



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT**  
**LAND CASE NO.337 OF 2013**

**DIXON ODHIAMBO OBUNGU .....PLAINTIFF/APPLICANT**

**VERSUS**

**MANJIT SEMBI.....1ST DEFENDANT/RESPONDENT**

**SURINDER SUD.....2ND DEFENDANT/RESPONDENT**

**HITESH DERODRA .....3RD DEFENDANT/RESPONDENT**

**EQUATOR MOTOR CLUB..... 4TH DEFENDANT/RESPONDENT**

**RULING**

**1. INTRODUCTION**

(a) **Dixon Odhiambo Obungu**, the plaintiff, through the plaint dated 21st November 2013 sued **Nanjit Sembi, Surinder Sudle, Hitesh Derodra** and **Equater Motor Club**, the Defendants, claiming restitution by payment of undisclosed sum of money, general and special damages, costs and interests.

(b) M/S L.G. Menezes advocates filed the memorandum of appearance dated 15th January 2014 on the 17th January 2014 for the Defendants and on 30th January 2014 filed their statement of defence dated 28th January 2014.

2. (a) That on 25th March 2014 M/S Bamisi & Smarts Advocates for the Plaintiffs filed the Notice of Motion dated 22nd March 2014 seeking to have the defence dated 28th January 2014 struck out and the plaintiff's suit listed for formal proof for failure to serve the statement of defence within time, among other grounds.

(b) The application is opposed by the Defendants through the replying affidavit of Manjit Sembi sworn on 16th May 2014. The deponent among others avers that the defence was posted under a letter dated 3rd February 2014 and the Defendants cannot be blamed for the non delivery as postal services are unreliable and beyond their control.

(c) The counsel for the parties appeared before the court on 25th February 2015 and agreed to file written submission in respect of the application dated 22nd March 2014. The plaintiff's Counsel filed his dated 31st March 2015 and the Defendant's counsel filed theirs dated 8th June 2015. The plaintiff's counsel filed a reply thereto dated 30th September 2015.

2. The main issues for the determination are as follows:

(a) Whether the statement of defence was served within 14 days and if not whether it should be struck out.

(b) Whether the defence disclose triable issues and if not whether it should be struck out.

(c) Who pays the costs.

3. The court has considered the grounds on the application, the affidavits evidence, the submissions by counsel and come to the following findings:

(a) That though the statement of defence was filed on 30th January 2014 and the Defendants depones that it was posted with the letter dated 3rd February 2014 to the plaintiff's counsel, no affidavit of service was filed by the process server and the position taken by the plaintiff that it was not served cannot be taken to be unreasonable or groundless. The Defendant had a duty to document the service through the specified mode and failed to do so. If the posting was done through registered post, the forwarding letter should have been duly marked and the appropriate certificate of postage would have been easily availed. The court therefore agrees with the plaintiff's counsel that the first time they saw the statement of defence was when they found it in the court file when coming to apply for interlocutory judgment. They then filed the application. The court is of the view that though the statement of defence was not served in time it would be important to establish whether it raises triable issues to the plaintiff's claim. The court has looked at paragraph 6 to 21 of the statement of defence and is of the view it joins issues with paragraphs 6 to 19 of the plaint. The statement of defence filed is not scandalous, frivolous or vexatious or an abuse of the process of the court. There are many superior court decisions to the effect that the power to strike out pleadings should be exercised sparingly and in the cases that are so helpless that they cannot be salvaged even through an amendment. This is not one of such cases that can be said to be hopeless.

4. That flowing from the foregoing the application dated 22nd March 2014 is without merit. The application is dismissed with each party bearing their own costs.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**

Dated and delivered this **12th of November 2015**

In presence of;

Applicant N/A

Respondent s n/a

Counsel Mr Balusi for Plaintiff/Applicant. Mr Odenga for Menzes for Defendant/Respondent

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**

12/11/2015

S.M. Kibunja J

Oyugi Court clerk

Parties absent

Mr Odunga for Menezes for Defendant/Respondent

Mr Balusi for plaintiff/Applicant

Corut. Ruling dated and delivered in open court in presence of Mr Odunga for Menezes for Defendant/Respondent and Mr Balusi for plaintiff/Applicant

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**