



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC NO. 88 OF 2014**

**NUH ABDILLE HASSAN.....PLAINTIFF**

**-VERSUS-**

**CHIEF LAND REGISTRAR.....1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. There is before me an application dated 24<sup>th</sup> June, 2014 for leave to be granted to the Plaintiff/Applicant to apply for judgment in default against the two defendants, the National Land Commission and the Chief Land Registrar.

2. The grounds upon which the application is based are that the Plaintiff filed the suit in January, 2014 and amended the same in March, 2014. The amended plaint together with the summons to enter appearance was served on 26<sup>th</sup> March, 2014. The Defendants who ought to have entered appearance and subsequently filed their defence by the latest 27<sup>th</sup> April, 2014 did not however do so. Further, it is stated that it is in the interest of justice that leave be granted to the Plaintiff to seek judgment against the Defendants. The Plaintiff seeks declaratory reliefs as well as the amount of Kshs. 175,133,880/= as special and liquidated damages by way of compensation for allegedly missing out on the Land Reference No. 3734/482. Finer details may be gleaned from the amended plaint filed on 14<sup>th</sup> March, 2014.

3. The Defendants object to the application. The Defendants have not only filed a Memorandum of Appearance but also a Statement of defence as well as Grounds of Objection. All were filed on 7<sup>th</sup> November, 2014. In the Grounds of Objection the Defendants state that the application offends Article 159(1) (d) of the Constitution of Kenya and further that the Applicant has not complied with the provisions of Order 5 Rule 9 of the Civil Procedure Rules as well as Section 13 of the Government Proceedings Act (Cap 40) of the Laws of Kenya. The Defendants also contend that the Applicant will not suffer any prejudice and further that it is in the interest of justice that the matter should go for full trial as the issues raised by both the Amended Plaint and the defence are very weighty. The Defendants also state that the application is an abuse of the process of the Honourable court.

4. Counsel, Ms. Wambui advocating for the Defendants and Mr. Wanjohi for the Plaintiff made their oral submissions respectively against and for the application on 7<sup>th</sup> November, 2014. Mr. Wanjohi protested

that the defence and Memorandum of Appearance were both filed late, very late he added. In his view, the current application was well grounded and ought to be allowed. Ms. Wambui reiterated that the application was an abuse of the process as the Attorney General on behalf of the Defendants was served with the process only during the last week of October, 2014 even though the amended plaint was filed in March. She however conceded that the National Land Commission had been served in March, 2014. She further contended that the Defendants have a cogent defence.

5. I have considered the application in its entirety. I have also carefully considered the submissions made by counsel. In my view the application cannot be said to be an abuse of the process. The rules enjoin the Plaintiff to seek the courts leave before requesting for judgment in default of appearance or defence against the Government where the latter or any of its departments is a defendant. The Plaintiff was doing exactly as prescribed by the Rules and should not be troubled at all.

6. In considering whether or not to grant a party leave to apply for judgment, in my view, the court is invited to exercise its discretionary jurisdiction. The exercise of such jurisdiction entails considering all relevant factors and ignoring all irrelevant factors. If a party has not filed a defence on time and does not file it all by the time the court is hearing the application it would be much simpler and easier for the court. Such substantial violation of the rules should prompt the court to exercise discretion in favour of an applicant for leave absent any violation of the rules or the law on his part. If a party files his defence out of time it would also be critical not only to find out and consider the period of delay but also the reasons for delay. As the defence would be on record, absent any application to strike the same out, it would be perfectly in order to consider whether it raises reasonable points of defence. Finally, in my view, the court should also ask itself whether the prejudice if any, occasioned by the late filing is such as to imperil the Plaintiff's claim and the prosecution thereof altogether.

7. I have considered the reasons advance for the delay in filing the defence statement. The Attorney General only became aware of the suit in October, 2014. This fact was not contested by the Plaintiff. Though the defendants had been served in March, 2014, they do not seem to have taken any action in instructing the Attorney General. The position is understandable.

8. The 1<sup>st</sup> Defendant falls under the Ministry of Lands & Housing. The 2<sup>nd</sup> Defendant is an independent constitutional commission. It is public knowledge that the 1<sup>st</sup> Defendant's parent Ministry as well as the 2<sup>nd</sup> Defendant Commission have been involved in a tussle over various issues including even over who controls the issuance of and the guarantee of the title documents. Yet the crux of this case involves exactly that. In my view, ignoring that factor would not amount to a proper exercise of discretion. The two defendants certainly could have done better and instructed the Attorney General in time. The Plaintiff too, with the knowledge of the squabbles, should have served the Attorney General with the summons and pleadings much earlier in March, 2014 the same way it now did in October, 2014. There was in my view and in the circumstances of this case, good reason and good faith in filing the defence late.

9. Secondly, I am of the view that the defence as drafted is reasonable. There are issues worth having at trial rather than locking out the defence. The Defence is not frivolous. It is denied that the Plaintiff was ever the proprietor of the suit property. Further, the Plaintiff is said to be blameworthy for failing to establish the root of title prior to claiming ownership. These averments may need to be investigated. Absent an application to strike out the Defence statement which was filed out of time, I have had to consider the same. My current findings of course are without the benefit of any evidence even in the form of witness statements and I must insert the rider that the Plaintiff may very well apply to strike the same defence out.

10. In totality I hold the view that the plaintiff will not be unduly prejudiced if the Defence statement is allowed to be on record as it is already. The Plaintiff is denied the leave to request for judgment and to proceed ex parte. The rules of the Civil Procedure ought to be interpreted and the powers granted to the court there under exercised with the aim of attaining the just determination of proceedings and of resolution of disputes: see Sections 1A & 1B of the Civil Procedure Act. The circumstances of this case would dictate that I do not lock out the Defendants from these proceedings but give effect to the overriding objective principle of facilitating a just resolution of disputes.

11. The upshot is that I will decline to exercise my discretion in favour of the Plaintiff. I would dismiss the application which I hereby do. I would however award any thrown away costs to the Plaintiff and further direct that the Defendants do file their respective list of witnesses, witness statements, bundle of documents as well as list of documents within the next thirty (30) days and thereafter the case be listed for trial conferencing. In default of compliance, the Defence Statement filed in court on 7<sup>th</sup> November, 2014 will be struck out.

12. Orders accordingly.

**Dated, signed and delivered at Nairobi this 18<sup>th</sup> day of November, 2014.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Applicant  
..... for the Respondent