

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 125 OF 1999

MAGONJWA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

RULING

The only issue that arises for decision here is whether a defence filed out of time but before judgment is a valid defence or ought to be ignored unless there is an application for leave to accept it on record.

The Attorney General who is the defendant in this matter was served with summons to enter appearance and the plaint dated 6.12.99 on 10.12.99.

The summons to enter appearance gave 10 days upto 20.12.99 to do so. No appearance was filed within that time. Not until 28.4.2000 (although dated 3.2.2000) and long after the plaintiff/applicant had sought interlocutory judgment in his chamber summons dated 14.1.2000. A statement of defence was also filed on the same day. The application for interlocutory judgment was infact set down for hearing on 2.5.2000 and it is clearly as a consequence of that application that the Attorney General was stirred from his slumber to file the appearance and defence. He says however through Senior Litigation Counsel Ms Mbiyu that he was perfectly within the law to do so since there was no judgment on record and order 9 rule 1 of the Civil Procedure Rules allows him to do so. The Rule states:

“A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgement is entered against him, or, if no interlocutory judgement is so entered, at any time before final judgement.”

Learned counsel for the plaintiff Mr Balala vehemently objected to such defence and submitted that it was a nullity. Accepting it on record without leave of court would be condoning the indolence of defendants and prejudicial to plaintiffs who comply with the procedure in prosecuting their cases. It would make non-sense of the provisions in the Civil Procedure under section 95 and order 49 rule 5 which provides for enlargement of time and the time limit stated in order 8 rule 1 & 2 and the summons to enter appearance, he submitted.

The matter of entering appearance and filing defence any time before judgment under order 9 rule 1 is a relatively new amendment to the Rules as it was introduced by LN/16/84. The new provision said nothing about order 8 rules 1 & 2 or the time limits stated in the summons to enter appearance or seeking leave of court to explain the delay.

Admittedly there is an apparent conflict in the legal provisions and I suppose the Rules Committee may have to rationalize them.

My understanding of the amendment is simply that it says; that a defendant is at liberty to appear and file a defence if there is no interlocutory or final judgment on record without seeking leave of court. A defence so filed cannot be ignored or declared a nullity.

That seemed to be the view of the Court of Appeal in *CA 75/98 Central Bank of Kenya v Uhuru Highway*

Development Ltd & others (UR) when it stated obiter in explaining order 50 rule 16 (2) of the Civil Procedure Rules:

“Even assuming the aforesaid rule was applicable, the appellant filed its grounds of opposition and affidavit in reply before the application came for orders. Rule 16(2) does not say, that documents filed out of time must be ignored. The sub-rule does not talk about any time frame. I suppose the Rules Committee purposely omitted the time element so that a document filed out of time (like a written statement of defence which under order 9 rule 1 is acceptable although filed late but before judgment is entered), is acceptable and valid if filed before the application is called for orders.” Underlining is mine.

Of course a defendant who binds his time and files defence after inordinate delay even though before judgment earns the wrath of the Court and must be condemned to pay throwaway costs.

And so it is in this matter. The defence, I find, is properly on record. As it was filed after unreasonable delay despite the difficulties put forward by the Attorney General in obtaining instructions, I order that the Attorney General shall bear all costs throwaway and the costs of the chamber summons dated 14.1.2000 which has now been overtaken by events

Dated and Delivered at Mombasa this 29th day of May 2000.

P.N.WAKI

JUDGE