



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE NO. 1904 OF 1989**

**NAHENDRA DAHYABHAI PATEL & ANOR. .... APPELLANT**

**VERSUS**

**RASIKBHAI DAHYABHAI & 4 OTHERS ..... DEFENDANT**

**RULING**

The issue that now arises brings into focus the interpretation of Orders 8 Rule 1 and Order 9 rule 1 Civil Procedure Rules. On the face of it the two are contradictory. But first, the brief facts.

On 16. 10. 2002, the plaintiff herein filed a "Reply to Re - amended defence of the Fifth defendant and defence to Counter -claim." That document however came long after the "Re-amended defence and counterclaim of the fifth defendant" had been filed and served on 26. 4. 1999 - more than 3 years earlier! Indeed it was filed when the opening address of the Plaintiffs case was in progress on the first day of the hearing of the suit. It is a fairly old matter filed more than 13 years ago. But the parties have hitherto been bogged down in Interlocutory matters.

The first defence of the fifth Defendant was filed on 08. 08. 1990. It had no counterclaim. There was a reply to it filed on 20. 1. 93. The defence was amended to include a counterclaim on 26. 7. 1993. The amendment to the defence was only a change of Advocates. Then on 26. 4. 1999 there was further amendment of the "Amended defence and Counterclaim." It was a substantial re-amendment of both pleadings. That is the pleading the Plaintiff was responding to more than 3 years later. The document filed is partly intituled "Reply to Re -amended defence" but in truth it ought to be an "Amended Reply" since there is already on record the original Reply to the defence of fifth Defendant. In law amendments go back to the original pleadings. "The defence to counterclaim should also refer to the "Defence to the Re - amended Counterclaim."

That defect in form notwithstanding, the plaintiff admits that the document was filed long after it was due under the Rules and in particular Order 8 Rule 1 as read with Order 8 Rule 17 (3) Civil Procedure Rules. Nevertheless he pleads that he has a right under Order 9 Rule 1 to place the document on record since fifth Defendant has not taken any action to obtain Interlocutory Judgment and there is no final Judgment on record.

The objection raised is that the document has been filed 3 years too late and without leave of Court. It is an invalid document and it ought to be expunged from the record. That is because Order 8 Rule 1 as read with rule 17 (3) requires the filing of the defence to counterclaim at the first service or before the first hearing of the suit or with leave of the court, which has not been sought or granted. It is an invalid document whose service on the 5th defendant was accepted under protest.

The two procedural rules in issue state:-

"ORDER VIII RULE 1 (1)

*The defendant may, and if so required by the court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his defence."*

ORDER IX RULE 1

*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 so entered, at any time before final judgment."*

Order 8 provides specifically for "Defence and counterclaim" while Order 9 provides for "Appearance of Parties." It is rather anomalous therefore to provide for the filing of defences under Order 9. That indeed was not the case until L/N 88/1978 which simply inserted the words "*and file a defence*" after the words "*A defendant may appear*" in Order 9 Rule (1). It was fully restated in its present form by LN 16/84. The rationale, it would appear, was to give a wide latitude to a defendant to be heard on the merits of his defence, whenever filed, where no step has been taken to obtain Judgment in default. The provision carries on the same liberalism in Rule 1(1) of Order 8 which employs the word "MAY" in requiring the filing of a defence. It is the same wording that was employed in the provision of the *Indian code of Civil Procedure* in its identical wording of Order 8 rule 1 before it was amended to employ the word "*Shall*" thus making the filing of a defence in the manner prescribed mandatory. Before the amendment, a defendant had the option to file his defence either at or before the first hearing or within a reasonable time from the date of service of summons unless where the court required him to file it at or before the first hearing or within some time as may be fixed by it. (*see Mulla, 14th Edition Vol. 11 a page 1064*). That in my view would be the same position with Orders 8 Rule 1 (1). A party to a suit is not bound to file a written statement of defence; if he does not do so, he is taken to admit the allegations in the plaint or counterclaim, but he is entitled to appear and submit any argument open to him on the Plaint or counterclaim at the formal proof.

So that, the Plaintiff in this case acknowledges that the "Reply to defence and Defence to counterclaim" was filed out of time. But it was before any judgment was entered. The plaintiff further acknowledges and concedes that he is liable to pay the costs incurred through his delay. I agree with the Plaintiff that there is no requirement for seeking leave of Court where no Judgment, Interlocutory or otherwise, has been entered for the defendant. The 5th defendant has not shown any prejudice that will accrue if the documents are accepted on record. There is already a "*Reply to defence*" and a joinder of issues thereon. The counterclaim is Intertwined with the main suit and it is unlikely therefore that default Judgment would be obtained on the basis of it. And finally the suit was at the stage of its first hearing.

For these reasons I am inclined to allow the documents on record, subject to their amendment as stated earlier, within the next four days. The 5th defendant shall be at liberty to file a "*Reply to the defence to reamended counterclaim*" within 4 days of service of the "*Amended reply to re-amended defence and defence to re-amended counter-claim*" The suit will then be re-listed for hearing.

All costs occasioned by the delay assessed at SHs.10,000/= to be paid to the 5th defendant by the Plaintiff.

Dated this 18th day of October, 2002.

P. N. WAKI  
JUDGE

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18. Waki Hira  
10. for  
2002 J. Plaintiff

Kairania h/b for Nagpah for D1 - D4. Ms Munyasya h/b for Billing for D5. CC: Mulinge  
Ruling delivered, dated and signed in Chambers.

P. N. WAKI  
JUDGE