



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 335 of 2005**

INSPECTOR GENERAL (CORPORATIONS).....  
.....PLAINTIFF

VERSUS

MAURICE MAKHANU.....  
.....DEFENDANT

**R U L I N G**

The Plaintiff seeks in this application (by chamber summons dated 16<sup>th</sup> December, 2005) two main orders: one, that the Defendant's statement of defence dated 20<sup>th</sup> and filed on 23<sup>rd</sup> September, 2005 be struck out, and two, that judgment be entered for the Plaintiff against the Defendant in the sum of KShs.1,076,250/00 plus interest at court rates and costs. The application is brought under Order 6, rule 13 (1) (d) and also under Order 8, rule 1 (2) of the Civil Procedure Rules. Sections 3 and 3A of the Civil Procedure Act are also quoted. The grounds for the application as set out on the face thereof are as follows:-

"1. -----

2. *That the statement of defence filed by the Defendant/Respondent is incurably defective and fatal ab initio.*

3. *That under Order VIII Rule 2 of the Civil Procedure Rules, a defendant who has been served with summons to enter appearance must file his/her defence within fifteen (15) days of entering such appearance and serve the same on the plaintiff or his advocates within seven (7) days of filing the defence.*

4. *That the Defendant's statement of defence has never been served on the Plaintiff or his advocate as required.*

5. *That failure to serve the documents amounts to an abuse of the court process."*

There is an affidavit sworn by the Plaintiff in support of the application.

The Defendant has opposed the application upon the grounds set out in the replying affidavit sworn by his counsel, DOMINIC ONINDO. These grounds amount to the plea that failure to serve the statement of defence as required by the rules was a lapse on the part of the Defendant's lawyers which should not be visited upon the Defendant; that as the defence has now been served upon the Plaintiff, no prejudice or injustice has been occasioned to him; and that the defence raises triable issues, and the Defendant should be given leave to defend the suit.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing. There are two issues here:-

**(1) *Whether the Defendant's statement of defence dated 20<sup>th</sup> and filed on 23<sup>rd</sup> September, 2005 is an abuse of the process of court and therefore liable to be struck out and judgment entered for the Plaintiff as prayed.***

**(2) Whether the statement of defence raises any triable issues.**

It is the Plaintiff's case that the Defendant failed to serve his defence upon the Plaintiff within seven (7) days from the date of filing the same as required by rule 1 (2) of Order 8 of the Civil Procedure Rules, and that therefore this renders the defence an abuse of the process of the court. The Plaintiff however concedes that the defence was duly filed. The Defendant readily concedes that indeed he failed to serve the defence within seven (7) days of filing as required by the rules. In my view failure to serve the defence as required the rule quoted above is a mere procedural lapse that cannot vitiate a statement of defence that is otherwise properly on record. To hold otherwise would be to occasion the Defendant injustice that cannot have been intended by rule 1 (2) of Order 8. The Plaintiff has since been served with the defence. Any inconvenience that he may have suffered by the late service of the defence can easily be made good by an award of costs. I must therefore reject the submission that the defence is an abuse of the process of the court for not having been served in time.

It is also the Plaintiff's case that the defence is a mere denial and raises no triable issue. I note that rule 13 (1) (a) of Order 6 has not been invoked. Under that rule the court may order to be struck out or amended a statement of defence on the ground that it discloses no reasonable defence. I also note that it is not pleaded in the grounds of the application on the face thereof that the defence is a mere denial that raises no triable issues. This ground is only mentioned in passing in paragraph 11 of the supporting affidavit. In paragraph 5 of the statement of defence the Defendant has denied that he was ever issued by the Plaintiff with the certificate of surcharge that forms the basis of the Plaintiff's claim. He has also denied in paragraph 6 of the defence that he was made aware of any decision to surcharge him in the sum claimed or at all. No documents have been exhibited in the supporting affidavit showing that the Defendant was duly served with the certificate of surcharge pleaded in paragraph 5 of the plaint. Evidence of such service must thus await production at trial. Therefore, at least one triable issue is disclosed by the defence, to wit, whether or not the Plaintiff duly served the Defendant with the certificate of surcharge forming the basis of his claim.

In the circumstances I must refuse the application by chamber summons dated 16<sup>th</sup> December, 2005. It is hereby dismissed. The Plaintiff is entitled to costs on the first issue of the application as indicated elsewhere above, while the Defendant is entitled to costs on the second issue which has been decided entirely in his favor. The proper order for costs therefore will be that each party bears his own costs of the application. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JUNE, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 9<sup>TH</sup> DAY OF JUNE, 2006.**