



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NUMBER 24 OF 2004**

**JAMES WILLY MWANZIA. .... PLAINTIFF**

**VERSUS**

**THE HON. THE ATTORNEY GENERAL. ....DEFENDANT**

**RULING**

The application before the court is a Notice of Motion filed by the Plaintiff on 8<sup>th</sup> March, 2012 and dated the same day. It seeks the striking out of the Defendant's Amended Defence dated 2<sup>nd</sup> February, 2012 and proceed to fix a hearing date of the suit. The grounds on which the application is brought is that the said Defence was filed without leave of court and amounts to an abuse of court process since as well it contradicts with the pre-trial consent orders dated 26<sup>th</sup> October, 2011. The application is as well supported by a supporting affidavit which brings out the fact that the said Amended Defence was filed without leave of court on 13<sup>th</sup> February, 2012 and served three weeks thereafter.

The Respondent/Defendant on the other hand, did not oppose this application by filing any replying affidavit carrying controverting facts. He instead, three months down the line, filed a statement of Grounds of Opposition which alleges that the suit is time-barred by virtue of Section 3(1) of the Public Authorities Limitation Act and that the reliefs sought in the Plaint could only be brought by way of a Constitutional Petition, and not plaint.

This application was heard by Khaminwa, J on 7<sup>th</sup> June, 2012 but no ruling had been drawn by the time the Judge left the Bench. The file was passed to me at the end of last year with a request to draw and deliver a ruling.

I have considered the application upon the grounds already stated above. It is not denied by the Respondent/Defendant that the Pre-trial conference had gone through on 26<sup>th</sup> October, 2011 and trial issues had been agreed upon and confirmed. It is clear from the record also that the Defendant did not raise the issue of time limitation as one of the issues to be determined by the court during the hearing.

Furthermore the Defendant has not denied that he filed the Amended defence out of time and without the leave of court which he indeed did not bother to seek. The Defendant has neither, during the pendency of this application, bothered to seek such leave. It is trite that any process filed without leave of court and outside the prescribed period, is not automatically admissible. This court understands that to be the reason why the Plaintiff herein seeks the striking out or expunging of the said Amended Defence from the record and fully agrees with him.

The upshot is that the said Amended Defence is an alien document in this suit. The Defendant as earlier stated has not even bothered to defend it or justify its presence in this record. In the circumstances, there is justification for its expunging from the record, which is hereby done with costs. Orders accordingly.

Dated and delivered at Nairobi this 24th day of March, 2014.

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**D A ONYANCHA**

**JUDGE**