



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY COURT**  
**CIVIL SUIT NO 158 OF 2013**

**BERNARD MAINA KAMAU .....PLAINTIFF**

**VERSUS**

**SUNRIPE (1976) LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 24<sup>th</sup> July 2014 and filed on 25<sup>th</sup> July 2013 was brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 (laws of Kenya), Order 10 Rule 11, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all the enabling provisions of the law. It sought the following orders:-

- a. **THAT the Honourable Court be pleased be set aside its ruling which set aside the judgment obtained by the Plaintiff.**
- b. **THAT the Plaintiff be allowed to execute the decree obtained on the 17<sup>th</sup> June 2013.**
- c. **THAT the Defendant's applications and Defence, if any be struck.**
- d. **THAT this Honourable varies its orders made on the 28<sup>th</sup> June 2013.**
- e. **THAT the Court's orders made on 28<sup>th</sup> June 2013 be and are hereby set aside.**
- f. **THAT the costs of this application be provided for.**

2. The said application was premised on the following grounds which were generally:-

- a. **THAT the interlocutory judgment that had been entered against the Defendant was set aside by the court on 28<sup>th</sup> June 2013.**
- b. **THAT the Defendant was ordered by the court to file its Defence by 12<sup>th</sup> June 2013 but it failed to comply, which was a sign that the Defendant did not have a Defence to the Plaintiff's claim.**
- c. **THAT the delays herein were intended to deny the Plaintiff his right to benefit from the fruits of his judgment and were highly prejudicial to him since he had closed his business due to the failure by the Defendant to pay the Plaintiff's goods.**

**AFFIDAVIT EVIDENCE AND GROUNDS OF OPPOSITION**

3. The Plaintiff's application was supported by the affidavit of Wangira Okoba sworn on 24<sup>th</sup> July 2013. The said deponent did not state the capacity in which he was swearing the said affidavit but

going by the name of the firm representing the Plaintiff herein, he appeared to have been an advocate representing the Plaintiff.

4. He stated that he perused the court file on 19<sup>th</sup> July 2013 and found that the Defendant had not filed its Defence as had been ordered by the court. It was his averment that it was apparent from the Defendant's behaviour that it did not respect the court hence its lacklustre manner of dealing with court orders.
5. He requested that the court reviews its ruling of 28<sup>th</sup> June 2013 and set aside the interim orders to allow the Plaintiff execute the decree against the Defendant granted on 17<sup>th</sup> June 2013. He averred that the Defendant was holding the Plaintiff in abeyance longer than was necessary which continued to highly prejudice the Plaintiff and consequently, it was in the interest of justice and equity that his application be allowed.
6. On 10<sup>th</sup> October 2013, the Defendant filed Grounds of Opposition dated 8<sup>th</sup> October 2013 in response to the Plaintiff's present application. The same were as follows:-
  - a. **THAT the Notice of Motion was irredeemably defective and the prayers could not be granted as the same had been overtaken by events since the Defendant had complied before the hearing of the suit and the application herein.**
  - b. **THAT the Notice of Motion as filed was incompetent and an abuse of the court process and brought under the wrong provisions of the law.**
  - c. **THAT the application had not met the conditions for setting aside a consent order and/or ruling.**
  - d. **THAT the Defendant had obtained orders to stay the execution of the default judgment that was now sought in the application and that there was no judgment on record the same having been set aside unconditionally.**
  - e. **THAT the Notice of Motion lacked merit as no evidence had been adduced and/or annexed to the application and the Defendant had complied within the reasonable time and further that the delay was not inordinate.**
  - f. **THAT the Defendant would crave to rely on Section (sic) 159 of the Constitution of Kenya, 2010.**

#### **LEGAL SUBMISSIONS BY THE PLAINTIFF**

7. In his written submissions dated 18<sup>th</sup> December 2013 and filed on 19<sup>th</sup> December 2013, Plaintiff set out the chronology of events from the time he filed the suit herein until 28<sup>th</sup> June 2013 when the following orders were recorded by consent of the parties and which he stated, were the conditions that were to be met by the Defendant:-
  - a. **THAT the Defendant would file and serve its Defence upon the Plaintiff by 12<sup>th</sup> June 2013.**
  - b. **THAT the Defendant would pay the Plaintiff thrown away costs in the sum of Kshs 20,000/=.**
8. He pointed out that the Defendant obeyed the second arm of the order but failed to obey the first arm which in his view was the most important one. It was his contention that the Defendant had taken an inordinately long period leading him to file the application herein.
9. He identified the following issues as those for determination by the court:-
  - a. **Were rules of procedure there to be followed at the convenience of a party even when couched in mandatory language as in the words of Order 7 Rule 1?**
  - b. **Whether when a court had ordered a litigant to undertake a certain activity within a particular period and time, the litigant had the liberty to extend such time and period?**
  - c. **If the party in a suit affected or aggrieved by continued delays by the opposing party had the option to move the court so as to enforce his rights?**
  - d. **Did the court have powers to set aside its own orders which were made to the convenience of a particular party if the favoured party failed to meet the conditions attendant to the favourable orders?**

10. It was his submission that the orders issued by the court were time-bound and accommodative to the Defendant. He argued that the Defendant failed to comply with the court's order of 28<sup>th</sup> June 2013 and that he decided to extend time without seeking leave of the court to do so. He contended that he had approached the court for assistance to recover what was rightly his as litigants could approach the courts of law when they sought to enforce certain rights or to ameliorate suffering occasioned by the actions of the opposing party. He argued that the reasons relied upon by the Defendant were not tenable or convincing and ought to be ignored.
11. He referred the court to the cases of **Peter Kamau Ikigu vs Barclays Bank of Kenya Limited [2008] eKLR** where Kimaru J held that the failure by the defendant therein to file a Defence within the period that was extended by the court sealed his fate and that of **Kenya Road Transporters Limited vs Kinyoro Gichuki [2007] eKLR** where Mutungi J (as he then was) observed that there had been no record showing that the appellant therein applied for the extension of the court's orders after he discovered that the orders could not be complied with.
12. He also placed reliance on other cases which he listed in his written submissions but did not espouse their relevance to the proceedings before this court. This court has time and again held that it is the duty advocates and litigants to demonstrate the nexus between the case law they rely upon and the matter for determination. It is not for the court to fish around to establish what exactly such a party's case is. The court is a neutral arbiter and should never enter the arena of the dispute. In the circumstances thereof, the court will not consider the said authorities in this ruling.

### **LEGAL SUBMISSIONS BY THE DEFENDANT**

13. The Defendant's written submissions dated 30<sup>th</sup> January 2014 were filed on 31<sup>st</sup> January 2014. It denied that it had breached any rule in law pursuant to the consent order that it recorded with the Plaintiff or that the Plaintiff had suffered prejudice when it filed its Defence when it did. It pointed out that the court had discretion to decide whether to set aside a consent order when it had complied with the conditions and paid the court filing fees.
14. It argued that the court had a duty to look at the underlying principles of striking out its Defence and Counter-claim and the prejudice that would be occasioned to the Plaintiff. It was its contention that the technical rules of procedure should not override the provisions of Article 159 (d) (sic) of the Constitution of Kenya, 2010 and urged the court to find that the suit herein should be heard on merit as pleadings had closed. It reiterated the grounds of opposition and urged the court to dismiss the application herein.

### **LEGAL ANALYSIS**

15. The court deemed it necessary to look at the history of this matter to establish whether or not the failure by the Defendant prejudiced the Plaintiff or breached any rules of law.
16. On 28<sup>th</sup> June 2013, the court issued the following orders by consent of the parties:-
  - a. **The interlocutory judgment entered in favour of the Plaintiff against the Defendant be set aside;**
  - b. **The Defendant file and serve its Defence by 12<sup>th</sup> July 2013;**
  - c. **The Plaintiff be at liberty to file and serve his Reply to Defence by 26<sup>th</sup> July 2013.**
  - d. **The Defendant pays the Plaintiff thrown away costs in the sum of Kshs 20,000/= by 5<sup>th</sup> July 2013.**
17. When the matter came up for hearing on 5<sup>th</sup> December 2013, Mr Wangira, advocate for the Plaintiff informed the court that he had been served with the Defendant's witness statements and documents but not the Defence as had been ordered by the court. Having indulged Mr Arum advocate as he was unwell, the court then issued directions on the service of written submissions in respect of the application herein. However, while the Plaintiff filed his written submissions on 19<sup>th</sup> December 2013 as had been directed by the court, the Defendant failed to file and serve its written submissions by 20<sup>th</sup> January 2014 as had been directed.
18. Subsequently, when the matter came up in court on 27<sup>th</sup> January 2014, Mr Arum told the court

that their computer crashed and all the documents in the computer deleted. The court gave the Defendant further leave to file and serve its written submissions by 30<sup>th</sup> January 2014 which it did.

19. On 5<sup>th</sup> December 2013 that Mr Arum was not in court for the reason that he was indisposed while on 24<sup>th</sup> February 2014, the court was informed that he had another matter at the Industrial Court. The court was told that the two (2) dates had been taken *ex parte*. However, Mr Wangira pointed out that they had invited the Defendant's advocates to fix the two (2) dates for the hearing of the application herein but the Defendant's advocates did not attend the registry to fix the same.
20. It is also apparent that the Defendant and its counsel did not adhere to the court's directions on two (2) occasions. These were the directions regarding the filing of its Defence and its written submissions which were to be done by 12<sup>th</sup> July 2013 and 20<sup>th</sup> January 2014 respectively. Instead, it filed its Defence and Counter-Claim on 23<sup>rd</sup> July 2013 and filed its written submissions on 31<sup>st</sup> January 2014 after the court extended time to it to do so.
21. Complying with court orders is an issue that should be taken with the seriousness that it deserves. Indeed, Section 1A (3) of the Civil Procedure Act Cap 21 (laws of Kenya) provides that:-

**“A party to civil proceedings or an advocate for such party is under a duty (emphasis court) to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.”**

22. It is therefore evident from Section 1A (3) of the Civil Procedure Act that the counsel for the Defendant was enjoined to adhere to the orders and directions that had given by the court. The said orders and directions are given by the court, not for the sake of it but rather to maintain order. Failure to adhere to court orders or its directions is not a procedural or technicality that a party would hope to cure by invoking the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010. There are consequences for failing to adhere to the said orders and directions unless an extension of time, within which to comply with the court orders or directions, has been granted.
23. The court therefore finds itself in agreement with the holdings in the cases of **Peter Kamau Ikigu vs Barclays Bank of Kenya Limited** (Supra) and **Kenya Road Transporters Limited vs Kinyoro Gichuki** (Supra) where failure to seek extension of time was considered. The fate of the Defendant's Statement of Defence filed on 23<sup>rd</sup> July 2013 was sealed and ought to be struck out or expunged from the court record. The question of whether the Plaintiff had suffered prejudice as a result of the Defendant's failure to file its Defence within the time frame that had been given by the court was therefore irrelevant.
24. Be that as it may, the cases cited by the Plaintiff herein to buttress his argument regarding adherence of time lines were delivered before the amendment of the Civil Procedure Act in 2009. Affordable resolution of disputes is now a principle that has been embedded in the said Civil Procedure Act and ought to be considered before a court can strike out pleadings.
25. Notably, Section 1A (1) of the Civil Procedure Act mandates the court to facilitate the just, expeditious, proportionate and affordable resolution (emphasis court) of the civil disputes governed by the Act.
26. Section 1B (d) of the Civil Procedure Act further provides as follows:-

**“For purposes of furthering the overriding objective under Section 1A of the Civil Procedure Act, the Court shall handle all matters presented for the purpose of attaining the following aims:-**

**d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable (emphasis court) by the respective parties...”**

27. The court has found it necessary to consider the issue of affordability of resolution of the dispute herein in view of the fact that the Defendant paid court fees of Kshs 70,075/= at the time it filed its Statement of Defence on 23<sup>rd</sup> July 2013. It is not clear how this amount was assessed as the Defendant's Counter-claim had sought the following reliefs:-

- a. **General damages**
- b. **Special damages**
- c. **Costs of this suit**
- d. **Interest on (a) and (b) above at court rates**
- e. **Any other relief that this court may deem fit and proper to grant.**

28. The Plaintiff's claim was ascertainable from the Plaintiff. His payment of the court filing fees in the sum of Kshs 70,450/= was therefore quite in order. While the Counter-claim is deemed to be a separate suit for which full court fees are payable, the quantum to be awarded to the Defendant was not known at the time it filed its Statement of Defence and Counter-claim. The practise of the court is that the court fees in the sum of Kshs 70,075/= that the Defendant paid on 23<sup>rd</sup> July 2013 would have been payable if the sums awarded to it at the conclusion of the case amounted to Kshs 1,000,000/= and above.
29. The payment of the court filing fees in the sum of Kshs 70,075/= was not a small amount. Weighing the affordability of the Defendant's prosecution of its case, because it would be required to pay fresh court filing if its Statement of Defence and Counter-claim was struck out, against its failure to adhere to the strict timelines that had been issued by the court as regards the filing of its Defence, the court would be hesitant to strike out the Defendant's Statement of Defence and Counter-claim.
30. At any given time, the main aim is to sustain rather than to terminate a suit. Striking out a suit is a draconian step which must be used as a last resort. An act of striking out of pleadings by the court should therefore be exercised cautiously and with a lot of restraint. This was a conclusion that was arrived at in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) had the following to say:-

**“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”**

31. Having carefully considered the pleadings herein, the affidavit evidence and the written submissions and the case law in support of the parties' respective cases, the court was not persuaded that the Defendant's Statement of Defence and Counter-claim should be struck out. The Defendant filed a Counter-claim and ought to be afforded an opportunity to present its case for determination by this court.
32. The court will not set aside the consent order it recorded on 28<sup>th</sup> June 2013 as the Plaintiff did not give sufficient reasons why the same should be set aside. Consent orders can only be set aside where there has been sufficient reasons such as fraud, mistake or misrepresentation which was not the case herein.
33. Evidently, Order 10 Rule 11 of the Civil Procedure Rules would also not be one that could assist the Plaintiff herein as interlocutory judgment had since been set aside and was no longer in existence. The provision is ordinarily invoked by the party against whom interlocutory judgment is entered and not the party in whose favour the said judgment had been entered. Order 50 Rule 6 of the Civil Procedure Rules, 2010 relied upon by the Plaintiff was also irrelevant for purposes of his application as he was not seeking enlargement of time to do a particular act out of time. In view of the overriding objectives cited hereinabove and irrelevance of provisions of the law the Plaintiff relied upon in support of his application, the court is not persuaded that it should grant the orders that he had sought herein.
34. The above notwithstanding, as has been stated hereinabove, parties should not be allowed to disobey orders and directions issued by the court. Orders and directions issued by the court must be adhered to without fail. If that were not so, this would be a recipe for chaos and promote a culture of impunity and non-adherence to law and order.
35. There must therefore be a penalty for failing to comply with court orders and/or directions. It is for that reason that the court will order that the Defendant pays the Plaintiff additional thrown away costs. The Plaintiff has been clearly prejudiced by the delays that have been occasioned by the Defendant on previous occasions when it failed to comply with the time lines given by the court, which prejudice the court has found can be adequately be compensated by an award for costs.

## **DISPOSITION**

36. Accordingly, the upshot of this court's ruling is that:-

- a. **The Plaintiff's Notice of Motion application dated 24<sup>th</sup> July 2013 and filed on 25<sup>th</sup> July 2013 was not merited and in the circumstances, the same is hereby dismissed. There will, however, be no order as to costs as the Defendant had initially failed to adhere to the court's directions.**
- b. **The Defendant shall pay the Plaintiff thrown away costs in the sum of Kshs 5,000/= within fourteen (14) days from the date of this ruling.**
- c. **In the event the Defendant shall fail to comply with order 36 (b) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**
- d. **The court hereby grants leave to the Plaintiff to file and serve its Reply to Defence and Defence to Counter-claim within fourteen (14) days from the date of this ruling.**
- e. **The Defendant is hereby directed to file its Reply to Defence to Counter-claim, if need be, within fourteen (14) days of service of the Plaintiff's Reply to Defence and Defence to Counter-claim.**

37. It is so ordered.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of July 2014**

**J. KAMAU**

**JUDGE**