



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 128 OF 1971

MACHARIA.....PLAINTIFF

VERSUS

WANYOIKE.....RESPONDENT

JUDGMENT

This is an application by way of motion under Order VI, rules 17 and 29 of the Civil Procedure (Revised) Rules, seeking the striking out of the pleading on behalf of three of eight defendants and the entering of judgment against them in accordance with the provisions of the latter rule. On January 27, 1971 the plaintiff-applicant filed a plaint in which he claimed the sum of Kshs 71,944.95 from eight defendants as joint contractors in an agreement with him under which agreement he advanced various sums of money to their joint and several use and/or benefit. He alleged that the defendants, contrary to the agreement, failed or refused to sell to him a parcel of land in discharge of a substantial portion of the amount of money he now claims and that they have also failed or refused to refund the Kshs 71,944.95 the total amount of monies he advanced to them. Counsel for the respondent in the instant application and who informed the Court that he is representing defendants Nos 1, 2, 4, 5 and 6 in the suit, filed a defence to the plaint on the March 11, 1971. Later, ie on September 8, 1971 he filed the document to which objection is now being taken. The nature of the document being of much importance, I reproduce its most relevant portion, viz

“Take notice that the defendants Nos 2, 4 and 6 served herein with the plaint on the 13th day of August, 1971, and who have appeared in this action on the 23rd day of August, 1971 hereby adopt the defence dated March 11, 1971 and filed by Messrs Khanna & Company also in the action, and further pleads as follows

8. The defendants will rely upon Section 3(2) of the Law of Contract Act (Cap 23)”

It was conceded, and rightly so, that this document is intended to be a pleading ie “a defence by reference”, and indeed it would have been difficult to contend to the contrary by virtue of the phrases “adopt the defence dated March 11, 1971” and “and further plead” contained therein.

The rules under which the application is brought provide as follows:

17. The court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action ...

29. The court may upon application, order any pleading to be struck out on the ground that it

discloses no reasonable cause of action or answer and, in any such case, or in case of the suit or defence being shown by the pleadings to be frivolous or vexatious, may order the suit to be stayed or dismissed or judgment to be entered accordingly as may be just.

Counsel for the respondents contended that the filed defence by reference constitutes no irregularity and submitted in the main that it should be shown on behalf of the plaintiff that some ingredient of the above mentioned rules on which the plaintiff relies has been disregarded; and with regard to rule 17 the motion was incompetent in that it does not set out the particular portion of the pleading objected to by the plaintiff; and that with respect to the filed defence of March 11, 1971 to which the present "defence" points, it cannot be said that it is, or contains matters, frivolous or vexatious. He further contended that there is no rule which prohibits the defendants putting in a common defence, or compelling them to repeat the seven paragraphs of the defence of the March 11, 1971. If I may say so, with respect to the main submission, counsel for the respondents appears to have misunderstood the true nature of the objection, or is assuming that the filed defence of the March 11, 1971 is already or effectively before the court as an approved pleading to the benefit of the respondents. As I see it the plaintiff is complaining against the nature and purport of the present "pleading by reference", the potential tow-line being cast from the tug to ship or wharf. It is the document of September 8, 1971 *per se* against which objection is being made and with which the court is particularly concerned, and in this behalf I think it is correct to address my mind to the all embracing provisions of the relevant portion of the cardinal rule 1 of Order VI, ie

Subject to the provisions of rules 27 and 28 of this order, every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for claim or defence as the case may be.

It appears to me that the mandatory terms of this portion of the rule in relation to the contents of "every pleading" are the correct media by which the questioned pleading should be assessed. It also appears to me, with respect, that the contention that there is no rule compelling the party pleading to repeat paragraphs of a pleading he intends to adopt must also fail as a matter of interpretation of the portion of rule 1 above. I am firmly of the view that the stating of facts is the primary dictate of the rule and since it is also permitted to raise points of law in a pleading, the proviso relating to rules 27 and 28 was incorporated in verbiage of the cardinal rule itself and not elsewhere, so as to eliminate instances of doubt, on the principle, *Expressio unius personae vel rei, est exclusio alterius*. That a pleading by way of the proposed short-cut method may or may not be an out of place is perhaps a worthwhile proposition for the rules making body on grounds of expedience or as a timesaving device; but experience has repeatedly shown that shortcuts invariably result in being more expensive and time-absorbing in the end. It may be specifically urged that in relation to the precaution against delay envisaged by rule 17, a short-cut accepted or applied to expedite but not delay; but a short-cut in breach of a fundamental rule creating or occasioning remedial action as in the circumstances under consideration cannot escape the stigma of 'delay'.

The court must construe the rules as they happen to be and I fail to see or agree that the proposed defence of the respondents as pleaded, is in accordance with the existing rule 1, and find that in the circumstances it manifests a tendency if not an already accomplished reality likely to delay the fair trial of the action. The proposed pleading is accordingly struck out. The court, however, considers that its discretion will not be justly exercised to enter judgment against the respondents as prayed, having regard to all the circumstances.

The motion succeeds in part mentioned with the costs of the application to the plaintiff.

1. Leave to appeal granted
2. Leave to file new defence within 14 days and to reply within 10 days thereafter

Dated and Delivered at Nairobi this 28th day of December 1971.

C.H.E.MILLER

JUDGE