



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 382 OF 1978**

**RICHARD H PAGE & ASSOCIATES LTD.....PLAINTIFF**

**VERSUS**

**ASHOK KUMAR KAPOOR.....DEFENDANT**

**JUDGMENT**

On 8th December 1978, the plaintiff, who had earlier filed a suit against the defendant, applied for summary judgment against the defendant as prayed in the plaint. The application was brought by way of notice of motion, supported by an affidavit sworn by Richard Hugh Page, as required by order XXXV, rule 2, of the Civil Procedure Rules.

When the notice of motion came up for hearing Mr YP Vohra, acting for the defendant, raised a legal preliminary objection. He argued that the defence was the last pleading to be filed and that was done on 16th May 1978. There was no reply to the defence. In the circumstances the pleadings closed fourteen days after service of the defence, as provided under order VI, rule 11, of the Civil Procedure Rules; and there having been no reply to the defence there was a joinder of issue by virtue of order VI, rule 10. The plaintiff, having joined issue with the defendant, cannot turn round and apply for summary judgment for “joining issue” (impliedly or expressly) means that the plaintiff admits that there are triable issues; and where there are triable issues there can be no summary judgment. He submitted that, where the pleadings have closed, the door for applying for summary judgment under order XXXV too is closed and the plaintiff cannot make such an application.

For the plaintiff Mr Fraser argued that the only condition precedent to the filing of an application for summary judgment is that the defendant must have appeared; otherwise there is no limitation as to when an application under order XXXV may be made. He submitted that a joinder of issue is no more than denial of the matter raised in the defence and non-filing of a reply to a defence is in no way a bar to applying for summary judgment. An application for summary judgment may be made even after the pleadings are deemed to have closed under order VI, rule 11. He relied on the English authority, *McLardy v Slateum* (1890) 24 QBD 504 and also referred to the English *Supreme Court Practice* 1976, Volume 1, orders 18 and 14. These two English Orders are substantially similar to our orders VI and XXXV, respectively.

It was pointed out by Mr Vohra that a point similar to the one he had raised has never been taken in East Africa. This explains the lack of local authority on the point. Order VI, rules 10 and 11 provide as follows:

10(1) If there is no reply to a defence, there is a joinder of issue on that defence ... (4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is

excepted from the joinder and is stated to be admitted in which case the express joinder of issue operates as a denial of every other allegation.

11. The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.

The English order 18, rule 14, is word-for-word similar to our order VI, rule 10, so I need not reproduce the English legislation.

*Stroud's Judicial Dictionary* (4th Edn) Volume 3, page 1438, defines “joinder of issue” as follows:

“Joinder of issue” is where the two parties to a litigation (whether civil or criminal) have agreed to rest the fate of the case upon the truth of the fact in question (3 Bl Com 315)

The position is further clarified in the *Supreme Court Practice* 1976 (*loc cit*), that if no reply is served in answer to a defence, the allegations of fact in the defence are deemed to be denied as a joinder of issue operates as a series of denials in the preceding pleading, except in respect of any allegation which is expressly admitted.

Where there is a joinder of issue on a defence the plaintiff denies the allegation and/or issues raised in the defence which, in effect, is the same as saying that there are no issues, or there is no defence. In my opinion, a joinder of issue does not operate as an admission that there are triable issues raised in the defence; if anything, it is a denial that there are triable issues raised by the defence.

The basis for an application for summary judgment under order XXXV rule I, is that the defendant has no defence to the plaintiff's claim and the purpose of order XXXV is, as I stated, in *Keshavji Jivraj Dodhia v JA Yantal Pethraj Gudka* (unreported) using the words of Sir Charles Newbold P in *Zola v Ralli Bros Ltd* [1969] EA 691,694, to enable a plaintiff with a liquidated claim, to which there is dearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant.

The English order 14, rule I, is more precise than our order XXXV, rule I.

The Kenyan order XXXV merely provides:

1(1) In all suits where a plaintiff seeks judgment for - (a) a debt or liquidated demand ... where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof ...

The order does not state on what ground the application is made, which the English counterpart does. This is what the English legislation says:

1(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ ... apply to the court for judgment against that defendant. [*emphasis supplied*]

In both countries it is a preliminary requirement that the defendant must have appeared. This is so, because if the defendant has not entered an appearance there is no need to go for summary judgment but the plaintiff may apply for judgment in default of appearance.

Although the Kenyan order XXXV does not say that the application for summary judgment is on the ground that the defendant has no defence this is what the law envisages and intends for, in the proforma affidavit (Form 3A, Appendix A) the plaintiff is required to state that he verily believes that “there is no defence to the suit”.

Order IXA, rule 3, which provides that “where the plaintiff makes a liquidated demand .... and the defendant fails to appear ... the Court shall enter judgment against the defendant,” applies, with necessary modification where a defendant fails to file a defence (see order IXA, rule 9). Thus, where a defendant has failed to file a defence the plaintiff is entitled to judgment against the defendant in default of filing a defence; and there would be no need to go for summary judgment.

This, in my view, means that the law having expressly required that before a plaintiff can go for summary judgment the defendant must have entered an appearance, there can be no importation of a requirement that such application must be before the pleadings have closed or before the defence or the reply to the defence has been filed. I recognised this reasoning when I said in *Bhundia Properties Ltd v East African Airways Corporation* (unreported) that:

if the defendant has filed a written statement of defence the Court may, in its discretion, look at it and see if it discloses an arguable case for the defendant which raises *prima facie* triable issues.

(See also *Mugambi v Gatururu* [1967] EA 196, 197). I am aware that in both the *Bhundia Properties* and the *Mugambi* cases it is not stated whether the pleadings had, or had not, closed and there was a joinder of issue, which has the effect of denying that the defendant has an arguable defence at all, and the closing of pleadings which leaves the plaintiff with the conviction either that the defendant has a defence to the suit and so there cannot be an application under order XXXV for summary judgment or that the defendant has no defence to the suit and so an application for summary judgment is likely to succeed, can operate as a bar to an application for summary judgment. Indeed, the purpose of summary judgment order is to enable a plaintiff quickly to realise what is his, so the application should be made immediately the condition precedent is fulfilled, ie appearance has been entered, and any delay in making the application must be explained .

Order VI, rule 11, provides that pleadings are deemed to close fourteen days from the date of service of the defence, if there has been no reply to the defence within that time. It does not matter whether the defence is filed on the same day that the appearance is entered; yet, unless the Court has otherwise ordered, a defendant has fifteen days from the date of entering appearance, within which to file his defence. If it were that no application under order XXXV could be entertained after the close of pleadings, then many a time a defendant would close the door to a plaintiff by filing a defence together with the memorandum of appearance where there is no need to reply to the defence. This practice could defeat the mischief which order XXXV was intended to cure. Of course, where the plaintiff has unnecessarily delayed making the application under order XXXV whether or not the pleadings have closed and whether or not there is joinder of issue he ought not to be allowed to benefit by summary procedure unless he can explain the delay. In my view, the ordinary time for making an application for summary judgment order XXXV is after the defendant has appeared and when the defence has not been filed; but such an application may be made after the ordinary time and the defence has been filed, in which case the plaintiff must satisfy the Court that the delay is justifiable. This is what was held in the English case *McLardy v Slateum* (1890) 24 QB 504 where the application for summary judgment was made after the delivery of the defence. Pollock B said (at page 506):

Although the primary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under order XIV, rule 1, because a defence has been delivered.

I adopt the same language, and would say that although the primary intention of order XXXV, rule 1, may be that an application for summary judgment under that order should be made before a defendant has filed his defence in the ordinary course, that is not in all cases compulsory and in my judgment upon the preliminary point of law raised the practice is that a plaintiff is not necessarily barred from making an application under order XXXV, rule 1, for summary judgment because a defence has been filed or the pleadings have closed and/or there is a joinder of issue, unless the joinder of issue expressly admits that there is a triable issue in the suit. With respect, I agree with Mr Fraser that once appearance has been

entered there is no time limit as to when an application under order XXXV may be filed; but any delay must be justified.

Another point I should explain is that Mr Fraser had filed a further affidavit explaining the delay and I refused to look at this affidavit for two reasons. Firstly, Mr Fraser had not obtained leave of the court to file a further affidavit (see my ruling in *Kiran Kumar Ranmal Shah v Waweru* (unreported) where I agree with the judgment of Chanan Singh J in *Abdul Aziz Suleman v South British Insurance Co Ltd* [1965] EA 66 that the law envisages only one affidavit by each party and leave must be sought to file a further affidavit). Secondly, the reasons for delay are required during the hearing of the main application and not at this stage since delay was not raised as a preliminary objection.

For the reasons I have given above the legal preliminary objection by the defendant is overruled.

*Order accordingly.*

**Dated and delivered at Nairobi this 19th day of July 1979.**

**Z.R CHESONI**

**JUDGE**