



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO 2047 OF 2000

MUSINGO..... PLAINTIFF

VERSUS

HABO AGENCIES LTD..... DEFENDANT

RULING

By a chamber summons filed in Court on 26th March, 2001, the plaintiff has applied for the defence filed herein to be struck out and judgment to be entered against the defendant as prayed in the plaint. The application is expressed to be brought under order VIII rule 1 (2) and order VI rule 13 (1) (d) of the Civil Procedure Rules. The application is made on the ground that although the defendant filed a memorandum of appearance and a defence timeously, the defence was not served on the plaintiff within seven days as required by order VIII rule 1 (2). The rule reads:-

“where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the Court, file his defence within fifteen days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the date of filing the defence.”

It is not in dispute that the defence was not served on the plaintiff as required by the rule. Mr Tiego for the plaintiff submits that the rule is mandatory and the Court has no alternative but to strike out such a pleading which, in his view, is incompetent for the reason that it was not served as required. He cited to me cases decided by the Court of Appeal on the application of the Court of Appeal Rules and the Presidential and National Assembly Elections Act, Cap 7 of the Laws of Kenya, for the broad proposition that where an essential document is not served on time as required by the Rules of Court or a statute, the same will be struck out. In the case of *Abdul Aziz Ngoma v Mungai Mathayo & Another* [1977] KLR 61 the East African Court of Appeal struck out an appeal as being incompetent on the ground that the memorandum and record of appeal were not served on the respondents within seven days of filing as required by rule 87.

The said rule provided that “the appellant shall before or within seven days after lodging the memorandum of appeal and the record of appeal serve copies thereof on each respondent”. The Court refused an application for extension of time to validate the service for it was not shown that there was sufficient reason for such extension of time. In *Carter & Sons Ltd v Kenya Finance Corporation & another* [Civil Appeal No 62 of 1993] (unreported), the Court of Appeal struck out an appeal on the ground that the notice of appeal had not been served on a person directly interested in the appeal contrary to the mandatory provisions of rule 76 (1) of the Court of Appeal Rules. The said rule provides in the pertinent part that

“An intended appellant shall, before or within 7 days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.” And in *David Wakairu Murathe v Samuel Kamau Macharia* [Civil Appeal No 171 of 1998] (unreported), the Court struck out an election petition on the ground that the same had not been served on one of the respondents within the period of twenty eight days after the publication of the results of the election in the Gazette as required by section 20 (1) (a) of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya. The said section reads: -

“20 (1) A petition.....

(a) to question the validity of an election shall be presented and served within twenty eight days after the date of publication of the result of the election in the Gazette.”

Mr Tiego submitted that although the above cases were decided on an interpretation of rules and provisions of law different from order VIII rule (2), the principle enunciated in them, namely that a document which required to be served but is not served becomes incompetent is applicable in the matter at hand. He asked me to strike out the defence on record as incompetent and enter judgment for the plaintiff as the claim was a liquidated one.

Mr Keyonzo for the respondent opposed the application. He submitted that the prayer of striking out the defence cannot be granted because the rule violated did not prescribe a penalty for default in serving the defence as required. He also submitted that judgment could not be entered under order VI rule 13 (1) (d) as a defence not served could not be construed to be an abuse of the process of the Court. He further submitted that what had happened in this case did not call for the draconian power of striking out a pleading and entering judgment. He pointed out that there was an explanation for the non service of the defence, namely that the defendant’s advocates who practice in Mombasa had forwarded the memorandum of appearance and defence to a co-respondent firm in Nairobi for filing and service of the same. He further submitted that the defendant’s lawyers were under the impression that the documents had been served until they were faced with the present application. He argued that no prejudice, apart from a short delay, had been suffered by the plaintiff as a result of the omission to serve the defence. He distinguished the cases cited by the plaintiff’s advocate on the ground that they were based on different procedural rules whose interpretation should not be imported into the Civil Procedure Rules.

From those submissions the only issue for decision in this application is whether a defence which is filed in Court but not served on the plaintiff within the prescribed period is to be struck out and judgment entered for the plaintiff.

On consideration of the submissions made I have taken the following view of the matter. There is a clear and non controverted breach of order VIII rule 1 (2) by the defendant. The explanation for the breach, namely, reliance on another advocate, though reasonable is irrelevant in this application. It would have been relevant in an application by the defendant for extension of time within which to serve the defence had the defendant made such an application which is allowed by order XLIX rule 5 of the Civil Procedure Rules. The defendant has not made any such application despite being put on notice by the present application that the defence on record was not served and it risked being struck out.

And whereas it is true that order VIII has not provided any consequence for not serving a defence within the prescribed time and to strike out the pleading is a draconian step, it cannot be the case that the rule can be flouted with impunity. It is, I apprehend, a rule of both procedural and substantive law, that no wrong ought to be without a remedy. Where, as here, no remedy is prescribed the Court should grant such relief as the nature of the wrong would in justice be appropriate. In this regard, I am persuaded that the principle to be gleaned from the appellate decisions relied on by the plaintiff 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. I think that remedy is an appropriate one for non service of the defence herein. The only other consideration is whether I should enter judgment as prayed in the plaint. I am unpersuaded that a defence on record which is not served is an abuse of the process of the Court within the meaning of order VI rule 13 (1) (d). The defence herein is to be struck out

not because it is an abuse of the process of the Court but because there has been default in serving the same within the prescribed time. The same having been expunged from the record, it is in my view up to the plaintiff to take such other or further action as is open to him under our rules of procedure to progress his claim to relief against the defendant.

In the result, the order of this Court is that the defendant's defence herein be and is hereby struck out with costs to the plaintiff.

Dated and delivered at Nairobi this 30th day of May, 2001

A.G. RINGERA

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JUDGE