



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 217 OF 2019

BULENT GULBAHAR.....1ST PLAINTIFF

PARAGON ELECTRONICS LIMITED.....2ND PLAINTIFF

-VERSUS-

FIDELITY SECURITY LIMITED.....1ST DEFENDANT

WALTER OUMA OPIYO.....2ND DEFENDANT

DAVID WEKESA.....3RD DEFENDANT

RULING

1. The plaintiffs herein took out the motion dated 3rd January 2020, whereof they applied for the following orders:

- i. That the defendants' statement of defence dated 21st November, 2019 be struck out and judgment be entered for the plaintiff.**
- ii. That the 3rd defendant's memorandum of appearance dated 1st November, 2019 be struck out.**
- iii. Costs of the application be borne by the defendant.**

2. The plaintiff filed the affidavit sworn by Valentine Ataka in support of the motion.

3. The defendants opposed the application by filing the replying affidavit sworn by Juliani Ochoki. When the motion came up for inter partes hearing, this court with the concurrence of the parties directed that the application be disposed of by written submissions.

4. I have taken into account the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written submissions.

5. The plaintiffs aver that they filed this suit on 8th October 2019 and that they served the plaint and summons to enter appearance upon the defendants on 28th October 2019. The plaintiffs also pointed out that the defendants entered appearance on 6th November 2019 but never filed a defence within the prescribed time but instead filed the same on 25th November 2019 without seeking for leave to do so.

6. The plaintiffs further pointed out that the firm of Emmanuel Wanyonyi & Co. Advocates filed a memorandum of appearance appear for the 3rd defendant out of time on 12th November 2019 therefore should be expunged.

7. The defendants admitted that their statement of defence was filed out of time because their advocate who was handling the matter fell ill from 8/11/2019 and proceeded for sick leave upto 20th November 2019 on the advise of the doctor. The defendants exhibited a medical report through the affidavit of Julian Ochoki. The defendant beseeched this court to find that they have given a plausible explanation for the delay in filing the statement of defence.

8. The defendants also urged this court to enlarge time within which to file the statement of defence and to deem the statement of defence filed out of time as fully filed out of time with leave of court vide their application which remains unopposed.

9. It is the submission of the plaintiffs that the defendants have failed to offer any plausible explanation why they filed their memorandum of appearance and defence out of time and without seeking for leave. They stated that the deponent of the replying affidavit deliberately lied on oath when she deponed that she resumed duty on 20.11.2019 the date the defence was filed.

10. They argued that the law firm of Ombuna & Onger & Co. Advocates must have had more than one advocate therefore it is not reasonable to claim that the matter had to wait for Julian Ochoki to resume duty from sick leave. The plaintiff also submitted that the defendants should have obtained leave prior to filing the statement of defence.

11. I have carefully considered the plaintiffs' assertion that M/s Julian Ochoki the deponent of the replying affidavit lied on oath. It is apparent from the averments that the plaintiffs failed to adduce credible affidavit evidence to controvert the averments of Julian Ochoki. In other words, there was no rebuttal evidence to show that the learned advocate had lied on oath. I am satisfied that the defendants have offered a plausible explanation for their failure to file their defence within the time prescribed by the statute and rules.

12. The plaintiffs have argued that it doesn't matter whether or not they have applied for entry of judgment in default of a defence. I think the critical question here is the prejudice visited upon the plaintiffs by the defendants act of filing a defence out of time without obtaining prior leave from court. It is not in dispute that the plaintiffs had not obtained a default judgment against the defendants at the time of filing a defence.

13. In my humble view, the plaintiffs have not shown the prejudice they have suffered. If this court were to accede to the plaintiffs' application and proceed to strike out the defence already filed, what may follow is that the defendants are likely to seek for leave to file a defence out of time if they succeed, then it will mean that a considerable amount of time will have been lost.

14. It behoves upon courts to apply the overriding objective by making an order that deems the defence filed without leave as duly filed with leave.

15. In the end, I find no merit in the motion dated 3rd January 2020. The same is dismissed with no order as to costs. The defendants' defence is deemed as duly filed with leave of court.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant