



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ENVIRONMENT AND LAND COURT**  
**ELC CASE NO. 12 OF 2012**

EUNICE WANJIRU CHEGE ..... PLAINTIFF

VERSUS

HANNAH WANJIKU CHEGE .....DEFENDANT

**RULING**

The plaintiff/applicant filed this suit against the defendant/respondent on 12<sup>th</sup> November 2012 seeking an order that the defendant/respondent do transfer land parcel No. LOC. 12/SUB LOC. 5/2788 to the plaintiff/applicant.

The defendant/respondent did instruct Mr. Kiriba advocate to appear for her and a notice of appointment of advocate was duly filed by Mr. Kiriba on 4<sup>th</sup> December 2012 (the notice is wrongly stamped as 4<sup>th</sup> November 2012). Thereafter, a defence and counter-claim was filed on 18<sup>th</sup> December 2012.

The plaintiff/applicant has now moved the Court by a Notice of Motion dated 13<sup>th</sup> June 2013 and brought under **Order 6 Rule 1 and Order 7 of the Civil Procedure Rules** seeking the striking out of the defence and counter-claim filed by the defendant/respondent and the entry of judgment as prayed in the plaint together with costs. The application is supported by the affidavit of the plaintiff/applicant and on the grounds that:-

- a. ***The defendant/respondent failed to enter appearance as required by law and only filed a notice of appointment of advocate.***
- b. ***The defendant/respondent has failed to serve the statement of defence and counter-claim upon the plaintiff/applicant's counsel thus violating laid down provisions of service.***

When the parties appeared before me on 17<sup>th</sup> July 2013, Mr. Njoroge for the plaintiff/applicant urged me to allow the application as there was no replying affidavit opposing it.

However, Mr. Kiriba sought an adjournment stating that though he was served with the application, it was his mistake that no replying affidavit was filed. He apologized for the error and sought a last chance.

**Order 6 Rule 1 of the Civil Procedure Rules** provides as follows:-

***“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 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”.***

It is clear from the supporting affidavit of the plaintiff/applicant that the defendant/respondent was served with the plaint and summons on 28<sup>th</sup> November 2012 which she duly signed. The defendant/respondent must have instructed her advocate immediately because Mr. Kiriba filed his notice of appointment on 4<sup>th</sup> December 2012 instead of a memorandum of appearance. That was of course in contravention of the Rules. The defendant/respondent then filed her defence and counter claim on 18<sup>th</sup> December 2012.

The plaintiff/applicant's Notice of Motion seeking the striking out of the defence and counter-claim is of course un-opposed as there is no replying affidavit. The defendant/respondent's advocate has acknowledged that this was due to an error on his part for which he has apologized.

The Notice of Motion now before me seeks the striking out of the defence and counter-claim and the entry of judgment as prayed in the plaint. It is not in dispute that there is a defence on the record although it has not been served upon the plaintiff/applicant as required under **Order 7 of the Civil Procedure Rules**. Striking out a pleading is a discretionary power to be exercised only in absolutely clear cases and exercised with extreme caution. It is a discretion to be very sparingly exercised and only in exceptional cases. In the defence, the defendant/respondent not only denies having entered into any sale agreement over the land with the plaintiff/applicant but also seeks the eviction of the plaintiff/applicant from the land in her counter-claim. I would not regard the defence and counter-claim as frivolous. The subject matter is land which is a very emotive subject and the mistake herein is that of the defendant/respondent's advocate and ordinarily, a party should not be punished for the negligence or mistake of his advocate unless it can be demonstrated that the party contributed to the same. In this case, as I have stated above, Mr. Kiriba readily admits that the error was on his part. It would be harsh therefore to punish the defendant/respondent due to the error of her legal advisor. It is true that Rules of procedure have been violated in this matter but such Rules should be seen as hand maidens of justice and not its mistress and, accordingly, unless procedural lapses have caused the other party prejudice which cannot be compensated in costs or there is a clear manifestation of an intention to over-reach, that alone should not have fatal consequences. As I have stated, the defence filed is not frivolous nor can it be deemed as an abuse of Court process. Unless under very clear circumstances, a party should not be driven away from the seat of justice without a hearing. That ought to be the last option of the Court. I would also point out that under **Article 159 of the Constitution**, justice shall be administered without undue regard to procedural technicalities. In this case, what the defendant/respondent's counsel has done is file a notice of appointment rather than a memorandum of appearance. I would regard that as a procedural technicality that should not have fatal consequences to defendant/respondent's case. Further, although the plaintiff/applicant's Notice of Motion is un-opposed, the defendant/respondent's counsel has attended Court and admitted his error and apologized. The Court accept his apology and most importantly, the Court would not want to punish a party due to an error by the advocate. It would of course have been another matter if the advocate had not appeared in Court to explain that lapse. I think this is one such situation where the other side can be compensated in costs.

In the circumstances, I would dismiss the Notice of Motion dated 13<sup>th</sup> June 2013 and make the following orders:-

- 1. That Mr. Kiriba advocate be deemed to be properly on record for the defendant by virtue of the notice of appointment.***
- 2. That Mr. Kiriba advocate do serve Mr. Njoroge advocate with the defence and counter claim within seven (7) days of this ruling being delivered***
- 3. That Mr. Kiriba advocate do meet personally the costs of this application which I assess at Ksh. 2,000/=.***

**JUDGE**

**9<sup>TH</sup> SEPTEMBER, 2013**

9/9/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Njoroge for Plaintiff – absent

Mr. Kiriba for Defendant – present

COURT: Ruling delivered this 9<sup>th</sup> day of September, 2013 in open Court.

**B. N. OLAO**

**JUDGE**

**9<sup>TH</sup> SEPTEMBER, 2013**