CIVIL PRACTICE AND PROCEDURE

PLEADINGS

- Validity of unsigned pleadings
- Whether party can rely on the original pleadings if the subsequent amended pleading is struck out.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1994 OF 2000

REGINA KAVENYA MUTUKU & 3 OTHERS..... PLAINTIFF

VERSUS

UNITED INSURANCE COMPANY LIMITED ..... DEFENDANT

RULING

This is an application by the plaintiffs to strike out what is described as the "purported defence" filed herein by the defendant. The application is expressed to be made under order 6 rule 13 (b), (c) and (d) and 14; order IX A rule 3; and section 3A of the Civil Procedure Act. From the face of the application, the relief is sought on the grounds that (1) default judgment should have been entered because the purported defence filed is unsigned and is therefore not a defence at all and (2) the document described as "further amended defence" is illegal as it purports to amend that which does not exist and is filed without leave. The application is supported by an affidavit sworn by Regina Kavenya Mutuku, the first plaintiff, on her own behalf and on behalf of the other plaintiffs. The application is opposed and there is replying affidavit sworn by Hudson Wanyonyi Wafula, a legal officer in the defendant company.

The application was canvassed before me on the 30th day of April 2002 by Mr. Nzamba Kitonga, counsel for the applicant, and Mr. A.N. Ngunjiri, counsel for the respondent. Although the grounds for the application as stated on the face thereof squarely revolve around the Legitimacy or validity of the defendant's defence on record, the invocation of order 6 rules 13 (1), (b), (c) and (d) suggest that relief was also sought on the basis that that defence, if valid, is scandalous, frivolous or vexatious, or it is intended to delay the fair trial of the action or it is otherwise an abuse of the process of the court. And indeed in the arguments by the learned Advocates for the parties the application was thus broadly argued. From the arguments advanced before me two issues may call for determination before the court may consider whether or not to strike out the defence and enter judgment for the plaintiff as prayed.

They are first, whether or not the defendant's defence on record is signed, and if it is not, the consequence of want of signature thereon, and secondly, if there is a valid defence on record whether it raises a sustainable defence on the merits. Before considering those issues, it is necessary to set out a short background to the matter.

From the pleadings and affidavits on record- it is not the original but a reconstructed record - it would appear the plaintiffs instituted H.C.C.C. No 2367 of 1999 against John Njunguna Kihumbe, for recovery on damages on behalf of the estate and dependants of Patrick Mutuku Mwilu, the deceased husband of the first plaintiff. The suit was not defended and after a formal proof, the plaintiffs were awarded a sum of Kshs.2, 942, 800 as damages together with interest thereon and the costs of the suit. The plaintiffs then instituted the present suit against United Insurance Company Ltd for a declaration that it was obliged to satisfy the aforesaid judgment by virtue of the provisions of the Insurance (Motor vehicle third party Risks) Act, Cap 405 of the Laws of Kenya on the basis that the company was the defendant's insurer in respect of Motor vehicle KAJ 542 N under policy number 8NP62961. The defendant entered appearance to the suit but did not file a defence within the prescribed time. On 19.12.2000, the plaintiffs applied for interlocutory judgment in the sum of Kshs.2, 942,800/=. The said judgment was entered on the following day. Apparently unaware of the entry of that judgment, the defendant filed a statement of defence on 11.1.2001. The said defence which was duly signed and was served on the plaintiff's Advocate on 15.1.2001 in essence denied that the defendant was the insurer of motor vehicle KAJ 542 N at the material time or that it had been served with the statutory notice under section 10 (2) of Cap.405 within the stipulated period. I may observe in passing that service on the insurer of such a notice of the institution of a suit against an insured is a condition precedent to the insurer's satisfaction of such a judgment. On 19th January 2001, the defendant was served with notice of entry of the judgment obtained in December. On 26th of January 2001 the defendant applied by way of chamber summons for orders of stay of execution of the said judgment; the setting aside of the same and all consequential orders and the grant of leave to defend the suit; and that the defence filed on 11th January 2001 be deemed as properly filed and duly served. Both the affidavit of the plaintiffs and that of the defendant are silent on what orders were made on the above application. And there is no way for the court to ascertain the position as the original record has disappeared. However, according to the submissions by Mr. Kitonga, the judgment against the defendant was set aside, the plaintiffs were ordered to file an amended plaint and the defendant was granted leave to defend. According to Mr. Ngunjiri, there was also an order that the defence filed on 11.1.2001 was deemed to have been properly filed and served. In his reply, Mr. Kitonga did not deny that the order alleged by Mr. Ngunjiri was indeed made. If I understood him correctly his position was that as that defence had been filed late, it was not a defence which could be relied on. Apparently in pursuance of the orders made on the aforesaid chamber summons, the plaintiff filed an amended plaint on 16.3.2001.

On being served therewith, he defendant filed an amended defence. That defence which was dated and filed on 26.3 2001 was not signed by the Advocates for the defendant. Then on 30th March, 2001 the defendant filed a further amended defence. This latter one was duly signed. With that background, the issues set out earlier on in the ruling may now be considered.

On whether or not the defendant has a signed defence on record, all depends on whether the statement of defence filed on11.1.2001 is validily on record. Mr. Ngunjiri submits that it is on the basis of the orders made on the application of 26th January, 2001. Mr. Kitonga appears to ignore it completely on the basis that it was filed late and interlocutory judgment had been entered before it was filed. He appears to think that the defendant's defence on record is the unsigned amended one of 26.3.2001 and the signed further amended one of 30th March 2001. He impugns the former on the ground that it violated order 6 rule 14 which provides that every pleading shall be signed by an Advocate, or a recognized agent, or by the party if he sues or defends in person. He submits that an unsigned defence is not a valid pleading. He also impugns the further amended defence as wanting in legality.

Having considered the above submissions, I take the following view of the matter. If Mr. Ngunjiri is right that the court did make an order that the defence filed on 11.1.2001 was deemed to be properly filed and served, then that defence is properly on record for the defendant and cannot be ignored on the basis of the argument that it was filed late and was not properly on record. Deeming is a legal fiction whose effect is to treat as done or undone that which was never actually done or was done as the case may be. And there is nothing on record or in the submissions to contradict Mr. Ngunjiri. Indeed the subsequent pleadings support him for when he filed the next pleading after being served with an amended plaint, he styled it an amended defence. Whether the existence of that defence saves or does not save the defendant's case is a matter I shall shortly come back to.

As regards the validity of the defence filed on 11.1.2001, no authorities were cited for the proposition that an unsigned pleading has no legal validity. Be that as it may, I am in agreement with the submission that an unsigned pleading cannot be valid in law. To my mind, it is the signature of the appropriate person on a pleading which authenticates the same. An unauthenticated document is not a pleading of anybody. It is a nullity. Accordingly if the defendant is not relying on the said document, the same is for striking out. But the defendant appears to rely on the further amended defence. To my mind whereas the defendant was perfectly at liberty to further amend its defence as it did for the pleadings had not closed as contemplated by order 6 rule II for the plaintiff had not served any reply to the amended defence by the time the further amended defence was filed, that further amended defence was a nullity for the reason that it purported to amend the amended defence which I have held to have been a nullity. In short both the amended defence and the further amended defence are nullities and I would strike them out as an abuse of the process of the court. The next matter for consideration is whether the defendant's amended defence having been struck out, the defendant can rely on the original defence as a valid pleading.

I confess that is not an easy point in the circumstances of this matter. I think the answer turns on whether or not a party whose amended pleading has been struck out is entitled to rely on the original pleading on record. The advocates did not address me on this point. And I am afraid there is no rule to the point. The nearest guidance is in Order VI rule 1 (6) which is to the effect that where a party has pleaded to a pleading which is subsequently amended and served on him without leave of the court before the closure of pleadings, he shall be taken to rely on his original pleading in answer to the amended one if he has not amended the same. That rule is obviously in applicable where, as here, the party has been served with a pleading amended pursuant to the order of the court and has actually filed his own amended pleading thereto. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record. The effect of an amended defencing my judgment is to supersede and replace the original defence with the amended one for the purpose of determining what facts are admitted or traversed, as the case may be, and therefore what issues are joined for trial. But that is of course subject to the rule that the amended pleading relates back in point of time to the date of the filing of the original one. Having taken that view of the matter, I find that the defendant has no valid defence on record. In the premises, it would be idle of me to enter into any consideration of whether or not any of the matters raised in the invalid defence by the defendant raises any bona fide triable issues.

The next question is whether I should then enter judgment as prayed in the chamber summons under consideration. If I understood Mr. Ngunjiri correctly, and I think I did, his arguments against entry of judgment as prayed were two. First, that the amended plaint prayed for a declaration that the defendant pays to the plaintiffs the decretal amount awarded in HCCCC NO. 2367 of 1999. He submitted there was no such decree and so the prayer for entry of judgment in the chamber summons was untenable. Secondly, that there was a valid defence on record which raised triable issues. I have ruled against his second proposition. And the first reason is lost on me. In HCCC NO. 2367 of 1999, Rawal, J. entered judgment for the plaintiffs in the sum ofKshs.2,942,800/= on 12th July 2000. And in the present suit, what the plaintiffs pray for is a declaration that the defendant do pay them the amount thus decreed. I am in the circumstances unable to see counsel for the defendant’s point. If he meant that a formal decree had not been extracted, that to my mind is inconsequential. What finally determines the rights of parties to litigation is the judgment of the court. A decree is merely the formal expression thereof. In the premises, I find the defendant's point to be a spurious one. There is therefore no reason why I should not enter judgment against the defendant. Accordingly the order of this court is that judgment be entered for the plaintiffs against the defendant as prayed in the plaint plus the costs of the application.

DELIVERED at Nairobi this 24th day of May 2002.

A.G. RINGERA

JUDGE