



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 74 OF 2002

MOSES MAINAT/a RUTHAGE ENTERPRISES.....1ST PLAINTIFF
SERAPHINE MUTHONI WARUTA.....2ND PLAINTIFF
JACOB KIMANI MWANGI3RD PLAINTIFF

V E R S U S

ALLAN WAWERU MBURU..... DEFENDANT

R U L I N G

This is Chamber Summons under Order 8 Rule 1(2) and Order 9A and Order 6 Rule 13 Rule (1) of the Civil Procedure Rules asking for orders that the defence filed on 9th July 2002 herein be struck out for failure to serve the same within the required time.

The Applicant/Plaintiff in his supporting affidavit of 14.8.2002 says that Plaintiff was served on 24.6.2002 on Defendant. That on 9.7.2002 Defendant filed defence but has not served the Plaintiff. However, it does not comply with Order 8 Rule 1(2) and should be struck off. But Defendant opposes the application on grounds that orders 7 and 8 Rule 1(1) do not provide for striking out of the defence.

The single issue is whether Orders 8, 9A and 6 Rule 13(1) provide for striking off the defence for failure of the Defendant to serve it upon the Plaintiff.

Order 13 is for striking out pleadings from court records as is in parimateria with English Rules of Supreme Court Order 18 Rule 19 and the commentary under that rule I find instructive and it says: -

“There are two jurisdictions pursuant to which the court may impose sanctions for breaches of the rules of pleading

(1) under the provisions of this rule... and under

(2) inherent jurisdiction of the court and even then not every pleading which offends rules of pleading will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach.”

And this can be exercised only in plain and obvious cases.

” It is, therefore clear that even had failure to serve be a breach of pleading (which it is not), it would not have attracted sanction under Order 6 Rule 13 r(1). Application cites other orders; being Order 8 r(1), Order 9A and Section 3A.

Order 9A provides for default consequences in entering appearance out of time and is not about service of defence, whereas Order VIII merely provides for when defence ought to be filed. Order 8 Rule 1(2) states that service should be in 7 days. No penalty is provided.

But does failure to comply with Order 8 Rule (1) attract striking out of the Plaintiff? I do not think so.

By contrast, Section 95 of Cap 21 does not contemplate it. It provides that: -

“Where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Act, the Court may in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired.”

In contrast here legislature allowed the Court to use its discretion to extend time fixed by itself even after expiry of the time originally fixed, but I believe the Court can use its inherent jurisdiction to extend that jurisdiction.

Where generally there is omission to comply with service under Order 8 Rule 2, this Court can revisit the earlier English cases and ask whether the failure is a mere irregularity or whether it renders proceedings void. This I think is a mere irregularity and can be corrected by ordering that service be effected in 7 days as is provided in the rules, which I hereby do.

I order further that Defendant pays cost of this application.

DATED this 20th day of June, 2003.

A.I. HAYANGA

JUDGE

Read to Mr. Ogunde for Respondent/Defendant

No appearance for Applicant/Plaintiff.

A.I. HAYANGA

JUDGE