REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 81 OF 2004

ISAAC CALEB SHIVACHI …….
PLAINTIFF/APPLICANT

VERSUS

THE SECRETARY, TEACHERS SERVICE

COMMISSION ……..…1ST
DEFENDANT/RESPONDENT

TEACHER SERVICE COMMISSION.....2ND
DEFENDANT/RESPONDENT

RULING

This application by Chamber Summons, dated 11th May, 2004 and filed on 12th May, 2004 was brought by the plaintiff under Orders VI, rule 13 and VIII, rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. It had only one substantive prayer,

"THAT, this Honourable Court do hereby strike out the defendants'

statement of defence".

What are the supporting grounds? The plaintiff had served the plaint upon the defendants on 19th February, 2004; the defendants entered appearance on 12th March, 2004 and filed their defence out of time, on 5th May, 2004 serving the same on 6th May, 2004. The defendants did not seek leave of the Court to file and serve their defence out of time, and so they apparently departed from the applicable rules of procedure.

Edwin Ndega Shiluli , an advocate with the conduct of the suit on behalf of the plaintiff, on 11th May, 2004 swore a supporting affidavit the contents of which may be summarized here.

The defendants' statement of defence was filed out of the time stipulated in the Civil Procedure Rules. The defendants did not first seek leave, before filing their belated defence. The defence was filed more than one-and-a-half months after entry of appearance, and this was out of time, by Order VIII rule 1(2); the period allowed is 15 days only, after entering appearance.

Ms Oyangi for the plaintiff submitted that the provision of Order VIII rule 1 is mandatory, and the defendant was required to file a defence within 15 days of filing and serving the memorandum of

appearance. No explanation at all had been given for this omission.

Mr. Bita , in opposition to the application, submitted that by Order IX rule 1, a defence may be filed any time before final judgment. He called in aid a decision of this

Court, Francis Maina Nduati v. Achelis Material Handling Ltd, Civil Case No. 487 of 2003 in which Lady Justice Kasango rule as follows:

> **"…… Order VIII rule 1(2) provides the period within which a defence ought to be filed and failure to so file [places] the plaintiff….. at liberty to apply for judgment in default of an appearance.**
>
> **"When the plaintiff fails to so apply for judgment …. Order IX, rule 1 provides [for] the defendant leeway to file a defence any time before interlocutory judgment.**
>
> **"That being the case the defendant's defence filed herein was**
>
> **indeed filed in time in that there was no interlocutory judgment**
>
> **entered in favour of the plaintiff at the time of filing thereof."**

Learned Counsel, ***Mr. Bita*** submitted that since the plaintiff had not applied for judgment when he very well could have done so, by his hesitation he did create more time for the defendant to quite lawfully put in a valid defence.

Counsel also called in aid of his argument the Court of Appeal case**, Trust Bank Ltd. V. Amalo Company Ltd.,** Civil Appeal No. 215 of 2000. The essential point in this case is that the Court must, in general, be guided, on the question of striking out of pleadings on technical grounds, by the primacy of allowing a hearing of disputes on the merits – an object to be ensured always, so far as possible. The Court of Appeal in that case stated:

> **"The principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges, C.J. (Tanzania) in the case of Essanji and Another v. Solanki [1968] E.A. at page 224:**
>
> **'The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from pursuing his right'….."**

The learned Judges of Appeal adopted the principle in the Essanji case, and pronounced themselves quite clearly in terms which are, I think, completely in agreement with the decision of the High Court which learned counsel cited earlier. Their Lordships thus said:

> **"That [i.e., the principle in the Essanji case] accords with the policy of the law as can be gleaned from Order IX(1) of the Civil Procedure Rules whereby a litigant has the right to appear, file his defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit . The spirit of the law is that as far as possible in the exercise of judicial discretion, the Court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so."**

The Court of Appeal stated its position in the Trust Ba nk case to be consistent with its earlier

holding in **Central Bank of Kenya v. Uhuru Highway Development Ltd & others** , C.A. No. 75 of 1998. From that earlier case their Lordships quoted the following passage from the judgment of Bosire, JA :

> **"I am, therefore, unable to subscribe to the view expressed by Mr. Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a Court is obliged to consider them unless for a reason other than mere lateness, [the Court] considers it undesirable to do so. Besides, the learned judge in the Court below fell into error when he said that a failure to file grounds of opposition automatically entitles the applicant to orders ex parte ."**

Mr. Bita submitted that this Court should be guided by the principles set out in ***Trust Bank Ltd v. Amalo Company Ltd.*** He urged that the orders being sought are discretionary, and that, clearly, Order IX (1) did not by any means shut out the defence from prosecuting their defence in the main suit. Counsel urged, and correctly as a matter of law, with respect, that interlocutory judgment can only be entered on liability ; and the case had not yet been fixed for hearing at the time the statement of defence was filed. In these circumstances, Mr. Bita submitted, the plaintiff/applicant had suffered no prejudice by the fact that the statement of defence had been filed. He prayed that the plaintiff's application be dismissed with costs.

The state of the law on striking out of defences, I think, is abundantly clear from the case law which I have reviewed hereinabove. I think it is clear that I am bound by those authorities; but to put the matter beyond doubt, I will here set out the content of Order IX, rule1:

> **"A defendant may appear at any time before final judgment , and may file a defence at any time before interlocutory judgment is entered against him, or, if no interlocutory judgment is so entered, at any time before final judgment".**

The plain meaning of the provision set out above is that there is an *open time - frame for the filing of a statement of defence, so long as the plaintiff has not made a valid limitation of this time -frame by securing an interlocutory judgment* . For so long as the plaintiff has not asserted himself in that manner and shortened the open time-frame available to the defendant, the plaintiff is not allowed to lay claim to the unlimited timeframe, as it belongs to the *defendant.*

The orders which I may make in this application are, therefore, inevitable; and

they are as follows:

> **1. The plaintiff's prayer that the defendant's statement of defence be struck out, is refused.**
>
> **2. The plaintiff shall bear the costs of this application in any even**t.

DATED and DELIVERED this 28th day of January, 2005.

J. B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiff/applicant : Ms Oyangi, instructed by M/s Khaminwa & Khaminwa advocates

For the defendants/respondents : Mr. Bita, instructed by the Hon. The Attorney-General