



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 268 OF 2015

BEATRICE WANJIRU KAMURI.....PLAINTIFF

VERSUS

JOHN KIBIRA MUIRURI.....DEFENDANT

RULING

*(Suit by plaintiff claiming certain land; no defence filed by defendant within time; plaintiff applying for interlocutory judgment; being a land claim, no interlocutory judgment entered; plaintiff fixing matter for hearing and serving defendant 8 months to the hearing date; 10 days to hearing date, defendant filing a defence; plaintiff applying that the defence be struck out; argument by defendant that defence could be filed at any time before hearing; provisions of Civil Procedure Act provide for defence to be filed within 14 days of the Memorandum of Appearance; fact that no interlocutory judgment may be entered not an excuse to file defence late; defence allowed out of time for the reason that it is critical for defendant also to be heard; defendant however penalized through payment of costs or else defence to be struck out)*

1. This suit was commenced by way of plaint filed on 1 October 2015. The claim of the plaintiff is that in the year 2011, she purchased a plot measuring 50 X 100 feet from the defendant, which plot was to be excised from the larger land parcel Nakuru Municipality Block 22/3805 (Muguga). Her complaint is that what was excised, which was registered as land parcel Nakuru Municipality Block 22/3990 (Muguga), ended up being of a smaller size, 43 X 88 feet, and not the size they had agreed. In this suit, she wants complete performance of their agreement and an extra portion of land from the defendant to fill up the size of what was registered in her name. Together with the plaint, the plaintiff filed an application inter alia seeking orders that the defendant be compelled to transfer to her a plot measuring 50 X 100 feet. That application came before me ex-parte in the first instance on 5 October 2015 but I was not convinced as to its urgency and I directed the plaintiff to serve and take a date in the registry.

2. Summons to enter appearance together with the pleadings and application were duly served and on 3 November 2015, the defendant entered appearance through the law firm of M/s Njeri Njagua & Company Advocates. No defence was however filed and no reply was made to the application by the plaintiff. On 1 December 2015, the plaintiff filed a request for judgment in default of defence. However, since the case was not one in respect of general damages or a liquidated claim, judgment in default was not entered. On 15 February 2015, counsels for the plaintiff, M/s Elizabeth Wangari & Company Advocates, applied for a hearing date for the suit given that no defence had been filed. On the same day, Mrs. Mukira, of the

said firm of advocates, appeared before me and requested me to give a date since the case was undefended. I gave the date of 10 October 2016 for hearing and directed that the defendant's counsel be served with a hearing notice. The hearing notice was then served shortly thereafter on 17 February 2016.

3. On 10 October 2016, the scheduled date for the hearing of the suit, Mrs. Mukira informed me that the defendant had on 29 September 2016 filed a defence and a replying affidavit both of which were served upon her on 30 September 2016. She received the same under protest as the same were filed without leave. She submitted that the court never extended the time for filing of these documents. She applied that the same be struck out and the case to proceed as an undefended cause.

4. Ms. Wanjiku Wamae for the defendant submitted on her part that there is no requirement for leave to file defence out of time since no judgment has been entered in the matter. She relied on the case of **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Salim Primary School & Another vs Francis Bahati Diwani & 2 Others, Malindi ELC Case No. 28 of 2012**. She submitted that there is no prejudice that will be caused to the plaintiff if the defence is deemed duly filed.

5. I have considered the matter. The claim herein is not a liquidated claim or a claim for general damages. If it were a liquidated claim, and no defence is filed, Order 10 Rule 4 would apply. The same provides as follows :-

#### **4. Judgment upon a liquidated demand [Order 10, rule 4.]**

*(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.*

*(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.*

6. If it were a claim for general damages Order 10 Rule 6 would apply and interlocutory judgment could be entered. The said provision is drawn as follows :-

#### **6. Interlocutory judgment [Order 10, rule 6.]**

*Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.*

7. It will be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory judgment, and as I have mentioned earlier, that was the reason why no interlocutory judgment was entered for the plaintiff when she applied for the same but instead, the plaintiff was granted a hearing date with the stipulation that she serves notice of the same upon the defendant. Notice was indeed served in good time about 8 months to the hearing date.

8. The question that arises here is whether, for the reason that there is no stipulation for entry of interlocutory judgment, the defendant is free to file his/her defence at any time before the matter is heard. That was the view of counsel for the defendant and it will be recalled that she sought reliance on the case of **Sir Ali Primary School** (supra). In that case, the plaintiff applied to have the defence of the defendants struck off on the argument that it offended the provisions of Order 7 Rule 1, which requires a defendant to file defence within 14 days of entry of appearance. Angote J, after analyzing the rules, was of opinion that there is no specific rule dealing with unliquidated claims, particularly matters relating to recovery of land, thus giving room to a defendant to file defence before the matter proceeds for hearing. He was of the view that filing a late defence is an irregularity which except in very clear cases may be cured. He thought that striking out the pleading would be an extreme measure, unless the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of court. The court declined to strike out the defence.

9. I do not think the learned judge in the above case, sanctioned or encouraged, any late filing of defence or other documents. Indeed, for the good administration of justice and case management, it is incumbent upon parties to file their documents within the time prescribed by the rules. The time for filing defence is prescribed in Order 7 Rule 1 which provides as follows :-

***Defence (Order 7, rule 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.*

10. In our case, appearance was filed on 3 November 2015. The defence therefore needed to be filed latest on 17 November 2015. There is no rule that says that where the case does not qualify for entry of interlocutory judgment, then a defence can be filed at any time, at the pleasure of the defendant. Order 7 Rule 1 still applies, and such defence needs to be filed within 14 days of filing the Memorandum of Appearance.

11. I on my part, have little sympathy for persons who deliberately file their documents late. If such party does not file his documents within time, he needs to give reasons as to why his documents need to be admitted, or else there is a risk that the same may be struck out. I agree, that striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the court process and attempting to steal a march on the other party. But that does not mean that parties ought to take for granted what is prescribed in the rules. I do not think that a party who cannot give good reason why he/she has filed his/her documents late ought to go scot-free as if there has been no breach of rules. There ought to be sanctions, in the form of fines or costs meted out upon such party, or else litigants will have no incentive to file their documents within the prescribed period. There is a purpose why the rules prescribe for various time frames within which to file and serve documents and these time frames ought to be given the utmost respect. Simply because a matter does not invite the entry of interlocutory judgment is not a licence to any litigant to file his defence outside the time prescribed by Order 7 Rule 1.

12. In our case, I have not been given any reason as to why no defence was filed within the prescribed period. Ms. Wamae in her submissions did not bother to give any reasons why the defendant thought it fit to file his defence late. She instead appeared to me to be attempting to argue that the late filing of the documents was justified. I am sorry to say that there was absolutely no justification. In fact it does seem to me as if the defendant was deliberately waiting to file his defence at the eleventh hour so as to delay the plaintiff from proceeding. How else would one explain the fact that the defendant did not file any

defence for close to one year since filing the memorandum of appearance. Why didn't the defendant file defence shortly after being served with the hearing notice in the month of February " I think he knew that if he files his defence just before the hearing date, the matter would be adjourned because then there would be need to have a pre-trial conference according to the Civil Procedure Rules of 2010. Courts should not have much leniency to such litigants.

13. That said, I do have serious respect to the right of every person to be heard. I will therefore admit the defence filed by the defendant though filed out of time. But as I have mentioned before, such a person needs to be sanctioned, to discourage other parties from flouting the prescribed time frames. It is clear to me that the plaintiff in this matter has been inconvenienced. She was made to believe that the defendant was not going to file a defence and took a hearing date trusting that her case would proceed as an undefended cause. It cannot be said that she has not suffered prejudice. She clearly has, since her case will now be delayed. To be fair to her, the defendant must pay her some costs as a condition for his defence being allowed out of time. I will in my discretion admit the defence out of time, but subject to the condition that the defendant pays to the plaintiff throw away costs of Kshs. 20,000/= within 14 days. If these costs are not paid within the time prescribed, then the defence will stand struck out and the plaintiff's suit will proceed as an undefended cause.

14. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 18th day of October 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

No appearance on part of M/s Elizabeth Wangari & Co. for plaintiff

N/A on part of M/s Njeri Njagua & Co. for defendant

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**



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