



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 237 OF 2001

LUCY N. MOMANYI T/A L. N. MOMANYI & COMPANY ADVOCATE.....PLAINTIFF

VERSUS

GEORGE WALTER SHULTZ.....DEFENDANT

Coram:

Mwera J.

Adhoch for Plaintiff

Aziz for Defendant

Court Clerk Furaha

RULING

The plaintiff/advocate filed a chamber summons dated 15th December, 2010 under the old Order IXA rule 10, Order XXI rule 22 of the Civil Procedure Rules and sections 1A, 3A, 63 (e) of the Civil Procedure Act for orders:

i. that there be a stay of execution and setting aside of the ex-parte proceedings of 1st September, 2010, the judgment and decree of 26th November, 2010 together with all consequential orders; and

ii. that the plaintiff be granted leave to prosecute the suit and defend the counter-claim.

In fourteen grounds the applicant contended that she was the defendant in the counter-claim. According to her the defendant did not file a valid counter-claim. He filed an application for leave to do that but that application has never been prosecuted. Yet the defendant took an ex-parte hearing date, prosecuted the “*counter-claim*”, ex-parte and obtained judgment against the plaintiff. That the plaintiff had filed a reply to the defence and defence to the counter-claim which was in error served on M/S Gikandi & Company Advocates, formerly acting for the defendant rather than the current M/S Fadhil & Kilonzo Advocates. Thus the plaintiff had not defaulted in filing a defence to the counter-claim. At this juncture it is not clear to the court if the defendant did not prosecute the application for leave to file a counter-claim, while the plaintiff was filing a defence to the same. But be that as it may.

The grounds continued that the defendant did not notify the plaintiff that he had obtained an interlocutory judgment until one was served on her. She has not prosecuted her plaint and she should be given time to defend the counter-claim. This application had been filed without delay. It was added in the grounds that the defendant was a foreigner, with no known assets in Kenya against which to execute. He should not be allowed to execute the decree of the counter-claim. And that the plaintiff was willing to issue any undertaking ordered.

A long supporting affidavit sworn by the plaintiff was filed going over the history of the dispute between the two; applications that were filed some with orders made and others still pending, plus the course travelled from Ibrahim J., Ojwang J. and the deputy registrar who ended up granting disputed interlocutory judgment sought to be set aside and why the same should be set aside either because the application for leave to file a counter-claim was never prosecuted or that the plaintiff filed a defence to it raising triable issues.

The defendant swore a replying affidavit, contesting each averment in the supporting affidavit. It was stated that the plaintiff filed a reply to defence and defence to counter-claim on 27th July, 2010 seven (7) years out of time from 11th November, 2003 when the court granted such proceeding with a condition. By 29th July, 2010, the defendant had his request for judgment on the counter-claim endorsed on 15th July, 2010. The matter then proceeded to formal proof. According to the defendant, the presence of the plaintiff was not necessary. Not quite so. Where a party has appeared but not filed a defence, he/she ought to be notified of formal proof proceedings. The replying affidavit was equally long. Both sides submitted, each holding onto its position.

The court took time to peruse the file, noted what proceedings went on, on what date and what orders were made including consents about payment of money held in an account. The record shows that at some stage the plaintiff got a decree of Shs. 1,457,526 against the defendant. The defendant has counter-claimed for about Shs. 3.5 million and he got judgment and decree, too, for that. And it is not clear why or whether the plaintiff explained why, as claimed by the defendant, she filed her reply to defence and defence to the counter-claim on 27th July, 2010 – 7 years out of time without the court's leave. Or why the defendant did not notify the plaintiff of the formal proof proceedings on the counter-claim.

Having all the foregoing in mind, this court is minded to order and it orders that the prayers in the present application be and are hereby granted. The plaintiff to file a suitable bank guarantee for Shs. 3.5 million in court in the next thirty (30) days or deposit in court cash Shs. 2 million. At least by that the defendant who thought that he was close to enjoying the fruits of litigating his counter-claim will not be disappointed. After all the plaintiff has told the court that she will put forth/abide by any court order regarding undertaking. The parties then have those thirty (30) days to prepare this old case for hearing

by filing/serving witness statements, bundles of paginated documents plus issues. This course will definitely see to the disposal of this matter on the merits and thus justice will be done. Besides, each side to ensure that all its pleadings – the plaint, defence and counter-claim, reply to defence and defence to counter-claim are on the file. The costs of this application go to the defendant.

Delivered on 2nd October, 2012.

J. W. MWERA

JUDGE



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