



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
Civil Case 1 of 2006

**MWANZIA MAKAU ..... PLAINTIFF/APPLICANT**

**VERSUS**

- 1. SPECIAL DISTRICT COMMISSIONER KITUI**
- 2. KITUI DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER**
- 3. JOSEPH MAKAU ..... DEFENDANTS/RESPONDENTS**

**RULING**

This is an application dated 28<sup>th</sup> August 2007, filed by the plaintiff Mwanzia Makau. The application was brought under Order IXA Rules 7 and 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (Cap 21). The prayers are:

- 1. THAT leave be granted to the applicant to apply for interlocutory judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents who have failed to file their respective appearances and defences.**
- 2. THAT cost of this application be provided for.**

The application has grounds on the face of the Chamber Summons (application). The grounds are that the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents did not enter appearance or file a defence and that the applicant can only proceed with the hearing of the case, if the orders sought are granted.

The application was filed with an affidavit sworn by Francis M Masika advocate, and filed on 2<sup>nd</sup> November 2007. It was deponed that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were served with summons and plaint on 31/1/2007, but had failed to enter appearance or file defences, and that the applicant cannot proceed with the matter if the orders sought are not granted.

The respondents did not file any response to the application. On the hearing date, learned counsel for the applicant Mr Masika, submitted that such an application was a requirement for the entry of an

interlocutory judgment, in proceedings against the government.

Order IXA Rule 7 of the Civil Procedure Rules provides:-

**“7. 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.”**

I have perused the Government Proceedings (Cap 40). Under Section 12 it is provided as follows:-

**“12 (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.**

**(2) No proceedings instituted in accordance with this part by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.”**

The above section provides that the proper party in Government proceedings is the Attorney-General, who is not a party in these present proceedings.

In the plaint, the applicant does not cite the law under which he has sued the Special District Commissioner Kitui and the Kitui District Land Adjudication and Settlement Officer. For the court to determine whether the proceedings against the two officers are proceedings against the Government, the legal provisions would have to be known and considered by the court.

Parties are required to invoke the law which confers on the court the jurisdiction to dispose of their matter or application. The applicant not having indicated the law which makes the proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> respondents to be proceedings against the Government, and the law which confers on this court powers to adjudicate on the application and grant the prayers sought, I find that the application is incurably incompetent. I will strike out the same.

Consequently, and for the above reasons, I strike out the application, with no orders as to costs.

Dated and delivered this **26<sup>th</sup>** day of **July** 2012.

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**George Dulu**

**Judge**

**In the presence of:**

Nyalo – Court clerk

Ms. Thiongo for Applicant