



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 125 OF 2011

1. SHALMAT NAUMI KASSIM
2. DUKE KIBAGENDI NYAKUNDI
3. TIMOTHY AYERE CHAWIYAH
4. HEBRAHIM OTIENO MBOYAPLAINTIFFS

VERSUS

THE ATTORNEY-GENERAL.....DEFENDANT

R U L I N G

1. The Plaintiffs have applied by **notice of motion dated 30th August 2012** for three main orders

- (i) That the Defendant's statement of defence filed in this suit be struck out.
- (ii) That leave be granted to enter judgment against the Defendant.
- (iii) That judgment be entered against the Defendant as prayed in the plaint.

2. The only ground for the application is that the Defendant has never served its statement of defence upon the Plaintiffs, having filed it on 30th June 2011, and that the Plaintiffs learnt of the existence of the statement of defence when their advocate went to file an application for leave to enter default judgment against the Defendant.

3. The Defendant has not filed any response to the application despite service.

4. The application is stated to be brought under **Order 7, rule 1** and **Order 10, rules 3** and **8** of the **Civil Procedure Rules, 2010** (the **Rules**). The inherent power of the court has also been invoked.

5. Order 7, rule 1 provides –

“1. Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

6. Order 10, rules 3 and 8 provide –

“3. Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on application by the plaintiff, strike out the memorandum of appearance or the defence as the case may be and make such order as it deems fit in the circumstances.”

“8. No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”

7. The orders sought in the present application are entirely at the discretion of the court. The Plaintiffs’ claims are in the tort of malicious prosecution. The Defendant is the Attorney-General of the Republic of Kenya and is sued for and on behalf of the Commissioner of Police in his capacity as Chief Legal Adviser to the Government of Kenya.

8. Whatever damages may be awarded to the Plaintiffs will be payable from public coffers. The Defendant duly entered appearance and filed a statement of defence dated 28th June 2011. It is not known why service of the same upon the Plaintiffs was overlooked.

9. It appears to me that the Plaintiffs will not suffer any undue prejudice if their suit proceeds to hearing on the merits. They have no doubt obtained a copy of the statement of defence from the court file, and they should now prepare the suit for hearing. Whatever inconvenience they may have suffered will be adequately compensated by an award of costs.

10. In the circumstances I will refuse the notice of motion dated 30th August 2012. It is hereby dismissed. I award costs of that application to the Plaintiffs in any event. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 25th DAY OF JULY 2014

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 25th DAY OF JULY 2014