



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 110 OF 2016

ISAIAH SIMIYU MABONGA.....PLAINTIFF

VERSUS

VICTORINA NANYAMA MABONGA..... DEFENDANT

RULING

1. This is a ruling on the application dated **23rd July, 2018**. That application has been brought by the plaintiff seeking orders that the statement of defence dated **3rd May, 2018** and filed in court on **7th May, 2018** be struck out and that interlocutory judgment be entered in favour of the plaintiff and the case be set down for formal proof. He also prays for costs be provided for.

2. The grounds on which the said application is made are that the defence was filed but not served; that no notice of appointment was filed and served as required and that the defence is filed in abuse of the court process and intended to delay the finalization of this matter.

3. The application is supported by the affidavit of the applicant sworn on **23/7/2018**. That affidavit reiterates the same matters set out in the grounds above.

4. In his opposition to the application, the defendant filed grounds of opposition dated **25/10/2018**. He stated that the instant application was brought after great delay; that the applicant occasioned the delay; that the parties are related by blood; that the application is premised on a procedural provision of the law and not a substantive provision; that **Article 159(2)(d)** should apply to have the application dismissed; that striking out would cause greater injustice than the full hearing on the merits and that the balance of convenience tilts in favour of the defendant.

5. The plaint in this suit was filed on **18/7/2016**. A memorandum of appearance was date stamped at the court registry on **31/8/2016**. (The official fees receipt shows payment to have been made on **30/8/2016**.) A request for judgment was filed on **21/10/2016**. An application for re-issuance of summons was made on **19th January, 2018**. A fresh memorandum of appearance was filed by C.K Yano Advocates on **27/4/2018**. Later C.K Yano Advocates filed a defence on behalf of the defendant on **7/5/2018**. That action was followed by the filing of the instant application on **24/7/2018**.

6. The plaintiff filed his submissions on **15/2/2019** but I have perused through the record and found no submissions filed on behalf of the defendant.

7. The application is premised on the provisions of **Section 1A** and **1B** of the **Civil Procedure Act Order 2 Rule 15(i) (d)** and **Order 10 Rule (3) of the Civil Procedure Rules**.

8. **Order 7 Rules 1** and **2** of the **Civil Procedure Rules** provides as follows:

“1. Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

9. It is clear that the defence in respect of this suit was filed within **14 days** of filing of the appearance but it was not served hence the instant application. No application was made to extend time within which to serve the defence.

10. It appears that the defendant agrees that service never occurred but avers that the application is premised on a procedural legal provision rather than a substantive one. It can not be gainsaid that procedural rules are the handmaidens of justice and that in any case the parties require to comply with the rules to facilitate the expeditious disposal of litigation in court. It would not do for any person to ignore rules which are made to facilitate hearings. Without rules a party may not know when to act or react and that may result in disorder in the justice system.

11. In **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR Kiage, JA** observed as follows:

“I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

12. Though **Article 159(2)(d)** *per se* can not aid a manifestly indolent litigant, I must consider here that the defendant had hired an advocate who is still on the record as appearing for him and he may not have had a direct hand in the decision as to when or where to serve process.

13. It is the submission of the plaintiff that this court should be persuaded by the case decision of **Daniel Wambua Ndabi Vs Peter Luka Ndutu Milimani Commercial Courts Civil Case Number 56 of 2004** and grant the application as prayed.

14. However that decision was made in the year **2004** before the **Constitution of Kenya 2010** was enacted. If this court were to try this matter in a manner that was to be considered fair under the auspices of the spirit of **Article 50** and **Article 159** of the Constitution of Kenya, it demands that, even if at a cost, the defendant be allowed to defend this matter as there is already a defence on the record.

15. I consider that regardless of any situation that may arise in litigation a court of law must at least look out for circumstances which may favour the hearing of a suit on the merits rather than have a pleading struck out on technicalities.

16. In times of yore the exercise of power to strike out a pleading under the old **Order 6 rule 13** of the **Civil Procedure Rules** on the basis of want of disclosure of a reasonable cause of action or defence was exercised very sparingly by the courts. In the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR** the court stated as follows:

“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

17. The above passage is from a decision in a case where the suit was sought to be dismissed on the basis that it did not disclose a cause of action and that it was an abuse of the court process. In other words in that application the court had to consider the merits of the entire suit in determining the application.

18. The instant application urges this court to strike out the defence to the suit on a technicality. No issue of the merits of that defence are addressed in the instant application.

19. I have examined that defence. It denies the claim and raises the defence of limitation which of course would have to go for trial to determine its merit. However, the only question that arises is if this court would, on the basis that the defence was not served within the proper period want to bar the defendant from defending this suit.

20. In my view, though there is vested power in this court to strike out pleadings in certain instances, and I have no doubt that this is one of them, this court should be more anxious to administer substantive justice to parties who come before it than strike out a pleading on a technicality even when the application for striking out is merited.

21. In determining this application, I have considered that costs can be a panacea for the length of delay occasioned by a litigant's indolence as long as in the eyes of the court there is still possibility of doing substantive justice between the parties.

22. In the instant case the hearing of the suit has not commenced and I find that if the matter went to hearing on the basis of the pleadings on the record the parties and particularly the plaintiff may not be prejudiced save by the delay. Justice may still be done.

23. In my view the ultimate penalty that the defendant should be compelled to meet is payment of some punitive costs for the delay in serving the defence. In saying this I am alive to the fact that the parties herein are said to be father and son.

24. I decline to strike out the defence as prayed. The application dated **23rd July 2018** is dismissed. However that dismissal is on condition that the defendant pays to the plaintiff the costs of that application assessed by this court at **Kshs. 6000/=** within **14 days** of this order and also serves his filed defence upon the plaintiff within **14 days** if he desires to defend this suit failure to which the defence will stand struck out.

25. I further order that this matter be transferred to the Chief Magistrate's court Kitale for hearing and final determination as that court has jurisdiction over the subject matter. The file shall be placed before the Chief Magistrate by the Deputy Registrar within two weeks with notice to the parties for his directions.

Dated, signed and delivered at Kitale on this 25th day of February, 2019.

MWANGI NJOROGI

JUDGE

25/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Wanyonyi for plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

25/2/2019