



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT KISUMU

ELC. NO. 150 OF 2012

NYANDO MILLERS LIMITED.....PLAINTIFF

-VERSUS-

SBI INTERNATIONAL HOLDINGS AGENCY.....DEFENDANT

RULING

1. The defendant seeks vide the Motion dated 3rd October, 2018, for the orders of 2nd October, 2018 allowing the application dated the 5th September, 2018 to be set aside with all consequential orders, and a Third Party notice be issued to one Leah Musimbi to be enjoined as a Defendant and costs. The application is based on the fourteen (14) grounds on its face and supported by the affidavit of Pinchas Lewestein, Operations Manager of the Defendant, sworn on the 3rd October, 2018.
2. The application is opposed by the plaintiff through their six (6) grounds of opposition dated 5th December, 2018.
3. The learned counsel for the defendant and the plaintiff filed the written submissions dated the 11th April, 2019 and 2nd July, 2019 respectively.
4. The following are the issues for the court's determination;
 - a. Whether the defendant has established reasonable cause for the orders of 2nd October, 2018 to be set aside.
 - b. Whether the Defendant has established that the joinder of Leah Musimbi as a Defendant, would help the court resolve the issues herein with exhaustively and with finality.
 - c. Who pays the costs of the application.
5. The court has after considering the grounds on the Motion, grounds of opposition, affidavit evidence, the record and submissions come to the following findings;
 - a. That the record shows and confirms that the defendant's motion dated 3rd August, 2016 seeking for Judgement entered in default of defence on the 18th December, 2015 be set aside among others, was heard and allowed through the ruling of 21st June, 2017. That among others, the defendant was allowed to file and serve their statement of defence within 30 days from that date, the 21st June, 2017. That the 30 days were lapsing on or about 21st July, 2017 and by that date no statement of defence had been filed. That come the 27th July, 2017, the learned counsel for the defendant filed the statement of defence of the same date. That statement of defence was filed about six (6) days outside the 30 days period given in the ruling of 21st June, 2017 and without applying for and or obtaining extension of time. The said statement of defence was therefore irregularly filed and placed on the record.
 - b. That the record of the court does not have any evidence of notice to show cause why the suit should not be dismissed for want of prosecution under **Order 17 Rule 2** of Civil Procedure Rules having been issued at any time, and or having been fixed for hearing for the 3rd September, 2018 as alleged by the defendant. That after the ruling of 21st June, 2017 on the defendant's application, the next proceedings were of 6th September, 2018 when one Bernard for Omay & Company advocates for the plaintiff, fixed their Motion dated the 5th September, 2018 for hearing on the 2nd October, 2018. That the proceedings of the 2nd October, 2018 confirms that both sides were represented, and after hearing both counsel and confirming that the motion had been served upon the defendant's counsel on the 13th September, 2018 and that no replying papers in opposition had been filed, the court took the motion as unopposed and granted it with costs. That is the order the defendant seeks to set aside.

c. That the defendant claim that the striking out of their statement of defence that allegedly raised triable issues denied them their right to be heard, is to say the least without basis. That for the statement of defence to be capable of raising triable issues to the plaintiff's claim, it must be regularly and legally on record. That the defendant's statement of defence dated and filed on the 27th July, 2017 pursuant to the court's ruling of the 21st June, 2017 was filed outside the time stipulated in the said ruling, and without extension of time and hence was irregularly on record. That by the time the said statement of defence was struck out on the 2nd October, 2018 pursuant to the Motion dated the 5th September, 2018 the defendant had not taken any steps to regularize the filing of the statement of defence, and cannot now turn round and claim the court has denied them their right to be heard. That where a party has been given timelines by the law or the court to do a certain act or process in the proceedings in which they are a party and fail to do so within the time prescribed, or to seek enlargement of time, such a party cannot cry foul as it has only itself to blame.

d. That the defendant explanation that it had not filed a reply to the plaintiff motion dated the 5th September, 2018 was because its Managing Director was out of the office do not appear convincing to the court. That the defendant is represented by counsel who could have filed and served grounds of opposition before the hearing date. That the instant motion is supported by an affidavit sworn by the Operations Manager, and not the Managing Director and the court wonders why the same Operations Manager could not have deponed the affidavit in respect of the plaintiff's application.

e. That the defendant has not shown how Leah Musimbi, whom they seek for Third Party notice to be issued to, and to be enjoined as a defendant, is related to the claim by the plaintiff. That the said Leah Musimbi has not herself moved the court to be enjoined or allowed to defend the plaintiff's claim, and there is no evidence that she has even been served with a notice to that effect. That the court therefore finds that the defendant has failed to show that the said Leah Musimbi is a necessary party for any of the issues between the parties herein to be decided exhaustively and with finality.

f. That as the defendant has not succeeded in any of their prayers, and as costs follow the events under **Section 27** of the Civil Procedure Act, they will pay the costs of the application to the plaintiff.

6. That the foregoing shows that the defendant's motion dated 3rd December, 2018 is without merit and is dismissed with costs.

Order accordingly.

S. M. KIBUNJA

ENVIRONMENT & LAND - JUDGE

DATED AND DELIVERED THIS 5TH DAY OF SEPTEMBER, 2019.

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE