



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL SUIT NO. 2687 OF 1998

YATIN VINUBHAI KOTAK.....PLAINTIFF

VERSUS

TUCHA ADVENTURES L.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

R U L I N G

On 23rd November, 1999, the Principal Deputy Registrar made orders, inter alia, that the 1st defendant do comply with Order 10 Rule 11A of the Civil Procedure Rules within 14 days and in default the plaintiff “may move the court under O.10 Rule 20”.

The 1st defendant did not comply with the said order and so, on 13th January, 2000 the plaintiff filed an application by way of Notice of Motion for orders that the 1st defendant’s statement of defence be struck out and judgment be entered in favour of the plaintiff. The application was opposed by the 1st defendant and both learned counsel for the parties have made their respective submissions which I have on record.

Before the ruling in respect of the said application was delivered, the first defendant filed an application by way of Notice of Motion under Order 49 Rule 5 of the Civil Procedure Rules for orders that the time fixed for the filing of the first defendant’s list of documents be extended to and include 1st February, 2000 that the list dated 31st January, 2000 and filed by the first defendant herein on 1st February, 2000 be deemed to have been properly filed and the costs of the application be the plaintiff’s in any event. I have gone through the entire record, the law applicable and the cited authorities. I must commend both learned counsel for their very able submissions.

In both applications before me, the court’s discretion is called for. This should be exercised judiciously having in mind all the attendant facts and circumstances. Each case depends on its peculiar circumstances.

One does not have to stretch the English language too far to agree that the order made by the learned Principal Deputy registrar on 23rd November, 1999 is an “unless order”. It should be noted that the adverse consequences were addressed to the 1st defendant. The other positive side was in favour of the plaintiff. What appears to me to have been the thrust of the order is that, unless the first defendant complied, the plaintiff had the liberty to apply. The same order meant that, in the event the 1st defendant defaulted he plaintiff may move the court as provided.

I would therefore agree with the learned counsel for the 1st defendant that, that was an “unless order” and as stated in *Re Jokai Tea Holdings Ltd (1993) 1 ALL E.R. 630*, the relevant question is whether such failure to comply with the “unless” order is intentional and contumacious. The court should not be astute to find excuses for such failure since obedience to peremptory orders of the court is the foundation of its authority, but, if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not to be treated as contumacious and ought not to disentitle him to rights which he would otherwise have enjoyed.

The court file was missing correspondence on record attests to this. The first defendant ought to have applied to reconstruct the record. This should be done only in clear and obvious cases. Looking at the pleadings herein, this is not a case where summary procedure should be invoked. Further, the subject matter herein is land and unless serious prejudice is likely to befall a party, the suit should proceed to full

hearing. I set no prejudice to either party at this stage.

The application to extend time is intertwined with the application to strike out. Indeed, some arguments were canvassed even before the application was filed. So as to meet the ends of justice. I shall allow the application.

And so the orders shall be that, the plaintiffs application filed on 13th January, 2000 is hereby dismissed. The first defendants application filed on 11th February, 2000 is hereby allowed. However the plaintiff shall have the costs of both applications in any event. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of March, 2000

A. MBOGHOLI MSAGHA

JUDGE