



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF EKNYA**

**AT KERICHO**

**CIVIL SUIT NO.10 OF 2017**

**MARTIN M. ODHIAMBO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**REAL PEOPLE KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**INDOMITABLE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**BENJAMIN KIPRONO LANGAT.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 11<sup>th</sup> June 2019 filed under section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, as well as Order 50 Rules 1 and 15 and Order 10 Rule 11 of the Civil Procedure Rules. The substantive orders sought are under prayers 2, 3, 4 and 5 as follows-

**1. (spent)**

**2. That the court be pleased to set aside the proceedings and directives entered herein on 14<sup>th</sup> February 2019 by the Deputy Registrar.**

**3. That leave be and is hereby granted to the defendant for the statement of defence dated 13<sup>th</sup> November 2018 and filed in court on 19<sup>th</sup> November 2018 to be deemed as properly filed on court record.**

**4. That the plaintiff is hereby granted leave to file his response to the statement of defence within 14 days.**

**5. That costs of this application be in the cause.**

2. The application has grounds on the face of the Notice of Motion and is supported by an affidavit sworn on 11<sup>th</sup> June 2019 by Elvis Kitaa Mulama a Legal Counsel in the employ of the 1<sup>st</sup> defendant Real People Kenya Limited. It is deponed in the affidavit that they were served with the Plaint and Summons on 17<sup>th</sup> October 2018 and instructed lawyers to act for them who prepared a statement of defence which was filed on 19<sup>th</sup> November 2018.

3. The application has been opposed through grounds of opposition stating that appearance was filed on 2/11/2018 and defence filed on 19/11/2018 both out of time without leave of the court. Secondly, that though the defence was served on the 28<sup>th</sup> November 2018 the same was received under protest.

4. On the hearing date, Ms Cheruiyot for the defendant and the plaintiff in person addressed me in court regarding the application and the grounds of opposition.

5. This application will be allowed in the interests of justice for all parties involved. The first reason is that though the plaintiff claims that the defence documents, that is Memorandum of Appearance and Statement of Defence were filed late, he has not filed an application or indicated that the same be expunged from the record. In my view, once a document has been filed in court, it can only be expunged by an order of the court. Short of that if it is filed before decision of the court, it has to be considered.

6. The second reason why the application will succeed is that the plaintiff agrees that the said defence documents were served on the plaintiff's counsel in November 2018. He however, the plaintiff went ahead to obtain judgment in February 2019. In my view, this smacks of dishonesty and unfair play, since he did not first apply to expunge the documents filed by the 1<sup>st</sup> defendants. I also note that in his application for judgment dated 27<sup>th</sup> November 2018 the document of service annexed thereto only mention a purported service on Real People Kenya Limited and not the other two defendants. It cannot thus be said that the other two defendants were served with plaint and summons.

7. The third reason why the application will succeed is the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 which states as follows-

**“159 (2) (d) justice shall be administered without undue regard to procedural technicalities.”**

In my view, all that the plaintiff is trying to do here by opposing the application is to use technicalities to shut out the defendants from participating in the trial, which is discouraged by the above Constitutional provisions.

8. Consequently, I allow the application and grant prayers 2, 3, 4 and 5. In addition, I order that the plaintiff properly serve the other two defendants with plaint and summons as provided for by law and rules through personal service, unless substituted service is ordered by this court.

**Dated and delivered at Kericho this 17<sup>h</sup> day of December 2019.**

**George Dulu**

**JUDGE**