



*No.23/2014*

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.62'B' OF 2014**  
**JOHN KYALO MUIA & 2 OTHERS.....PLAINTIFF**  
**VERSUS**  
**FRANCIS MUTISYA MULE & ANOTHER.....DEFENDANT**

**RULING**

1. The Plaintiff/Respondent herein lodged Originating Summons dated 28.7.2014 on 31.7.2014 seeking various declaratory orders over alleged trust properties.
2. The first Defendant/Applicant was served on the 20.8.2014. The first Defendant filed memorandum of appearance on 11.9.2014 and served same on the 15.9.2014 but was received under protest. The 1st Defendant has not filed any reply to the originating summons but on 26.9.2014 did lodge an application seeking his memorandum of Appearance to be admitted out of time and that he be allowed to file reply to Originating Summons out of time. Further he seeks leave to enjoin Kaloki Mule to the suit as a co-defendant.
3. In his affidavit sworn on 26.9.2014, he depones that after service of summons, he took time to talk with family members over the subject matters as they are subjects of Machakos HC.Succ.353'B'/03 and same was finalized. The memorandum of appearance was received under protest and thus his Advocates were not able to file reply to Originating Summons as it would have been out of time and thus elicit an application to strike it out.
4. The Applicant avers that if prayers sought are granted the Plaintiff will not be prejudiced and in any event there are very serious triable issues. He has annexed a draft Replying Affidavit to demonstrate the triable issues to be canvassed during the trial if allowed to file the Affidavit in reply to the originating summons.
5. The Applicant further filed a supplementary affidavit sworn on the 13.10.2014. The application is opposed by way of the Replying Affidavit of Francis Mutua Kaloki 3rd Plaintiff/Respondent sworn on 8.10.2014. The Respondent confirm that the service of the Originating Summons was affected on the 31.7.2014 and due to the default in reply to the Originating Summons, the Respondents lodged a request for judgment against the Applicant/1st Defendant.
6. The Respondent avers that it is indolence which made Applicant to default in filing reply to the originating summons after filing memorandum of appearance. It took Applicant 15 days from date of

filing memorandum of appearance to file instant application. The Respondent opposes the enjoining of the Daniel Mule Kaloki because according to them, the Applicant has no capacity to seek such order and aver that only Daniel Mule Kaloki can seek such orders, if he is so interested to be enjoined in the proceedings.

7. The Respondents aver that the P&A Machakos HC. Suc.No.353'B'/03 is finalized and distribution done and nothing is pending in the P&A matter. The Respondent avers that Esther Ngali Mule was allocated 5 acres which in the Originating Summons are alleged to be held in trust for the Respondent and Daniel Mule Kaloki got 5 acres and therefore cannot be interested in Esther Ngali Mule's share as he has his own.

8. The Respondent avers that they will be prejudiced if application is allowed as they have applied for the judgement. In the Applicant's written submissions, he cites the provisions of Section 1A, 1B, 3A, Articles 159 (2) (d). Articles 10, 25, 50 and the following case laws:

**HC Misc.122/2013 ROCKY DRIVING SCHOOL VS. AGIMBA ASS. ADVOCATE,**

**HCC NO.426/2012 JAMES KIMANI KABOGO VS. KCB.**

**ELC 590/2013 DOROTHY WANGARE AND WANJIKU KUNGU VS. AKASH H. DODHIA.**

and proportionate to allow the application. Further, for the ends of justice, it is only fair to hear the parties herein on merit.

9. The Applicant submits it is purely court's discretion to extend time to cover the situations and circumstances in the instant case in line with Section 95 of Civil Procedure Act. The Applicant argue that since judgment has not been entered nor direction taken, it is only prudent the matter be heard between all parties on merit and incorporating the intended defendant.

10. The Applicant submits that in line with order 1 Rule 10 (2) Civil Procedure Rules, it is proper to join the intended 2nd Defendant. On the Respondent's part, they submit that no reasonable explanation has been given as to the delay in filing the defence/reply. The Respondent cannot see how the succession case and the family meeting could have occasioned the delay in replying. They submit that the draft reply discloses a sham reply/Defence and raises no triable issues.

11. The Respondent claim is only 3 acres from share of Esther Ngali Mule. Daniel Mule Kaloki claim is 5 acres share in the grant but not from Esther Ngali's 5 acre share in the grant. The court observes that it is not contested that the filing of memorandum of appearance was late and that the defence has not been filed to date. The explanation based on the existence of HC.Succ. 353'B'/03 and the alleged family meeting do not disclose how the same occasioned delay in filing the reply.

12. However, the court notes that despite the request for the judgment, the plaintiff has not yet moved court for entry of judgment and the direction in terms of order 37 Rule 16 Civil Procedure Rules. The Respondents have not disclosed any prejudice they are going to suffer by the 1st Defendant filing reply to Originating Summons herein.

13. On the other hand it is prudent we hear the Applicant on the issues raised in his draft Reply and make an informed decision. On the issue of enjoining Daniel Mule Kaloki, the same seems illogical for the Applicant to add him in the case as a Defendant. He does not claim anything from him nor do the Plaintiff's claim anything from him. Daniel Mule Kaloki has not expressed any interest in joining the proceedings.

14. If the Applicant wishes he can call him as a witness. There is no legal justification to add the said Daniel Mule Kaloki as a Defendant herein for the sake of having him as a party. His stake should be disclosed but not just moot issues.

The court therefore, makes the followings orders:

- 1. Application dated 26.9.2014 is allowed in terms of prayer No. (b). The Reply be filed within 7 days and served.**
- 2. Costs in the cause.**

**Dated and Delivered at Machakos this 21<sup>st</sup> day of November, 2014.**

**CHARLES KARIUKI**

**JUDGE**