



REPUBLIC OF KENYA



KENYA LAW
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Kenya Alliance Insurance Company Limited v Wambua (Civil Suit E005 of 2022) [2023] KEHC 17973 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL SUIT E005 OF 2022**

**RK LIMO, J
MAY 23, 2023**

BETWEEN

THE KENYA ALLIANCE INSURANCE COMPANY LIMITED PLAINTIFF

AND

LEWIS KATUNGA WAMBUA DEFENDANT

RULING

1. Before Me, is a Notice of Motion dated April 25, 2023 brought under sections 1A, 1B, 3A of *Civil Procedure Act* and Order 10 Rule 3, and Order 51 of the *Civil Procedure Rules*. The plaintiff applicant is seeking the following Orders namely: -
 - i. Spent
 - ii. That defendant's Memorandum of appearance and defence be struck out for failure of service.
 - iii. That this court be pleased to set down this case for formal proof on priority basis.
 - iv. Costs

2. The application is supported by the affidavit of Shadrack Ruto sworn on April 25, 2023 and the following 7 grounds;
 - i. That the plaintiff filed this declaratory suit against the defendant on October 26, 2022.
 - ii. That the defendant was duly served with the Plaint and Summons to enter appearance on November 9, 2022, on which date the defendant's time to enter appearance and to file a Defence started running.



- iii. That the defendant herein to date is yet to serve the plaintiff with his Memorandum of Appearance and Defence in the suit.
 - iv. That the plaintiff upon a perusal of the judiciary e-filing system, through the public information kiosk, discovered that the defendant on November 14, 2022 and December 7, 2022 filed pleadings which pleadings are yet to be served upon the plaintiff.
 - v. That it is now 5 months since the time the defendant was served with the summons to enter appearance and the Plaintiff herein and the defendant is yet to serve the plaintiff with his Memorandum of Appearance and Defence.
 - vi. That it is in the interest of expeditious disposal of this suit that this honourable court strikes out the filed and unserved Memorandum of Appearance and Defence herein.
 - vii. That the plaintiff is desirous of having the suit heard and determined at the earliest instance as it seeks declaratory orders that affect a multiplicity of other suits emanating from an accident that occurred on 19th Mach 2022, involving the defendant as the registered owner of a motor vehicle registration KCY 467W.
3. In his Supporting affidavit, the deponent has reiterated majority of the grounds adduced in support of this application and avers that the court should set this matter for formal proof and in doing so, should also strike out the Memorandum of Appearance and Statement of Defence filed by the respondent because they were filed but not served upon the applicant.
 4. He contends that the memorandum of appearance was filed on November 14, 2022 but only served on May 9, 2023 when the defence was also served. His position is that the five months' delay was inordinate adding that, the same was filed out of time and served out of time.
 5. He contends that the provisions of Order 7 is couched in mandatory terms and since there was no leave sought to extend time, the same should be struck out.
 6. The respondent opposed this application vide a replying affidavits sworn by Lewis Katunga Wambua on May 16, 2023 in which he deposes that he instructed his Counsel to enter appearance on his behalf in this matter on November 9, 2022 which he believed was done. That he was advised that the applicant's pleadings were incomplete as the applicant had not filed its supporting documents and witness statements. That to-date, the applicant is yet to comply as the aforementioned documents are yet to be filed as such, his memorandum of Appearance as well as defence should not be struck out.
 7. The respondent in other words is conceding that the memorandum, of appearance and defence were both filed out of time and served out of time as well. The only issue raised by the Respondent is that the applicant is also not clean because he did not comply with the rules in respect to filing witness statements and documents and in support of his claim. He contends that, even if his defence was to be struck out, the applicant is stuck because no witness statements were filed.
 8. He contends that this application is a knee-jack reaction by the applicant because there was nothing stopping him for requesting for interlocutory judgement.
 9. He urges this court to find that the issue raised by the applicant is a mere technicality curable under article 159(2) of the Constitution of Kenya 2010. He pleads with this court to invoke the above



article in admitting the memorandum of appearance and defence out of time adding that no one would stand prejudiced in that event.

10. This court has considered this application and the response made. There is no contest that defence was filed and served out of time. The only issue for determination by this court is whether the same should be struck out on that basis.
11. A perusal of the record herein shows the applicant herein filed this suit vide plaint dated October 24, 2022 and filed the same in court on October 26, 2022. The applicant thereafter served the respondent with Summons to Enter Appearance together with the Plaint on November 9, 2022.
12. The respondent proceeded to file a Memorandum of Appearance through Counsel on November 14, 2022 and thereafter, filed a Statement of Defence on December 7, 2022. The matter in issue is that despite filing the pleadings, the respondent failed to serve the same upon the applicant and only did so on May 9, 2023. This has been admitted to in the respondent's replying affidavit.
13. Time of entering appearance is provided for under Order 6 Rule 1 of *Civil Procedure Rules* as follows: -
"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 appearance within the time prescribed in the summons."
14. Filing of the Defence is provided for under Order 7 Rule 1 of the *Civil Procedure Rules* as follows: -
"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 14 days after he has entered an appearance in the suit and serve it on the plaintiff within 14 days from the date of filing the defence and file an affidavit of service."
15. Consequences of non-service of the Memorandum of appearance and defence are set out under Order 10 Rule 3 of the *Civil Procedural Rules* as follows: -
"Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances."
16. The Memorandum of Appearance was filed within prescribed timelines but the statement of Defence was filed out of time within 9 days as the same ought to have been filed 14 days after the Memorandum of Appearance was filed which ought to have been by November 28, 2022. The Defence was filed on December 7, 2022. Which was 9 days out of time.
17. Striking out pleadings because of failure to comply with timelines save for election matters is usually an extreme measure and courts are usually conservative or done in only exceptional circumstances. The defence herein, was filed 9 days out of time and though the same was served late, the big question given the scale and magnitude of the plaintiff's claim is whether the same should be struck out and shut the door of justice against the Respondent.
18. In my view, the delay of 9 days is not that inordinate and though service was done more than four months later the question I have interrogated is what prejudice did the applicant suffer as a result of default? The answer is that it possibly suffered none because had it felt aggrieved, it could have simply requested for interlocutory judgement.
19. Secondly, in its main suit, the applicant is seeking a declaratory prayer that; it is not liable to indemnify the defendant against any claim arising out of an accident which occurred on March 19, 2022 involving motor-vehicle registration No, KCY 467W on the grounds that there was material non-disclosure and



a breach of contract on the part of the respondent in relation to the insurance policy contract between the two parties. The respondent has denied these claims of breach of policy terms and cited that the applicant is estopped from repudiating claims emanating from the said accident as the applicant assumed responsibility by repairing the subject motor vehicle.

20. This court finds that contrary to the respondent's claim, the applicant actually filed witness statement and documents to be relied during trial.
21. The issues before court are contentious and involve many parties. I am not persuaded that striking out the defence will serve the interest of justice. Striking out the defence would have the effect of shutting the door of access to justice and right to be heard both of which are fundamental rights under article 48 and 50 of the Constitution of Kenya.
22. Court as observed above have dealt with issues related to the issues wherein. In Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and others [2013], eKLR the Court of Appeal delve on this issue when it stated;
"Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardship and unfairness."
23. In Wachira Karani v Bildad Wachira (2016) eKLR the court held that;
"The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justitiae, to have any determination which affects him set aside."
24. In the light of the above decisions, this court finds no merit in the application dated April 25, 2023. The same is disallowed but the costs shall go to the successful party in the main suit. I am also inclined to invoke the provisions of article 159(2) (d) of the Constitution of Kenya which I hereby do by treating both the memorandum of appearance and defence as duly filed and served.
25. Doing so, will meet the overriding objectives of section 1A of the Civil Procedure Act. I also in that spirit direct parties to take a mention date after this ruling for pre-trial directions.

DATED, SIGNED AND DELIVERED AT KITUI THIS 23RD DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

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