



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1047 of 2003

DOREEN OSIMBO OUKO PLAINTIFF

VERSUS

AGRICULTURAL FINANCE COPORATION DEFENDANT

RULING

The plaintiff Doreen Osimbo Ouko, is the administrator of the estate of the late Dr James Omondi Ouko. The plaintiff sued the defendant seeking prayers as appear in the plaint.

The defendant was served with summons to enter appearance on 24th October 2003.

A memo of appearance was filed on 3rd November and on 19th November 2003, the defendant's defence was filed.

By a Notice of Motion application filed on 28th January, 2004, the plaintiff's counsel moved the court, seeking to have "the memo of appearance, defence and any other pleading filed on behalf of the defendant struck off", with costs to the defendant on the grounds that:

- (a) "The defendant filed its defence out of time without court's leave".
- (b) "The defendant has to date not served the plaintiff's advocates with the Memo of Appearance and defence or any other pleadings having filed the same",
- (c) "The defendant's action is an abuse of the process of court".

The plaintiff filed and served its list of authorities, subsequently. The plaintiff took a date at the Registry for the hearing of the Notice of Motion application. The court's records show that the plaintiff's advocate's representative appeared in the Registry on 29th January 2004 and was given the hearing date of 24th March 2004.

When the application was tabled before me for hearing on 24th March 2004, Mr Lutta, advocate for the plaintiff submitted that he was served with grounds of opposition only on 22nd March 2004, and he therefore had only one day before the hearing of the application, yet the Rules require service of at least 3 clear days before the hearing. Mr Lutta said that the defendant's counsel had no right of audience in court, and prayed the court to allow him to proceed ex parte.

Mr Mutai for the defendant submitted that his grounds of opposition were properly on record, he conceded, however, that they were served late. He prayed the court to take into account the substantive matter, as the lack of 3 clear days within which the grounds of opposition should have been served is “minor” taking into account the substantive matter. He asserted that no prejudice has been caused to the plaintiff.

The relevant Rule of Practice and Procedure under which the objection was raised by Mr Lutta, is Rule 16(1) and (3) of Order L which reads:

“Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing. (The above underlining is mine).

Rule 3 on the other hand reads:

“If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard ex parte”

In my consideration of the 2 Rules, i.e. 1 and 3 of Order L, I find Rule (1) to be mandatory, but then the court has a discretion when it comes to a decision whether to proceed ex parte or not because Rule 3 uses the words, “may”.

In this case the plaintiff’s counsel filed the present application and served it in good time. The defendant’s counsel, on the other hand filed his grounds of opposition, in what would appear to be “good time” – i.e. 19th March 2004, but chose not to serve the plaintiff’s counsel with the same, until 22nd March, a day before the hearing of the application. This was in contravention of Order L R 16(1) of the Civil Procedure Rules.

I find no proper explanation given by the defendant’s counsel, who instead termed his action ‘minor’ and urged the court to take into account the substantive matter. He did not explain what he meant by ‘substantive matter’, but going by the court records, I find that the plaintiff filed the application in question, seeking to have both the Memo of Appearance and the defence filed by the defendant’s counsel ‘struck out’ because the same have never been served on him. He made this application on 28th January 2004, after the 2 documents aforesaid, were filed in court on 3rd and 11th November, 2003 respectively. Why were they not served? No answer to this question can be found from the face of the record. To add “insult to injury”, so to speak, the defendant’s counsel chooses to serve grounds of opposition on the plaintiff’s counsel, only a day before the hearing of the application in contravention of the Rules.

I find the actions of the defendant’s counsel to amount to abuse of the process of court, as such, I am unable to exercise a discretion in favour of the defendant. Instead I move under Order L R 16(3) of the Civil Procedure Rules and direct that the application by the plaintiff dated 21st January 2004, be heard ex parte, before another judge.

Dated at Nairobi this 24th day of June 2004.

JOYCE ALUOCH

JUDGE