

IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 840 OF 2002

HON. HENRY RONG`UNO CHEBOIWOPLAINTIFF

V E R S U S

WILFRED C. CHEPKURGAT1ST DEFENDANT

CO-OPERATIVE BANK OF

KENYA LIMITED2ND DEFENDANT

MOROP FARM COMPANY LTD.....3RD DEFENDANT

R U L I N G

On 2nd August 2002 the plaintiff herein entered an interlocutory judgment against the defendant no.1 in default of filing defence and then later set the case for formal proof on 3rd October 2002. But the second defendant on that day appeared by an advocate objecting to the hearing stating that the second defendant`s interest would be affected and so there should be no formal proof against the case of the first defendant.

I think the objection is untenable as the right of formal proof follows as a consequence of failure to enter defence. It is a right that accrues to the plaintiff as against the defendant in his default to file defence. However the matter is not devoid of some difficulties.

Looking at the prayers in the plaint and although the plaint is against the three defendants yet the relief sought is only as against the 1st defendant and also for a declaratory decree. Hence the other defendants who are not required to do anything cannot claim existence of any prejudice against them. The procedure to seek interlocutory judgment where plaintiff cannot obtain all the relief he requires on such interlocutory application should proceed to trial although there was default in serving defence. But where plaintiff fails to seek for entry of judgment in default of defence for all that he is entitled to. He will be denied costs of the remaining part if he does it later.

Where several defendants are sued and plaintiff asks for judgment against those who have defaulted but leaves those who have entered defence, the best procedure is to set the case for hearing against those who have entered defence and also list formal proof as against the defaulting defendant at the same time. See BRIDSON v SMITH [1876] 24 W.R 392 where among several defendants one or more default but one or more do not, then the court should decide if the case against the defendant defaulting is severable and if that be so then the plaintiff can proceed without serving application on the none defaulting party.

Here the case against the 1st defendant is only as against him and there is no relief sought against the others. So the claims are severable.

I think the plaintiff has a right to proceed against the 1st defendant in formal proof.

Delivered this 11th day of July 2002

A. I. HAYANGA

J U D G E

