



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIV CASE 1160 OF 02

HARON OKETCH RAPEMO.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

RULING

This is the plaintiffs application for an order that leave be granted to enter judgment against the first defendant in default of Defence. The application is brought under order 1 Rule 16 A Civil Procedure Rules Rule 16 A of Order 1 prohibits the court from entering judgment in favour of a defendant under Rule 16 without leave of the court. Order 1 Rule 16 deals with judgment against third parties in default of appearance or in default of delivering pleadings. By Order 1 Rule 16 A (2) Civil Procedure Rules, application for leave to enter judgment against the government under Rule 16 shall be made by summons served not less than seven days before the return day.

The Attorney General entered appearance for himself and the second defendant on 14.8.2002. The Attorney General filed a Defence on 20.9.2002 - 3 days after he was served with the present application.

On the same day, that is 20.9.2002, the Attorney General filed an application for an order that the suit be struck out. That application had not been served by the time the plaintiffs application came for hearing and it was ordered that plaintiffs application be heard first. The objection to the application by the respondent's counsel on the grounds that it brought by Notice of Motion instead of by Chamber summons and further on the ground that the Jurat of the supporting affidavit does not state the place where it was sworn are without merit. These are technical objection to the application which do not affect the jurisdiction of the court.

Firstly, by order L Rules 8, 9, and 10 of Civil Procedure Rules, the court has jurisdiction to transfer Chamber business into court and court business into Chambers. In practice the courts in Nairobi deal with nearly all businesses in Chamber for lack of sufficient court rooms. So, the fact that the application is brought by Notice of Motion instead by Chamber summons does not render the application a nullity. Secondly, court has jurisdiction to receive any affidavit not with standing any irregularity in its form – order XCIII Rule 7 Civil Procedure Rules.

This suit was not filed prematurely as counsel for respondents submits. The Notice of intention to sue was served on the Attorney General on 6.3.2002.

The present suit was filed on 10.7.2002. That is more than 30 days after the Notice was served on the Attorney General. But the respondents counsel has raised a more substantial ground of opposition. According to him by order IX Rule 1 Civil Procedure Rules, 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 if no interlocutory judgment is entered at any time before final judgment. So, time for filing defence is only limited by the entry of an interlocutory judgment. By the time the present application was filed and prosecuted, no interlocutory judgment had been entered against the first and second defendants. And by the time the application was prosecuted, the first and 2nd defendants had already filed a Defence on 20.9.2002.

The filing of the Defence before any judgment was entered against the first and second defendants defeated the application and all the applicant can claim is the costs of the application. Moreover, this application is wrongly brought under Order 1 Rule 16A of Civil Procedure Rules. That Rule applies to cases where the Government is a third party and where the defendant in the suit is asking for judgment against the Government as a third party. The Government is not a third party in this suit. It is the first defendant. The application should have been brought under order IXA Rule 7 as read with Rule 9 Civil Procedure Rules. I understand plaintiffs application as asking the court to enter final judgment against the first defendant as prayed in the plaint. I do not understand plaintiff's application as asking the court to enter interlocutory judgment against the Government.

Before a final judgment can be entered under Order IXA Rule 3(1) Civil Procedure Rules , in default of appearance or defence; the court must be satisfied that plaint makes a liquidated demand only. In the plaint, plaintiffs claims definite figures for pension, reduced pension, accommodation expenses, storage charges, pro rata leave days and unpaid salary increment.

Those claims arise from a contract of employment and plaintiffs refers to them in the plaint as special damages. The total claim is shs 5,735,756. First plaintiff is not given authority by the law to compute pension payable to him. The statutory duty to compute pension payable to a public officer is given to the Director of Pensions. The pension is computed in accordance with the law as contained in the Pensions Act. The plaint does not show how the accommodation expenses which amount to shs 3,624,000, the Transport expenses, the storage charges or pro rata leave days arise.

The mere fact that plaintiff has specified the sum he claims under each head does not make his claim a liquidated demand or debt. If the ascertainment of the sums claimed requires investigation beyond mere calculation the sum is not a liquidated demand and final judgment cannot be entered in default of appearance of defence. In my view, the plaintiff claims is not a liquidated demand as it requires further investigation. It is only after receiving evidence that the court can determine whether or not the claims made are sustainable or not and if so, whether plaintiff is entitled to the sums claimed in the plaint.

It follows that final judgment cannot be entered against the government for the sum claimed under order IXA Rule 3(1) Civil Procedure Rules.

In my view plaintiffs claim can fall either under order IXA Rule 5 or under IX Rule 8 Civil Procedure Rules. But applicant has not sought leave to enter interlocutory judgment against the Government. In any case, the application has been defeated by the subsequent filing of the defence.

For the foregoing reasons, I dismiss the application with costs to first defendant

E. M. Githinji

Judge

28.10.2002

Mr. Muli for applicant present

Mr. Shikule for Attorney General present

Order: Ruling to be typed and supplied to Mr. Muli as prayed

E. M. Githinji

JUDGE