Antoinette Absaloms the defendants General Counsel. In the affidavits, it is deponed that there are not two defences filed herein in respect of the same plaint as the same were filed in response to the original plaint and the amended one respectively.

The application was canvassed before me on 19.9.07 by Mr. Ngoge Learned counsel for the plaintiffs and Ms Wetende Learned counsel for the defendant. The gist of the argument made by counsel for the plaintiffs is that when summons to enter appearance was served upon the defendant, its advocates served an unsigned defence which in counsel's view is not valid. Consequently, the defendant did not comply with the provisions of Order VIII Rule 1 (2) with regard to service of its defence. Reliance was placed upon the case of **Regina Karenya Mutuku & 3 others – vs – United Insurance Company Limited HCCC No.1994 of 2000 (UR)**. In that case, Ringera J, as he then was, held that an unsigned pleading has no validity in law. Mr. Ngoge also placed reliance on the case of **Wilfred Odhiambo Musingo – vs – Itabo Agencies Ltd: HCCC No.2047 of 2000 (UR)** for the proposition that a defence which is not served within the prescribed time is liable to be struck out. Mr. Ngoge further argued that the 2nd defence filed by the defendant should have been described as an amended defence and defendant's failure to so describe the defence meant that there were now two defences in the same matter which amounts to abuse

of the process of the court. For that proposition reliance was placed upon the case of **Giro Commercial Bank Ltd – vs Sam Nyamweya: HCCC No.1391 of 2000 (UR)**.

Responding to the submissions made by Counsel for the plaintiffs, Ms Wetende, Learned counsel for the defendant, argued that although the filed defence to the original plaint was signed, the served copy was not so signed through inadvertence. In counsel's view, the defence on the court file was validly on record. In any event, so counsel further contended, the plaintiff served an amended plaint to which the defendant responded by filing a defence to the amended plaint which defence was in reality a reply. It was therefore not true, according to counsel, that there were two defences and that any prejudice or confusion had been occasioned. Reliance was placed upon several cases including: **Vipin Magulal Shah – vs – Investment and Mortgages & Another: CA No.325 of 2000 (UR)** in which it was held that the pleading that matters is the pleading on the file. Counsel relied upon **MF1 Office Solutions – vs – A. Marjan & Another Mombasa HCCC No.365 of 2001 (UR)** in which it was held that unsigned and served pleading had not caused prejudice and that the defect was curable and **Tononoka Stants Ltd – vs – The Eastern & Southern African Trade and Development Bank** C.A. No.295 of 1998 (UR) where it was observed that a mistake remains a mistake.

Having considered the rival submissions of counsel, and further having carefully considered the application, the affidavits filed both for and in opposition thereto and the authorities cited, I take the following view of the matter. I agree with counsel for the plaintiffs that unsigned pleadings are not valid in Law. As observed by Ringera J in **Mutuku & Others – vs – United Insurance Company Limited** (Supra), **“it is the signature of the appropriate person on a pleading which authenticates the same.”**

In the matter at hand however, the filed defence to the original plaint was signed. It was therefore authenticated and its validity is beyond question. The copy, served upon the plaintiffs' advocates was not signed. It was however served within the prescribed time. So what prejudice was occasioned to the plaintiffs? They filed a reply although they said the same was under protest and then amended their plaint. I do not detect any prejudice having been occasioned to the plaintiffs at all. I believe counsel for the defendant that the failure to sign the served copy of the defence was inadvertent and excusable. This case is distinguishable from those relied upon by the plaintiffs as in none of them were the pleadings on record valid. For instance in **Regina Kavenya Mutuku & others – vs – United Insurance Co. Ltd** (Supra) the defence filed was unsigned.

The plaintiffs have attacked the defendant's defence to amend plaint on the alternative basis that, it is really not an amended pleading under Order VI A Rule 1 of the Civil Procedure Rules as no amendment in fact occurred. On its part the defendant contends that the same should be treated as a reply. Under Order VIA Rule 1 (2), where an amended plaint is served on a defendant if he has already filed a defence, he may amend his defence and Rule 6 reads as follows:-

“Where a party has pleaded to a pleading which is subsequently amended and served on him under Subrule (1) then if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading”

I have perused what the defendant calls **“defence to amended plaint”** dated 7.3.2007. The only addition to the original defence are the words **“TO AMENDED PLAINT”**. There is otherwise no amendment to the original defence at all. It is the same document. I suspect the defendant introduced it in an apparent attempt to cure the defect in the served unsigned defence. It is superfluous and is struck out.

As already found, there is a valid defence on record. The same was not challenged on the basis of want of triable issues. I cannot in the premises enter judgment for the plaintiffs as sought in the application.

In the result, the plaintiffs' application is declined with no order as to costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Wetende Ms for the defendant.

F. AZANGALALA

JUDGE

18/10/07