

ARISING FROM CIVIL SUIT RUK No. 0125 of 2009

- a. That the joint statement of defence is omnibus, barred by law and it is taken that that each defendant did not file a defence to the suit as directed in the summons to file a defence.
- b. That the joint statement of defence is frivolous and vexatious and it should be struck out with costs
- c. That no fees were paid on filing the written statement of defence, that as such it is a nullity in law.
- d. That the entire joint statement of defence contains mere denials which do not offer any defence at all.

The trial Magistrate dismissed all the objections holding that there is no rule which bars the respondents from filing a joint defence.

On fees, the trial magistrate found that indeed no fees had been paid but gave the respondents leave to make a late payment of fees and file a defence out of time.

No finding was made on the other objections.

The appellant being aggrieved with these holdings filed this appeal. The memorandum of appeal has the following grounds:

- i. The learned trial magistrate erred in law and fact when she disallowed the appellant's first and second objections.
- ii. The learned trial magistrate erred in law and fact when after holding that the written statement of defence was filed out of time, failed to strike off the said written statement of defence from the court record with costs to the plaintiff.

- iii. The learned trial magistrate erred in law and fact when she granted an order to the respondents (defendants) to seek leave to file a written statement of defence out of time when the preliminary objections were not contested by the respondents. The said order is prejudicial and bad in law.

The appellant prays the appeal be allowed and the preliminary objections in the lower court upheld. Secondly, that the written statement of defence be struck off and the suit proceeds for formal proof in the lower court and finally costs of this appeal.

On the first ground of appeal, Counsel for the appellant invited this court to look at their submissions on the 1st, 2nd and 4th preliminary objections in the lower court.

The complaint in the first PO (preliminary objection) was that under Order 8 r 1 and 2 of the Civil Procedure Rules the defendants should have filed separate defences as each was served with a plaint individually. Secondly that it also offended Order 1 r 12 of the same CPR. She relied on the case **Joy Kaingana & anor Vs Dabo Boubon (1986) HCB 59**.

Secondly, that the defendants filed their defence out of time and as such it ought to be struck out under Order 8 r 2.

Thirdly, that the defence was filed without the payment of court fees.

Fourthly, that the defence was not served on Counsel for the defendants and

Lastly the defendants did not disclose the material facts on which they rely in their defence.

I shall start with the first preliminary objection. The complaint is that defendants filed an omnibus defence. I understood omnibus defence here to

mean that one defence was filed for all where each defendant ought to have put in a separate defence.

The appellant relies on Order 1 r 12 of the **CPR** as authority for this complaint. Order 1 r 12 provides,

(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.

My understanding of this rule is that one defendant or plaintiff, as the case may be, is authorised in writing by the other defendants or plaintiffs, to appear for or plead or act for those others who gave him the authority. One party would thus have been granted authority to appear on behalf of all the other 8 defendants.

This is not the case in the instant case. All nine defendants have attended, pleaded and acted in this case. The question of authority does not therefore arise and Order 1 r 12 is inapplicable here.

The other half of the complaint on this PO is that the parties filed one defence instead of each filing a separate defence. Counsel here cited Order 8 rr 1 and 2.

Order 8 Rule 2 is on set off and counter claim, it would thus appear that the rule envisaged was sub rule 2 of rule 1. I shall reproduce Order 8 Rule 1 (1) and (2) here.

(1) The defendant may, and if so required by the court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his or her defence.

(2) Where a defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons.

The submission of counsel is that all these defendants were individually served and ought to have put in separate individual defences.

Where there are multiple defendants this rule ought to be read with Order 1 r 3 of the CPR which provides for multiple defendants. In the instant case it was the plaintiff who chose to join the defendants as was the right thing to do considering that this matter was based on the same facts and law.

Order 1 r 3 CPR provides,

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common question of law or fact would arise.

Clearly, as can be seen from reading these rules together, there is no requirement that where there are several defendants in one suit then each defendant is required to put in an individual defence.

The second PO is that while each defendant ought to have filed a defence, it turns out that the defendants filed a late defence. They were each served on the 10th of August 2009 and filed their defence on the 26th of August 2009. This makes them late by one day. As seen from O 8 r 2 reproduced above a defence must be filed within 15 days.

There is authority that a court ought not to exclude a defence filed out of time as it would prevent the court from hearing the suit on merit (see **Robinson Vs.**

Oluroch [1971] EA 374). It is also true that where a defence is out of time under Order 8 r 2 of the Civil Procedure Rules, it is open to the plaintiff to proceed under O 9 r 10 and set down the suit for hearing ex parte. The defendant here did not take that action and cannot now be heard to object to the late defence.

The third PO relates to non-payment of court fees which the learned trial magistrate found was not fatal to the action and granted the respondents time to file out of time.

I notice that the plaint is stamped in exactly the same way as the written statement of defence. Both do not bear an endorsement of payment of court fees. The trial magistrate nevertheless found that the fees were paid late. It is the law that no action is filed unless court fees have been paid. [see Rule 4 **The Judicature (Court Fees, Fines and Deposits) Rules SI 13-3**]. The same rules however provide in Rule 6 that fees on documents which attract fees must be paid. But if any such document is through mistake or inadvertence received, filed or used in any court without the proper fees for it having been paid, the court may, if it thinks fit, order that such fees as it may direct be paid on that document.

From this provision, the learned trial magistrate therefore correctly exercised her discretion under Rule 6 (supra) to allow the fees in the instant case to be paid out of time. The written statement of defence had been received and the plaintiffs had put in a response to that defence by the time the preliminary objections were raised. The parties were at that stage acting on a document for which fees had not been paid and the magistrate then used her discretion as stated earlier to grant leave to pay out of time.

The last PO is that the entire joint statement of defence contains mere denials which do not offer any defence at all. Counsel contends that mere denials offend Order 6 r 1.

Without going into the merits of the pleadings, I find that what is material in the defence has been pleaded, and the denials are as per the requirement in Order 8 r 3, of **the CPR** which requires a defendant to make specific denials to any facts raised in the plaint or they will be deemed to have been admitted. The defendants in this case have traversed and denied all the allegations in the plaint.

From the foregoing I find that the first ground of appeal fails. The second and third grounds are disposed of in my findings on Ground 1.

I have not touched on the other POs as they were submitted on but had not been raised by counsel as part of the POs she gave court notice as the POs she intended to raise at trial.

Wherefore this appeal fails. Costs to the respondents.

It is ordered that this file is remitted back to the trial court for the full trial to commence.

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Michael Elubu

Judge

5th of October 2015