



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
HIGH COURT CIVIL CASE NO. 82 OF 2009

SAMUEL MWANGI GATOTO
T/A DIANI FARMERS DAY & NIGHT CLUB
& ALSO T/A GAMBOTO GUEST HOUSE PLAINTIFF
=VERSUS=
THE ATTORNEY GENERAL DEFENDANT

RULING

[1] The Defendant in this case has filed this application praying that the interlocutory judgement entered on 7th May 2009 against the Defendant be set aside. They also claim for the time the Defendant may file his defence be extended and that the Defendant’s defence dated 9th June 2009 be deemed as properly filed and served.

[2] This application is supported by the Affidavit of one Mwangi Njoroge State Counsel. In his main argument, the State Counsel argues that the suit is against the Government and that the entry of any judgement is forbidden by the provisions of Order IXA rule 7 of the Civil Procedure Rules unless leave has been applied for. That the judgement is irregular since no such leave was obtained. He argued that the Attorney General has good defence and that the delay occasioned herein was not intentional but was caused by the exchange of necessary communications between the Attorney General’s Office and other departments of Government concerned with the matter with a view to obtaining clear instructions.

[3] Mr. Eredi learned State Counsel argued that the entry of judgement herein offended the previous and current Civil Procedure Rules as now found in Order 10 Rule 8. He argued that they have annexed a statement of defence that raises triable issues and that the Government shall be highly prejudiced if the judgement is not set aside. He admitted that

there was a delay but, that delay was excusable. He asked the court to exercise its discretion and allow the application.

[4] Mr. Gikandi learned counsel for the Respondent in reply argued that the Respondent entered appearance but did not file a defence. That they applied for an interlocutory judgement.

He argued that for one to give the Defendant who is a department of Government notice of entry of judgment is to give a party to a suit preferential treatment. He reiterated that such notice is contrary to Article 22 of the Constitution. Article 22 says that all are equal before the law. He argued that though the Civil Procedure Act Sec 10 rule 8¹ prohibits entry of judgement against the Government such rule is conflict with Article 22 of the Constitution and the Defendant in this case would be getting an unfair treatment. He however left it to the discretion of the court and urged the court to exercise its discretion in his clients favour.

[5] Mr. Eredi argued in reply that the current constitution has no retrospective application. That the only option left to the Respondent is to file a Constitutional review.

These are the competing interests in this case. There is no doubt that Order 9A rule 7 of the Civil Procedure Rules provided for a requirement that leave be sought before entry of judgement against the Government. This section was retained under the new Civil Procedure Rules as amended in 2010 in order 10 rule 8.

[6] Mr. Gikandi learned counsel for the Respondent argued that this provision order 10 rule 8 is contrary to the Constitution in what he called Article 22. Article 22 deals with right to institute legal proceedings. I presume he meant Article 27 which states:

1. *“Every person is equal before the law and has the right to equal protection and equal benefit of the law”*
2. *“Equality includes the full and equal enjoyment of all rights and fundamental freedoms”*

[7] The Civil Procedure Act is described in the preamble as follows:

“an act of parliament to make provision for procedure in civil courts.”

The Civil Procedure therefore provides the procedure to be followed in civil courts. The Constitution of Kenya provides the framework upon which all laws in this country are founded. Any law that is inconsistent with the Constitution is void to the extent of the inconsistency.¹

[8] Was Order 9A rule7 now order 10 rule 8 inconsistent with the Constitution to the extent that it said notice of entry of judgement must be given to the Government? The constitution itself defines equality in that respect as equal enjoyment of all rights and fundamental freedoms. The only rights and fundamental freedoms that may not be limited are:

- a. Freedom from torture and cruel and inhuman or degrading treatment or punishment
- b. Freedom from slavery or servitude
- c. The right to a fair trial and
- d. The right to an order of habeas corpus.

All other Rights are not absolute and can be limited by law to extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account the nature, importance, extent, of the right and taking account of the prejudice of the right to enjoyment of the right to others and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

[9] The full enjoyment of the Respondent's rights as envisaged in Article 27 (2) is limited by law under Order 10 Rule 8 in the requirement that leave must be sought to enter judgement. This limitation is allowed by the Constitution itself under Article 24 aforesaid.

10] The purpose of requiring leave to be sought must, have been well canvassed by parliament when such clause was included. Once judgement is entered against Government, in most cases funds are involved. Government funds are regulated and must, be passed through appropriation bills. It is important that the planners are aware of how many judgements are against the Government and their financial implication on the financial year. It is therefore not difficult to understand why such a clause in rule 10 (8) should be inserted in the Constitution. In any case, I have found that it is not in conflict with Article 27 aforesaid.

[11] The Constitution of Kenya and the Civil Procedure Rules must be read together. The Constitution being the foundation and the Civil Procedure being the procedure in civil matters.

[12] The argument by Mr. Gikandi though ingenious is not sustainable and it is not upheld.

[13] The Respondent did not comply with the procedural requirement of the Civil Procedure Act. The judgement entered herein was irregularly obtained. The same is set aside.

[14] The defence dated 9th June 2009 is deemed as properly filed.

[15] This case shall proceed to hearing in the new term. Parties should take an early hearing date.

[16] As the Attorney General failed to file his defence in time, he shall not be deserving of any costs. Each party shall bear their own costs for this application.

Dated and Delivered in Mombasa this 21st day of February 2014.

S.N. MUKUNYA

JUDGE

21.2.2014

In the presence of:

Mr. Masika Advocate for Mr. Eregi Advocate for the defendant.

Mr. Gikandi Advocate for the plaintiff.

1 *Order 10 rule 8 - No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.*

1 *Sec. 2(4) - Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*



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