



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 339 OF 2011

JAMES JUMA MUCHEMI & PARTNERS LIMITED PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA..... 1ST DEFENDANT

TUSKER MATTRESSES LIMITED 2ND DEFENDANT

R U L I N G

This is a ruling on an objection by the 2nd Defendant to the Plaintiff's Notice of Motion dated 19th June, 2012 for Summary Judgment. The application was filed on the same day and is brought under Order 36 Rules 1(1) and 8(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Mr. Ciuri, learned Counsel for the 2nd Defendant submitted that the objection was based on the fact that the proviso to Order 36 rule 1(1) of the Civil procedure Rules 2010 explicitly states that an application for summary judgment can only be brought where a Defendant has appeared and not filed a Defence. In this case, the 2nd Defendant has filed and served an Amended Statement of Defence and Counterclaim dated 1/2/12 with leave of this court, that the Plaintiff did file and serve an Amended Reply to the 2nd Defendant's Amended Defence and Defence to Counterclaim dated 16/2/2012, that the provisions of Order 36 are plain and unambiguous, that the proviso presupposes that there should be no defence for the application to be brought. That under the circumstances, the Amended Defence and Counterclaim already insitu provide a bar to the Plaintiff's Motion. In the circumstances Counsel submitted that the application is bad in law and should be dismissed by applying Order 36 Rule 8 (2).

Mr. Munyu, learned Counsel for the 1st Defendant was in support of Ground 1 of the 2nd Defendant's Grounds of Opposition. He associated himself with Mr. Ciuri's submissions and urged that the application should be struck out with costs.

Ms Mithamo, learned Counsel for the Plaintiff was of the view that the application as brought was competent. She submitted that notwithstanding the proviso to order 36 Rule 1 (i), still the court can look at the Defence to see if it raises any triable issue, that in the instance case, by virtue of the lease between the Plaintiff and the 2nd Defendant, there cannot be any defence to the Plaintiff's claim. She concluded

that in the interests of justice, the proviso should be overlooked and the application be considered on merit. She urged that the Preliminary Objection be dismissed.

I have considered the rival arguments of Counsel. The suit in this case was filed in or about August, 2011. The 2nd Defendant filed a statement of Defence and Counterclaim on 19th September, 2011. The said pleading was amended on 6th February, 2012 and filed accordingly. As already stated, the motion dated 19th June, 2012 seeks summary judgment to be entered against the 2nd Defendant under Order 36 Rule 1(1) of the Civil Procedure Rules. The proviso to that sub rule provides:-

“.....where the Defendant has appeared but not filed a defence, the Plaintiff may apply for judgment for the amount claimed, or part thereof and interest or for recovery of the land and rent or mesne profits.” (Emphasis supplied).

It is clear that the sub rule provides that the application is to be made where a defendant has appeared **“but not filed a defence.”** this particular provision as read together with Rules 2 and 4 of Order 36, shows that the intention of the drafters of that Order was that no application may be made for Summary Judgment after a defence has been filed. The mischief sought to be addressed is quite clear, that a Plaintiff who has a genuine and bona fide claim against a defendant does not have to wait until he sees the defence filed by the Defendant to decide that the Defendant has no defence to his claim. Under the new Rules, the proviso to Order 36 Rule 1 (1) is very clear unlike the previous rule which did not have the words **“... but not filed a defence...”**. This means that the drafters of the Civil Procedure Rules 2010 intended to completely bar applications under Order 36 being brought after the defence has been filed. In my view, the intention of the drafters was that if a party wanted to apply for Judgment after a defence has been filed, such a party is now left to use the other provisions of our Rules that allow summary Procedures i.e. either Order 2 Rule 15 or Order 13.

I do not agree with Ms Mithamo that the proviso can be overlooked. Doing so would be causing injustice by disobeying an express provision of the law which courts are called upon to guard and protect jealously.

Accordingly, I uphold the objection and strike out the application with costs to the 2nd Defendant. Although Mr. Munyu attended and supported the objection I will not order costs to his client because no document in response to the motion had been filed by the 1st Defendant and further, that that application was only directed as against the 2nd Defendant only. The costs awarded to the 2nd defendant are to await the trial or earlier determination of the suit as the case may be.

It is so ordered.

DATED and Delivered at Nairobi this 6th day of July, 2012.

.....
A. MABEYA
JUDGE