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

Civil Appeal 296 of 2004

JOSEPH KANAKE…………………………………………………………………………………………. APPELLANT

VERSUS

CALTEX OIL KENYA LIMITED…...……………………………………………………………………. RESPONDENT

JU D G M E N T

The Amended Memorandum of Appeal herein, dated 2/11/04, challenges the Ruling of the lower court in SRM, in Civil Case No. 1217 of 2003, delivered on 16/4/04 on the following grounds:

aa) The Learned trial Magistrate erred in law in holding that the court had no discretion in the matter and the only remedy is to strike out the defence.

a) The subordinate court misdirected itself in law by not considering exhaustively that the appellant had amended its defence before the close of pleadings and had attempted to serve the same when the Respondent refused.

b) The Learned Magistrate erred in law as it was not demonstrated how the non-service had greatly embarrassed the Respondent in prosecuting the Plaintiff's case.

c) The Learned Magistrate erred in law and fact by arriving at a wrong decision as the appellant will be condemned unheard on a mistake of counsel.

d) The Learned trial Magistrate erred in law in entering judgment against the appellant when there was a valid defence on record.

Wherefore the appellant prays for: this appeal to be allowed; the Ruling of the Lower court delivered on 16/4/04 be set aside and appellant be at liberty to defend the suit on the merits.

The Ruling from which this appeal arose was from a Chamber Summons, under Order 8 Rule 1(2) and Order 6 rule 13(1)(c), of the Civil Procedure Rules, dated 9/4/04, which application sought striking out the defence filed on 23/2/04 but which had not been served on the Plaintiff/Respondent's Counsel. The application also sought to have judgment entered in favour of the Respondent, as prayed in the plaint. The basic ground for the above prayer was that failure to comply with the mandatory rules renders the defence a nullity and the same should be struck out and or expunged from the court records.

Order 8 rule 1 (2) of the Civil Procedure Rules provides:

"*where a Defenant has been served with a summons to appear, he shall, unless some other or further order be made by the court, file his defence within 15 days after he has entered an appearance in the suit and serve it on the Plaintiff within 7 days from the date of filing the defence.*"

Order 6 rule 13 (1) (c) of the Civil Procedure Rules, provides as under:

"*At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that………it may prejudice, embarrass or delay the fair trial of the action.*"

The appellant herein, entered appearance on 5/2/04, and filed his defence on 23/2/04.

Accordingly, in terms of Order 8 rule 1 (2), he should have served the Respondent with his statement of defence at the very latest by 1/3/04. That did not happen, and by the 9/3/04, when the application seeking to strike out the defence as filed, the defence had not been served upon the Respondent; nor was there any application to enlarge the time within which the defence might have been served, as provided by Order 49 Rule 5 of the Civil Procedure Rules. Indeed, even as of the date when the Ruling appealed against was delivered, the Respondent had not been served with the statement of defence, even thought the defence had been filed in the court.

Under the above circumstances there did not seem to exist any basis for the Learned Magistrate not to grant the orders prayed for in Respondent's application for failure to comply with the mandatory provisions of Order 8 rule 1 (2) of the Civil Procedure Rules.

I have carefully considered the submission by counsel for the appellant that the provisions above do not expressly state that failure to serve the defence shall lead to its being struck out. I have great difficulty with that line of approach.

The whole purpose, and intention of the provisions of that rule must be grasped. It is not enough that the defence has been filed in the court. The Plaintiff must be served to enable him prepare his case during the hearing, and to know what to expect and ride over in the cause of the hearing of his claim. On this basis, it is trite to observe that a defence in the court file, but not served upon the Plaintiff, is absolutely worthless. It is that mischief that the Rules Committee sought to deal with when it introduced the present sub-rule (2) of Rule 1 of Order 8, in the year 2000, vide Legal Notice No. 36 of 2000. Prior to that amendment, there was no provision to serve the Plaintiff with the statement of defence, at all. Filing of the defence was all that the original sub-rule (2) required.

The sub-rule is expressed in mandatory terms – **shall** – and I understand the Learned Magistrate's position that the courts hands are tied and there is no discretion or way of circumventing those provisions.

Accordingly, I would find no basis upon which to interfere with the Lower Court's ruling, and striking out of the defence for non-compliance with a mandatory legal provision. I would, save for what I say later in this Judgment dismiss that ground of appeal as lacking both in substance and merit. **However**, the Learned Counsel for the appellant correctly contended that since the defence was in the court file, the court should have at least allowed the appellant to put in an application for enlargement of time.

I have already found and held that there was no such an application, by the appellant, for enlargement of time, upto the time the lower court delivered its Ruling, herein appealed against. May I also add that it is trite law that courts have no power to grant reliefs not prayed for in the pleadings before the court. The submission lacks legal authority and I reject the same.

However, Learned Counsel for the appellant sought to rely, and cited the decision by the Court of Appeal in **THE KENYA RAILWS CORPORATION VS. NATIONAL CEREALS & PRODUCE BOARD,** Civil Appeal No. 62 of 1998, where the court, quoting with approval, the decision in the English Case of **ROGERS V. WOODS [1948] 1 ALL ER 38** said, in part, at P.3 "**a party who has appeared but is in default of pleadings should not be debarred from defending if he can indicate the existence of a defence which is not patently frivolous and which he wishes to put forward. Further, doors of**

justice must not be closed to an innocent litigant because counsel made a blunder or committed an excusable mistake or innocent omission."

I have considered the above authority, and the others which were cited before me. The above authority was cited in the cause of the submissions on ground (c) of the Memorandum of Appeal.

It was an error by the Learned Magistrate not to even consider the Amended Statement of Defence already in the courts record, however irregularly it came to be in the Record.

It was unfortunate that the appellant's counsel filed the amended statement of defence, then for whatever reason, failed to serve the same on the Respondent. That clearly, as held herein earlier, violated Order 8 rule 1 (2). But the fact of the matter was that the statement of defence was in the court record, even though not served upon the Respondent as at the time of the Ruling on 16/4/04. The Learned Magistrate should have considered the defence in the court Record prior to the Ruling which expunged the defence and entered judgment in favour of the Respondent.

I have looked at the amended written statement of Defence by the appellant which was filed on the 6/4/04, and in light of the plaint, it is my humble view that the defence raises triable issues which can only be determined at a full trial of the suit. Such issues include whether or not the Respondent was a guarantor; whether there had been part payment by the Respondent (together with others) towards the settlement of the sum claimed in the plaint. All these are triable issues which cannot be categorized or dismissed as frivolous. The Respondent should be given an opportunity to defend the suit, rather than be condemned unheard, as the Ruling seems to have done, if it is allowed to stand.

I have looked at the Replying Affidavit to the application in which the Ruling appealed against was given. While the Replying Affidavit, as with the statement of defence, was not served, it provides an explanation as to the non-service. That explanation points to the fact that the Appellant was making an amended defence, prior to the close of the pleadings, and hence the delay and need to finalize and file the amended defence, prior to serving the same on the Plaintiff.

All in all, while the non-compliance with mandatory provisions cannot, and should not be encouraged, the court is bound to take into account the pleadings in the court record, however irregularly they came to be there, before delivering its Ruling or judgment. Had the lower court done that, it would have avoided the draconian Ruling, which effectively condemned the appellant unheard, even though he had triable issues in the amended statement of defence.

For the above reasons, the appeal herein is allowed; the Ruling of the Lower court set aside and the appellant is at liberty to defend the suit on merits.

The costs of this appeal to abide the outcome of the suit at the subordinate court.

DATED and delivered in Nairobi, this 7th Day of June, 2006.

O.K. MUTUNGI

JUDGE