

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 109 OF 2015

RUMBA KINUTHIAPLAINTIFF/RESPONDENT

VERSUS

THE COUNTY GOVERNMENT

OF KIAMBU.....DEFENDANT/APPLICANT

RULING

This is an application by the defendant for orders that there be a stay in entering interlocutory Judgment in this suit, that the time to file a defence be enlarged and defendant be allowed to file a defence out of time. The reasons for seeking those orders are set out in the grounds on the face of the application and also the supporting affidavit sworn by one Titus Ranja a senior legal counsel with the defendant.

There is a replying affidavit sworn by the plaintiff herein. Both parties have filed submissions addressing the said application. The application is brought under Order 51 Rule I of the Civil Procedure Rules and Sections 1 A, 1B and 3A of the Civil Procedure Act. It is the defendant's position that the failure to file the defence was occasioned by the inadvertence of the advocate on record and that an innocent litigant should not be punished for the mistake of the advocate on record.

It is also the defendant's case that the defendant has an arguable defence which raises triable issues worthy of the court's consideration for determination. If the application is not allowed, the applicant is likely to suffer prejudice as it will be condemned unheard. On the other hand, the plaintiff/respondent does not stand to suffer any loss which cannot be compensated by way of damages if the application is allowed.

The application is opposed for having been brought under the wrong provision of law, and that it is also a demonstration of the chaotic and disorderly office presided over by the counsel for the defendant. It is the plaintiff's position that the defendant cannot be described as an innocent litigant because it is the employer of the deponent of the supporting affidavit. The draft defence that has been annexed is also said to be a sham.

The courts have moved away from relying on technicalities such as the citing of wrong provisions of law in pleadings. They are more concerned with substance rather than the form. The court is being asked to exercise its inherent jurisdiction and also the objectives of Sections 1 A and 1B of the Civil Procedure Act which are to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

It is the duty of the court to handle all matters presented before it for purposes of attaining those objectives. Injustice may result if a party is locked out without having their day in court. However, not all cases deserve the same approach and each case shall be considered on its own facts.

I have looked at the draft defence annexed to the application and in my view it raises or discloses triable issues that should be considered on merit. In any case, following an interlocutory application by the plaintiff, Sergon J gave some reliefs to the plaintiff on 22nd May, 2015 which ensured that the defendant shall not interfere with the plaintiff until this case is heard and determined. That is to say, the plaintiff is not likely to suffer any prejudice if the defendant is granted leave to file its defence out of time.

The foregoing being the case, the application is allowed and the defendant granted leave to file its defence within 15 days from the date of this ruling. Thereafter the parties shall comply with Order 11 of the Civil Procedure Rules to facilitate the hearing of the main suit. The plaintiff shall have the costs of this application in any event.

Dated, signed and delivered at Nairobi this 8th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE