



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.56 OF 2004

DANIEL WAMBUA NDABIPLAINTIFF

V E R S U S

PETER LUKA NDUTUDEFENDANT

R U L I N G

The plaintiff by his application seeks:-

- (1) The defendant's defence be struck out;
- (2) That judgment be entered in favour of the plaintiff as prayed in the plaint.

The plaintiff has come under Order 9A Rules 2, 3 and 9, Order 8 rules 1(2), Order 6 rule 13(1) (d) of the Civil procedure Rules and Section 3A of the Civil procedure Act.

The application is based on the grounds:-

- (a) That the defendant did not served the plaintiff with defence within seven days as stipulated in law, thus the defence was served on the plaintiff out of time without leave of the court;
- (b) That the defendant has to date not sought the leave of this Honourable court to file and serve a new defence against the plaintiff's claim set out in the plaint;
- (c) That the defence filed in this matter is improperly on record;
- (d) That it is the interest of justice that judgment be entered in favour of the plaintiff and against the defendant as prayed.

The plaintiff's argument is that the defendant filed a defence on 9th March 2004 but failed to serve it within 7 days as required under Order 8 rule 1(2).

This rule requires a defendant to serve a defence on the plaintiff within 7 days of filing.

Both plaintiff's and defence counsel agree that the defence was served out of the stipulated time.

Counsel for the plaintiff argued that the defendant had failed to seek leave of the court for extension of the period of service of the defence and this was despite being put on notice in the plaintiff's reply to

defence.

Counsel submitted that Order 6 rule 13 (d) gave the court jurisdiction to strike out pleadings, that are an abuse of the court's process.

Counsel relied on the case of WILFRED ODHIAMBO MUSINGO -V- HABO AGENCIES LTD HCCC NO.2047 OF 2000.

In this case defence was struck out for having been served outside the period of 7 days.

The plaintiff also relied on the case of CHARLES OMWATA OMWOYO -V- AFRICAN HIGHLANDS & PRODUCE CO. LTD. HCCC.NO. 308 OF 2002.

He relied on page 3 of that case as follows:-

"The plaintiff's advocate has made a passionate plea to this court that to dismiss the application would be tantamount to punish the plaintiff for the mistake of his advocate. That may very well be so. However, I am of the opinion that if a court has no jurisdiction to do something it cannot do so in what is said to be the interest of justice. The interest of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court."

Counsel for the plaintiff submitted that if the defendant was to suffer as result of the defence being struck out he had recourse against his advocate.

He was of the view that it was irrelevant for the defendant to say that the failure to serve the defence was due to fault of a new clerk at the advocate's office.

The defence counsel in response relied on two replying affidavits sworn on 17th May 2004.

The affidavits state that it was not intentional, the failure to serve the defence but the same was due to a newly employed clerk who filed it in the office file without service. This was described as honest mistake and since no prejudice was suffered by the plaintiff he can adequately be compensated with costs.

Counsel responded to the plaintiff's authorities by saying that they were persuasive but not binding.

He distinguished this case with the one of CHARLES OMWATA OMWOYO by saying in that case the advocate's mistake was negligent mistake where else in this case the mistake was genuine error.

He said that the 3 days delay in serving was not inordinate and that mistake could have been corrected at the hearing of this suit.

He was of the view that the court should look at the defence, the content thereof, before striking it out.

Counsel relied in the case of NITIN PROPERTIES LTD -VJAGIT SINGH KAWI & ANOTHER CIV.APP NO.132 OF 1989 where he argued it was decided that the power of striking out should be exercised with caution.

In BHANDARI CONSTRUCTION COMPANY -V- STANDARD JOINERY & BUILDING COMPANY (1983) KLR page 111, counsel said that it supports his contention that the plaintiff can be adequately compensated by costs instead of striking out the defence.

The court in deciding this ruling is faced with a situation where the defendant concedes that the defence was filed out of the 7 days period.

The provision of Order 8 rule 1 (2) is in mandatory terms and does not afford this court discretion.

The defendant breached that provision and the court is persuaded that in so doing is in abuse of the process of this court.

The defence was not served with the defendant having sought extension of the period of service.

The court having made that finding is persuaded that the defence served out of time ought to be struck out.

The plaintiff has moved this court for judgment to be entered in its favour.

The court grants the following orders:-

- (1) That the defendant's defence filed in this court on 9th March 2004 is hereby struck out.**
- (2) That interlocutory judgment is hereby entered in favour of the plaintiff.**
- (3) The costs of the application dated 20th April 2004 are awarded to the plaintiff in any event.**

Dated and delivered on this3..day ofsep.....2004

MARY KASANGO

AG. JUDGE