



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**ENVIRONMENT & LAND COURT**  
**LAND CASE NO.55 OF 2015**

**NANCY ATIENO OMONDI.....PLAINTIFF**

**VERSUS**

**WYCLIFFE ABOK.....DEFENDANT**

**RULING**

**1. INTRODUCTION**

(a) The plaintiff, **Nancy Atieno Omondi**, filed the plaint dated 25th February 2015 against the Defendant, **Wycliffe Abok**, claiming for refund of deposits and other expenses incurred in respect of agreements for sale of land parcels **Kisumu/Kanyawegi/9305 , 6818 and 6819**, costs and interests.

(b) The summons dated 2nd March 2015 were issued and admittedly served on the Defendant and he filed memorandum of appearance dated 16th March 2015 through his advocates.

c. The plaintiff applied for judgment under Order 10 Rule 10 of the Civil Procedure Rules through her advocates letter dated 2nd April 2015. The judgment was entered by the Deputy Registrar on the same date. The counsel applied for certificate of costs in lieu of taxation under Rule 68a of the Advocate Remuneration Order through their letter dated 11th April 2015 and the same was issued on 21st April 2015 at Kshs.224,005/=.

2. (a) That on the 28th April 2015, the Defendant filed the Notice of Motion dated 27th April 2015 seeking for the interlocutory judgment to be set aside and he be allowed to file a defence in terms of the draft defence annexed. The application is based on three grounds, among them being that he delayed in handing over his documents to his advocate to prepare a defence for reasons that he had a sick child. The application was listed for hearing on 24th June 2015.

(b) The decree was drawn and issued on 22nd May 2015 and the warrants of attachment dated 2nd June 2015 were issued.

(c) That on 10th June 2015, the Defendant filed the Notice of Motion dated 9th June 2015 seeking for stay of execution pending the hearing of the application dated 27th April 2015. The defendant's counsel appeared before the court on 11th June 2015 and the application was certified urgent and temporary stay orders granted.

(d) That counsel for both parties appeared before the court on 24th June 2015 and agreed to have the applications dated 27th April 2015 and 9th June 2015 consolidated and heard together through written submissions.

(e) The plaintiff opposed the two application through the replying affidavit of Daniel Otieno sworn on 23rd June 2015. The deponent among others states that the documents they provided confirmed the Defendant had received and admitted receiving the amount of money whose request is sought and if his application are to be allowed the total amount should be deposited in an interest earning account in the joint names of parties counsel. The plaintiff counsel filed their submissions dated 21st July 2025 on the 22nd July 2015 while the Defendant's counsel filed theirs dated 5th October 2015 on the same date.

3. The issue for determination is whether the Defendant's failure to file the defence in time was excusable. Secondly whether he has a good defence to the plaintiffs case. Thirdly whether the orders sought should be issued and at what terms.

4. The court has considered the grounds on the two applications dated 27th April 2015 and 9th June 2015, the affidavit evidence filed by both parties and the written rival submissions and come to the following finding;

(a) That though the Defendant blame the delay in the filing of a defence on his delay in providing his advocate with relevant documents due to time he took attending to his sick child, there are no hospital documentary evidence availed to confirm that indeed he had a sick child that he was attending too. In any case, this counsel had been served with notice of entry of judgment dated 13th April 2015 and letter dated 22nd April 2015 forwarding the draft decree, but it was not until 28th April 2015 when the application dated 27th April 2015 was filed. Had the hospital documents, on the child who was reportedly sick been availed, the court would have established the dates of the treatments to see whether they could have explained the Defendant's engagement and delay in filing the defence. That reason given by the Applicant do not appear excusable.

(b) That the draft defence does not in any way indicate that the Defendant denies entering into the three sale agreements with the plaintiff or receiving the deposits mentioned. However, the Defendant at paragraph 9 blames the plaintiff for unilaterally pulling out of the transactions. This effectively raises some triable issues and is a reasonable response to the plaintiff's claim that should go to hearing.

(c) That as the Defendant do not appear to have had areasonable excuse in delaying to file the defence in time and so as to ensure justice to both parties, it is only fair the amount of the deposits and related expenses incurred by the plaintiff be secured in an interest earning account as the Defendant gets his day in court. That way, in case the plaintiff were successful in her claim, she would easily access the amount, and the Defendant would ensure he does not cause any unnecessary delay.

6. That for reasons set out above, the application dated 27th April 2015, and 9th June 2015 are allowed in the following terms:

(a) That the judgment entered in default of defence on the 2nd April 2015 and all consequential orders flowing from it, are hereby set aside on condition that the defendant, do deposit the whole principal claim of Kshs.2,566,560/= In an interest earning account in the joint names of the parties counsel within 30 (thirty) days in a financial institution agreed upon by counsel.

(b) The Defendant is hereby granted leave to file and serve a statement of defence within fifteen (15 ) days.

(c) That should the Defendant fail to certify the condition set in (a) above, all the others orders in (a) and (b) will automatically lapse.

(d) The defendant do pay the costs of the two applications.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**

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

In presence of

Plaintiff/Respondent N/A

Defendant/Applicant N/A

Counsel Mr Mwamu for Anyul for Applicants

M/S Alinatine for Otieno for Respondent

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

12/11/2015

12/11/2015

S.M. Kibunja j

Court clerk Oyugi

Parties absent

Mr Mwamu for Mr Anyul for Applicant

M/S Alinatine for Otieno for Respondent

Court: Ruling dated and delivered in open court in presence of Mr Mwamu for Anyul for Applicant and M/S Alinatine for Oteno for Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/11/2015**