



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 853 OF 1999

JULIUS KABUI MWANGI

**TERESIAH NJERI MWANGI (Suing as heirs and legal Representatives of
the estate of MWANGI GICHUKA (DECEASED)).....PLAINTIFFS**

- V E R S U S -

WANGUI GATUNDU & 13 OTHERS.....DEFENDANTS

RULING

1) On 30th July 2018, Mr. C. N. Kihara learned advocate for the legal representative of the Estate of Maina Ngura, deceased, sought to introduce a witness statement and to allow the aforesaid party to testify in support of his defence. Mr. Amuga, learned advocate for the plaintiff raised an objection and urged this court to reject the request.

2) It is the submission of Mr. C. N. Kihara that though the 5th defendant did not file a defence, he has a constitutional right to be heard hence he should not be shut out. The learned advocate cited Articles 10(2), 48 and 50(1) of the Constitution of Kenya to buttress his arguments.

3) It was pointed out that so long as a default judgment has not been entered, a party who has entered appearance and without filing a defence is entitled to testify in defence.

4) The learned advocate cited and relied on the following authorities.

i. Prime Salt Works Ltd vs Kenya Industrial Plastics Ltd (2001)2EA 528

ii. Charles Karuru Mbutu vs- Samuel Muhori, Civil Appeal No. 127/99.

iii. Kotecha & Another vs- Naranda Pau & Another Civil Appeal No. 86 of 2003.

iv. Adolf Gitonga Wakahia & Others -s- Mwangi Thong'o (1986-1989) EA 589.

v. Stephen Bowen vs- Gilbert Muraquri Civil Appeal No. 112 of 1986

vi. Doge vs- Kenya Cannery (1989) KLR 127

vii. Charles Mbembe Oloo vs Kenya Posts & Telecommunications Corporation (1985) KLR 829

viii. Dalop Singh Karan vs- Anderji Odhavji Nathwani (1949) KLR 40.

ix. Kenneth Stanley Njindo Mativa vs- the Hon. Attorney General (1995 – 1998) 1 E.A. 192

x. De Bebeer No. vs- Zameer Khan & Another (Amicus Curiae) CCT 59/2000 South African Court

- 5) What cuts across the above authorities is the inherent right to be heard.
- 6) Mr. C. N. Kihara further argued that a party who has not been served has a right to be heard. He pointed out that the evidence the 5th defendant seeks to introduce is very crucial in that it will show who are or were the original shareholders of the partnership.
- 7) Mr. Amuga learned advocate strenuously opposed the application to allow the 5th defendant testify. It was argued that the 5th defendant agreed to have the proceedings continue in the absence of a defence.
- 8) The plaintiff argued that if the 5th defendant is allowed to testify and or rely on a witness statement(s) that will be detrimental to the plaintiff. It was pointed out that it would amount to an ambush and make the trial unfair. The learned advocate argued that the 5th defendant had failed to convince Mr. Justice Onyancha to grant him leave to file a defence out of time.
- 9) Having considered the rival submissions it is not in dispute that the 5th defendant merely filed an appearance but failed to file a defence within the time allowed by law and procedure.
- 10) It is also not in dispute that the 5th defendant's application for leave to file a defence out of time was dismissed by Mr. Justice Onyancha.
- 11) Thirdly, that the 5th defendant has filed an appeal before the Court of Appeal to impugn the decision of Justice Onyancha and that the aforesaid appeal is still pending.
- 12) It is also apparent that the 5th defendants seeks to introduce or rely on a witness statement after the plaintiffs have closed their case.
- 13) Having considered the material placed before this court together with rival submissions, I have come to the following conclusion in this matter. **First**, that a party who has failed to file a defence in an action which requires the filing of a defence has no right to file a witness statement nor a right to be heard in defence but still retains the right to participate in the cross-examination of witnesses and the right too to file and present final submissions.
- 14) If the 5th defendant's application is allowed it will obviously prejudice the plaintiff's case in that the 5th defendant will have an advantage of redesigning his defence and fill in the gaps having had the benefit of listening to the plaintiffs' witnesses. In other words the plaintiffs will have been ambushed. Such a practice cannot be condoned. In any case the basis of a defence witness statement or evidence is a defence which in this case has not been filed.
- 15) In the end, I find no merit in the 5th defendant's application, the same is dismissed. Consequently, the 5th defendant has no right to file and rely on any witness statement(s) neither is he allowed to testify. Costs of the application to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendants