



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 627 OF 2009

CHRISPINUS CHARLES BARASA.....1ST PLAINTIFF

PASCILISA BARASA.....2ND PLAINTIFF

VERSUS

WENE OWINO.....1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....2ND DEFENDANT

RULING

By a Notice of Motion dated the 16/12/13 the 1st plaintiff/applicant seeks to have the defendants defence struck out and that costs of the application be in the cause. The application is brought under order 7 rule 5 and order 11 rule 3, 1(o) of the Civil Procedure Rule and Section 3A of the Civil Procedure Act. The application is based on one ground that the defendants have failed to comply with the law and filed the list of documents they intend to rely on as ordered by the court.

The application is supported by the affidavit of Chrispinus Charles Barasa the 1st plaintiff. He states that he has been advised by his advocates on record P. C Onduso Advocates that the defendants have not complied with the express provisions of the law. That from the Court record the defendants on the 2/10/13 were ordered to comply with the law and file their list of documents they intended to rely on within 60 days but they have failed to do have hence their application that the defence be struck out.

I have considered what has been deposed. That Court record shows that the defendant was ordered to comply within 60 days and the matter was to be mentioned on the 3/12/13. On the 3/12/13 the plaintiff's counsel attended Court and informed the Court that the defendants were yet to comply.

What are the provisions of orders cited in this application? Order 7 rule 5 provides for the documents to accompany a defence and counter claim. Order 11 rule 3 1 (o) provides that the court may make such orders as may be appropriate including striking out the action of defence. Order 11 deals with pre-trial directions and conference. It elaborates the process of pre-trial in detail. Order 11 (3) provides for the actual case conference. What is provided under Order 11 rule (3) are actions to be taken at the case conference. It is evident from the record that on the 2/10/13 parties appealed before Justice Waweru for pre-trial conference. The defendant was given time within which to comply but they have failed to do so. Should this court strike out their defence? The defendants have shown an interest in defending the suit. It has been held by courts that striking out of a defence can be a drastic action and any such order should be sparingly given. To seek striking out a defence after the matter came up once after the pre-trial conference would in my view be a drastic action.

I do recognise that Order 11 was created for expeditious disposals of cases, but even as a Court considers applications brought under Order 11 it should be careful not to make drastic orders that would affect a party who has shown an interest in resolving the matter. I note that the defendants did not file response to the application however I will not grant the orders sought for the reasons states in this ruling. I also find this application is premature as the parties only appeared in Court once. The plaintiff should endeavour to have another date for pre-trial conference to establish what the defendants list of documents are and set down the suit for hearing thereafter. I therefore decline to grant the order the application is dismissed but costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **7th** day of **March** 2014.

R. E OUGO

JUDGE

In the presence of:

.....**1ST Plaintiff/ Applicant**

.....**2nd Plaintiff/Applicant**

.....**1st Defendant/Respondent**

.....**2nd Defendant/Respondent**

.....**Court Clerk**