



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC NO. 20 OF 2006

PRISCILLA JERUTO KISOSOPLAINTIFF

VERSUS

KIPOROT OLE TOTONA alias SINGO ARAP

TOTONA1ST DEFENDANT

TUNGO TOTONA2ND DEFENDANT

LEDEMA TOTONA3RD DEFENDANT

RONALD TOTONA4TH DEFENDANT

RULING No.2 (of 21st MARCH 2016)

1. This matter is slated for hearing today. Earlier in the day, Mr Karanja, learned counsel for the plaintiff applied for the striking out of 3 defendants in the counterclaim filed by the 1st defendant in the original suit. The reasons for the application was that it was over 4 years since the counterclaim was filed and the same has not been served on the persons named as the 2nd - 4th defendants in the counterclaim. I allowed the application and struck out the said persons and directed that the matter do proceed with the original plaintiff as the only defendant in the counterclaim .

2. After delivery of my ruling, Mr Arusei, learned counsel for the defendant, applied for the striking out of the reply to defence and defence to counterclaim for the reason that the same have never been served. He relied on Order 2 Rule 13. He also sought that judgment be entered in accordance with the counterclaim. Mr Arusei also applied to have 2 of the plaintiff's witnesses disqualified from testifying as their witness statements have never been served.

3. He submitted that the sword of justice cuts both ways and if the court has decided that the persons in the counterclaim be struck off for want of service, then the defence to counterclaim and the witness statements which have not been served, must face the same treatment. He submitted that the court is faced with an illegality and has no discretion in the matter. He relied on the case of *Kenya Transport Association Vs. Municipal Council of Mombasa, Mombasa High Court Constitutional Petition No.6 of 2011*. He further relied on a dictum mentioned in the said case, of Lord Denning, in the case of *Benjamin Leonard MacFaoy – Vs - United Africa Ltd (1962) AC 152*. The good judge stated as follows: -

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so...”

4. On the other hand, Mr. Karanja conceded that service of the two documents in issue had not been effected. He however submitted that the parties addressed the matters in the defence to counterclaim by joining issues. He submitted that the issues agreed to be for trial are encompassed in that Defence to Counterclaim and no prejudice will be caused if the same is served today.

5. On service of the witness statements, Mr Karanja submitted that the same were filed but inadvertently served upon the law firm of M/s Gordon Ogolla & Co. Advocates and not Mr. Arusei. He submitted that the plaintiff should be allowed to call her witnesses for the sake of justice. He stated that these witnesses have earlier testified and no prejudice will be caused to the defendant. He applied that the documents be admitted out of time.

6. He submitted that the issues herein are separated from the issue of the striking out of the parties in the counterclaim . He submitted that the question at hand is not one of an illegality but an irregularity.

7. In reply, Mr. Arusei submitted inter alia that it cannot be said that there was an oversight of service since 2013. He denied that the issues were joined and submitted that parties filed separate issues. He further submitted that none of the 2 witnesses has earlier testified.

8. I have considered the matter . What I am being asked to do is to order the striking out of the Reply to Defence and Defence to Counterclaim and 2 witness statements filed by the plaintiff and which were not served.

9. First, let me deal with the submissions that since I struck out 3 parties from the counterclaim for want of service, then I must automatically strike out the two documents for want of service. It was argued by Mr Arusei that the sword of justice cuts both ways. That may be so, but that does not mean that a court’s hands are tied and that it must apply the “*an eye for an eye*” maxim. Simply because the court has denied an application made by one party to the suit, does not mean that to be fair and equal, then any application made by the other party must also be denied. That to me is skewed reasoning. A court must assess every application on its own merits, not on the basis of whether or not it denied the other party an order in an earlier application.

10. Let me give an analogy of a football match to drive the point home. If player A is tackled by player B and the referee denies a penalty, because of course it thought that that was not a tackle worthy of a penalty , does it mean that if player B is ruthlessly tackled by player A in player A’s penalty box, then because player A was denied the earlier penalty appeal, player B must be denied the penalty?

11. It is the same case here. The fact that I struck off some persons as defendants to the 1st defendant’s counterclaim does not mean that I must then strike out every unserved pleading or document filed by the plaintiff. I need and must consider every application on its own merits.

12. Neither do I think that the lack of service of a filed document is an “illegality”. An illegality is defined in the ***Concise Oxford English Dictionary , 11th edition***, as something “*contrary to or forbidden by law*” .

13. The Civil Procedure Rules prescribe when pleadings and documents may be served, but it does not say that it is “illegal” or “forbidden” to serve such documents thereafter. A party is at liberty to apply for service out of time and such application must be considered on reasons given. It is not a case of “illegality” and the court has discretion.

14. In our case, Mr Karanja has cited inadvertence. Mistakes will continue being made as we are all human. In the case of the Reply to Defence and Defence to Counterclaim, I note that the same was filed

on 29th November 2011. There is inordinate time lapse for not serving it in time. But I do not see what prejudice the defendant stands to suffer if I am to admit it. The plaintiff in any event has a claim which addresses more or less the same issues raised in the Defence to counterclaim. One could as well argue that there is a

“*joinder of issues*”, which is not to be confused with “*agreed issues*”, which is what the parties believe are subject to be determined in the trial.

15. On the question of failure to serve the witness statements. I note that the drafting of the same show that they were to be served upon the law firm of M/s Gordon Ogolla & Co. Advocates. Mr Karanja submitted that they did serve the said law firm.

16. I think this is a case of a pure mistake. There may have been confusion as the said firm was in these proceedings at some point. I do not see the justice in denying a party opportunity to table his/her witness because the counsel in drawing and in service of the documents presented the wrong firm of advocates. This may be compensated by an order of costs and by an order allowing the other party leeway and time to assess whether or not they need to call an additional witness or rely on additional documents in light of the now disclosed witnesses. The trial is yet to commence. I think it is immaterial whether or not they had earlier testified for the case is starting de novo. (for the record, the 2 witnesses had not earlier testified).

17. From my above discourse, I do admit the Reply to Defence and Defence to Counterclaim filed on 29 November 2011 out of time. I also admit the witness statements and direct that the same be served forthwith. The defendants are at liberty to file any additional witness statement and /or documents in light of the above, within 30 days. Today’s costs will in any event be shouldered by the plaintiff.

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st day of March, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Mr Lawrence Karanja present for plaintiff

Mr Arusei present for defendant

Court Assistant : Janet

MUNYAO SILA

JUDGE

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