



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE 1149 OF 2001

JOHN OKUMU AKELLO.....PLAINTIFF

VERSUS

JOB OLOO.....DEFENDANT

RULING

This is the plaintiff's application for an order that the Defendants Defence be struck out on the ground that the Defence was not filed within the prescribed time. The application is brought under section 3A Civil Procedure Act 1(2) CP Rules.

Plaintiff filed an Amended plaint on 27.8.2001 by which he substituted the name of the defendant with the name of Job Oloo. The plaint and the summons to enter appearance were served on one David Otieno said to be brother of the defendant on 13.9.2001. On 16.11.2001, plaintiffs counsel filed a request for interlocutory judgment against Job Oloo in default of Appearance. The Deputy Registrar refused to enter Judgement on the ground that the service was not proper as the summons were served on the defendant's brother. On 4.4.2002, M/S Inamdar & Inamdar entered Appearance under protest for Job Oloo. On the 26.4.2002, Job Oloo filed the defence through the firm of M/S Inamdar & Inamdar Advocates. Order VIII Rule 1(2) provides:

I agree with the plaintiffs counsel that the 15 days after entering an appearance on 4.4.2002 expired on about 19.4.2002. I further agree with the plaintiffs counsel that the defence filed on 26.4.2002 was filed 7 days after the prescribed time of 15 days. Consequently, I rule that the defence was filed in breach of order VII Rule 1(2) Civil Procedure Rules.

The applicants counsel relies on the Ruling of Ringera J. dated 30.5.2001 in HCCC No. 2047 of 2000 in which a defence served even days after filing of the Defence was struck out as being in breach of order VIII Rule 1(2) Civil Procedure Rules. In that Ruling Ringera J. held in part: "In this regard I am persuaded that the principle to be gleaned from appellate decisions relied on by plaintiffs counsel is that where a document is required to be served within a prescribed period is not so served and the court has not made any order extending such period of service, such a document ought to be struck out"

In this case order XI Rule 1 Civil Procedure Rules should also be considered.

It provides:

"A defendant may appear at any time before final judgment and may file a defence at any time before interlocutory judgment is entered against him or it no interlocutory judgment is so entered, at any time before final judgment"

The defence though filed after the 15 days prescribed by order VIII Rule 1(2) Civil Procedure Rules was filed before any interlocutory judgment had been entered. According to order IX Rule 1 Civil Procedure Rules, the Defence is validly filed.

Order IXA Civil Procedure Rules provides for consequences of nonappearance and Default of the defence. Plaintiff claims pecuniary damages. By order 1 X A Rule 9 as read with order IXA Rule 5 Civil Procedure Rules, interlocutory judgment could have been entered against the defendant on request by plaintiff after the expiry of the 15 days prescribed period before the defendant filed the defence. But plaintiff did not file a request for judgment before the defence was filed.

I agree with the view of Mr. Kahonge for the defendant that the punishment for failure to file a Defence within the 15 days as prescribed by order VIII Rule 1(2) Civil Procedure Rules is provided by Order IXA. A party who wishes to take advantage of the 15 days limitation period has to request for and obtain judgment against a defendant before the Defence is filed. If the Defence is filed before any interlocutory judgment is entered, then the 15 days limitation period becomes in operative and order IX Rule 1 Civil Procedure Rule supersedes order VIII Rules 1 (2) Civil Procedure Rules as it relates to time for filing Defence.

For the foregoing reasons, I am satisfied that the application is incompetent and misconceived. It is dismissed with costs to the defendant

E. M. Githinji

JUDGE

8.7.2002

Mr. Ngani holding brief for Mr. Oluoch present

Mr. Kihonge for Respondent present

Mr. Kihonge

I apply for a certified copy of typed Ruling Order: To issue

E. M. Githinji

Judge