



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 32 of 2008

BAKARI ALI OGADA & 245 OTHERS APPELLANTS

AND

UNILEVER KENYA LTD RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Milimani

Commercial Court, Nairobi (Azangalala, J dated 18th October, 2007

in

H. C.C.C. NO. 10 OF 2007

JUDGMENT OF THE COURT

By an application dated 18th May, 2007 filed by the appellants in the superior court, the appellants sought that the two defences filed by the respondent, dated 19th February, 2007 and 7th March, 2007, be struck out and judgment be entered for the appellants. Essentially, the grounds relied upon by the appellants were that the **Civil Procedure Act and Rules** do not allow the filing of two defences in one matter; that doing so is an abuse of the process; that, in any event, the first defence was not served within the required seven days as per **Order 6 rule 1 (2)** of the Civil Procedure Rules and that the defences are scandalous, frivolous or vexatious and may embarrass or delay the fair trial of the case.

The superior court (Azangalala, J) declined to issue the orders sought. Aggrieved by that decision, the appellants preferred this appeal citing 21 needlessly long and repetitive grounds of appeal. The main thrust of those grounds is that the superior court was wrong in granting a prayer that was not sought, i.e. striking out one defence, while upholding as valid the earlier defence; that the filing of the two defences was an abuse of the court process and both ought to have been struck out; that the first defence had not been served within the mandatory seven days as required by **Order 6 rule 1 (2)** of the **Civil Procedure Rules**; that having struck out the defence dated 7th March, 2007 the superior court lacked jurisdiction to deem the original defence as valid; that it was wrong to force the respondent to adopt the defence of 19th February, 2007; and that the superior court was wrong in not awarding costs to the appellants.

Elaborating further on the above grounds, Mr O. P. Ngoge, learned counsel for the appellants, argued that the learned judge of the superior court ought to have entered judgment for the appellants instead of validating a defence disowned by the respondent. He relied on the following cases to support his argument that a prayer not sought by a party cannot be granted by the court: ***Wareham t/a Af Wareham & 2 Others vs Kenya Post Office Savings Bank (2004) 2 KLR 91, Council of Human Ecology vs Captain Mutinda – Civil Appeal No. 204 of 1998 (UR)*** and ***Narshidas & Company Ltd vs Nyali Air Conditioning & Refrigeration Services Ltd – Civil Appeal No. 205 of 1995 (UR)***.

Mrs E. W. Opiyo, learned counsel for the respondent, submitted that the respondent had indeed not filed two defences; that the second defence was in fact a reply to the amended plaint; that in striking out the second defence, the subordinate court simply relied on **Order 6 rule 1 (2)** of the **Civil Procedure Rules** which stipulates that where a party does amend its pleading in response to the other party's amendment, that party will be taken to rely on its pleading in

answer to the amended pleading. Finally, relying on the case of *Trust Bank Ltd vs Amalo Co. Ltd (2003) I EA 350*, Mrs Opiyo argued that the respondent was entitled to be heard on its defence on merit.

We would agree with that statement. We are of the view that as far as is possible the courts should encourage the resolution of disputes by hearing both sides on merit, without undue regard to technicalities. The courts should not easily strike out pleadings, unless there is a good reason to do so. We reiterate the principle outlined by this court in *Trust Bank Ltd vs Amalo (supra)* as follows:

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges CJ (Tanzania) in the case of Essanji and another vs Solanki (1968) EA at 224.

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right”.

That accords with the policy of the law as can be gleaned from order IX, rule 1 of Civil Procedure rules whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

The learned judge of the superior court was clearly right in holding that the first defence dated 19th February, 2007 was valid even though an unsigned copy of that defence had been served on the appellants. It is not disputed that the defence filed in court had indeed been signed, and that only the copy served on the appellant was unsigned. We concur with the superior court’s finding that that fact alone did not cause any prejudice to the appellant and that there was no reason to strike the same out.

With regard to the appellants’ complaint that the learned judge was “partial in forcing the defendant/respondent to adopt the defence filed on 19th February, 2007...”, we need only say that the respondent is certainly not complaining about that point! And finally, with regard to the appellants’ submission that the costs of the application should have been awarded to them, we would simply say that costs are a discretionary matter. We have no reason to believe that that discretion was wrongly exercised.

Accordingly, and for the reasons stated, we find that this appeal has no merit, and dismiss the same with no order as to costs.

Dated and delivered at Nairobi this 5th day of June, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR