REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 78 of 2005

RONGAI WORKSHOP AND TRANSPORTERS LTD……...……PLAINTIFF

VERSUS

FREDRICK WANJALA…….....……..…….1ST DEFENDANT

MODERN COAST BUILDERS AND CONSTRUCTION LTD….....2ND DEFENDANT

RULING

The plaintiff herein has filed an application under the provisions of **Order VIII Rules 1(2) and 20, Order VI rule 13(c) & (d) and 16 of the Civil Procedure Rules** seeking to have the statement of defence filed by the defendants herein struck out and judgment entered for the plaintiff against the defendants as prayed in the plaint. The application is based on the grounds that the plaintiff alleges that the Memorandum of Appearance and Defence for both defendants was filed in court on the 11th and 27th of May 2005 respectively but were not served upon the plaintiff's advocates within seven days as required by **Order VIII Rule 1(2) of the Civil Procedure Rules**. They further state that the said defence was served more than one month after the same was filed and therefore in the plaintiff's opinion, the said defence would prejudice, embarrass and delay the fair trial of this case. The plaintiff further states that the said defence is scandalous frivolous and vexatious and filed in abuse of the due process of the court. The application is supported by the annexed affidavit of Mrs V. J. Evans. The application is opposed. James Gitau Singh swore a replying affidavit. In the said affidavit, he admits that the memorandum of appearance and defence was served late but urges this court to interpret the law purposefully so as not to delay the expeditious determination of the suit herein on its merits. He urged this court to dismiss the application with costs.

At the hearing of the application, Mr Ombati Learned Counsel for the plaintiff submitted that, although the defence was filed in time, the same was served out of time. He argued that the defendants had made no effort to seek extension of time from court to enable them serve the said defence out of time. He urged this court to allow the application. He referred this court to two decisions of the High Court namely ***Wilfred Musingo –vs- Habo Agencies Limited Nairobi HCCC No. 2047 OF 2000 (Milimani) (unreported)*** and ***Muus Kenya Limited –vs- Jane Mweu Nairobi HCCC No. 499 OF 2001 (Milimani) (unreported).***

Mr Musangi, Learned Counsel for the defendants admitted that the memorandum of appearance and the defence were served out of time but stated that such delay should not attract the sanction to have the suit struck out as prayed by the plaintiff. He submitted that the said defence raises triable issues and further that this court had a discretion to admit the said defence to enable the issues in dispute to be determined on merit. He submitted that the reasoning in the ***Habo Case*** was faulty. In his view, in the circumstances of this case the plaintiff would be adequately compensated by an award of costs. He urged this court to dismiss the application.

I have read the pleadings filed by the parties to this application. I have also considered the submissions made before me by the counsel for the plaintiff and the defendants respectively. The issue for determination by this court is whether the fact that the defendants served the defence out of time should attract this court's sanction to have the said defence struck out as prayed by the plaintiff. The decision of

this court will hinge on the interpretation of **Order VIII rule 1(2) of the Civil Procedure Rules**. This rule was inserted by Legal Notice No. 36 of 2000 and which states as follows:

*"**Where a defendant has been served with summons to enter appearance he shall, unless some other or further order be made by the court, file his defence within fifteen days after he has entered an appearance in the suit and served it on the plaintiff within seven days from the date of the defence**."*

The wording of this subrule is clear. The defendant is required to file a defence within fifteen days after appearance has been entered and further serve the same upon the plaintiff within seven days of the said defence being filed. The said subrule although coached in mandatory terms, does not state what sanction such a defendant would face in the event that he fails to serve the defence within the said seven days.

The sanction that the defendant would face if he does not enter appearance within the requisite period are provided for by the rules. The plaintiff would be at liberty to seek entry of ex-parte judgment in default of appearance or where defence is not filed, judgment in default of a defence being filed. In my view the fact that the said sanction was not provided by the rules meant that the court hearing the matter had a discretion either to admit the defence or to strike it out. In my opinion the said rule was meant to hasten the process of litigation by mandating parties to do certain acts within a certain period of time so as not to delay the just determination of the case. The rule was not meant to be an impediment to the administration of justice.

Another test to be applied by the court is whether the said delay in serving the defence had prejudiced the plaintiff. In this case it is admitted that the said defence was filed out of time. The question that this court asks itself is this: What prejudice has the plaintiff suffered by the non-observance of **Order VIII Rule 1(2) of the Civil Procedure Rules**? By their own admission, the defendants admit that the said defence was served within a month after the same was filed. I have perused the said defence and I have noted that it raises triable issues which ideally should be ventilated on merit. If I were to strike out the defence filed, what would the defendants do? They would obviously make an application to extend time to be allowed to file the said defence out of time. Such application would unnecessarily clog up this court's time and whose ultimate result in the circumstances of this case would be predictable. I hold that the plaintiff has suffered no prejudice at all by the delay in serving it with the defence. In fact by filing this application, the plaintiff has delayed the just and expeditious determination of its case. In the circumstances therefore I would not be prepared to exercise my discretion in favour of the plaintiff.

The two decisions referred to me that of ***Habo Industries*** and ***Muus Kenya Limited*** are decisions of the High Court and therefore are persuasive to this court. I have carefully read the said decisions and, with due respect with the Learned Judge who made them, I disagree with its reasoning. If this court were strictly to apply the reasoning of the learned judge in cases involving delay of service of defences, then this court would be reduced to being a mechanical applicant of the law in the absence of the exercise of discretion. This court would be abdicating its judicial responsibility if it would interpret provisions of the law with a view of striking out suits on technicalities rather than making decision sustaining them. Common sense should be applied in interpreting provisions that do not go to the root of addressing the matters in dispute.

In the circumstances of this case therefore I will disallow the application. I dismiss the same. However since it is the defendants' delay which moved the plaintiff to make the application, I will grant them costs of this application. In my view that would be adequate compensation for the plaintiff. The suit herein should be heard and determined on merits.

DATED at NAKURU this 24th day of February 2006.

L. KIMARU

JUDGE