



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Civil Case 48 of 2003**

**ABDUL RAZAK MASUDI .....APPLICANT/PLAINTIFF**

**VERSUS**

**TEBERE CONCRETE COMPANY LTD..... 1<sup>ST</sup> RESPONDENT/RESPONDENT**

**KAVIT MAHINDRA ..... 2<sup>ND</sup> RESPONDENT/RESPONDENT**

**RULING**

1. The Application dated 8/10/2003 seeks orders under order VI Rule 13(1) (a) (b) and (c) of the Civil Procedure Rules that the Defence filed herein on 25/9/2003 be struck out and be expunged from the record. Further, and as a consequence, interlocutory judgment be entered against the Defendants jointly and severally as prayed in the Plaint and in terms of the Request for Judgment filed on 23/9/2003.
2. The facts in support are pretty straight – forward; the Defendants were served with summons to Enter Appearance on 22/8/2003. They had fifteen (15) days to do so but only filed a Memorandum of Appearance through their Advocates on 24/9/2003. A day earlier on 23/9/2003, the plaintiff had filed a Request for Judgment in default of Appearance or Defence. On 25/9/2003, the Defendants filed a common statement of Defence and served the plaintiff.
3. Counsel for the Plaintiff now argues that because of the delay in filing and serving the Defence, the same should be treated as hopelessly out of time and should be struck out. In any event, he argues, it is a sham and it is not an answer to the Plaintiff's claim.
4. In response, it is argued on behalf of the Defendant that the Defence raises triable issues including the lack of locus standi by the Plaintiff to institute the proceedings herein. Further, that the nature of the matter is such that the court should determine the suit on its merits and not on technicalities. In any case, no prejudice has been cited that the Plaintiff has suffered by fact of the Defence having been filed late.
5. It would seem to me and contrary to submission by Counsel for the Plaintiff that the real reason that the orders are sought at this point is because there was delay in filing the Defence. That therefore the Request for Judgment should be granted in default and that the Defence on record be expunged. The substance of the Defence is not addressed anywhere in the body of the Application nor in the Supporting Affidavit of Abdul Rasak Masudi. I shall therefore address the latter issue only.
6. The matter is really not as grave as Counsel put it. Order IX Rule 1 of the Civil Procedure Rules

states as follows;

“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.”

7. The Plaintiff did request for interlocutory Judgment but

the record shows that such Judgment was not in fact entered. The request cannot amount to a Judgment and the Defendants were at liberty to file their Defence in spite of the request for interlocutory Judgment. Had Judgment been entered then the Defendants' position would have been quite different.

8. I however understand Counsel for the Plaintiff although

he did not say so to be relying on L.N. NO. 36/2000 which introduced an amendment to Order VII Rule 2 and Order IX Rule 3 of the Civil Procedure Rules. The two amendments have the effect of making it mandatory that a Defendant “shall” serve his Memorandum of Appearance and Defence upon the Plaintiff within 7 days of filing either of the documents. No authority was cited for the proposition that if the Defendant does not do so, then Order VI Rule 13 has to be invoked and the Defence struck out. Maybe in a different matter, the issue would be addressed more seriously.

9. In any event, I am not satisfied that the reasons given should lead me to strike out the Defence. The Plaintiff in this case raises questions of alleged negligence leading to the death of one Masudi Hassan in a road accident. The Defendants have denied the alleged negligence and even the locus standi of the Plaintiff. These are matters that should go to trial. As I said there, was little said about the substance of the Defence and I have said elsewhere that the other matters raised are extraneous to order VI Rule 13.

10. I am aware that it is only in clear cases that the drastic remedy of striking out should be invoked

(See D.T. Dobie a Co. (K) Ltd vs Muchira (1982)

KLR 1 at page 9 and Coast Projects Ltd vs M.R.Shah Construction (K) Ltd C.A. 242 of 2003)

This is not one such case and I decline to exercise discretion in favour of the plaintiff.

11. The application dated 8/1/2003 is hereby dismissed with costs.

Orders accordingly.

Read in Open Court on 27th Day of January 2005

I. LENAOLA

JUDGE

In the presence of;

Mr. Momanyi holding brief for Ondari for Defendant/Respondent

N/A for Plaintiff/Applicant

I. LENAOLA

JUDGE