



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 662 of 2011**

**GODFREY GITHINJI KAMIRI.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**RULING**

The Plaintiff filed an application dated 27/6/2012 which is brought under the provisions of Order 10 Rules 8 and 10 and Order 51 Rule 1 of the Civil Procedure Rules, as well as under section 3A of the Civil Procedure Act. The Plaintiff is seeking orders that the court grants leave for judgment to be entered against the Defendant, and costs of the application. The application is premised on the grounds that the Defendant was duly served with summons to enter appearance on 22/3/2012, and filed a Memorandum of Appearance on 3/4/2012, but that to date it has not filed a statement of defence. The application is supported by an affidavit sworn on 27/6/2012 by Johnson Mitey, counsel for the Plaintiff.

Briefly the Plaintiff's claim in the Plaint filed on 23/11/2011 is that he is the registered owner of L.R. No. 209/13539/79, having purchased it from one John Njenga Mungai who had acquired the said property from the City Council of Nairobi. Further, that on 26/11/2010, the Registrar of Titles through Gazette Notice No. 15580 revoked title for said property. The Plaintiff thus prayed for judgment against the Defendant for reinstatement of the title, and a permanent injunction restraining the Defendant from nullifying and/or revoking the title.

The application is opposed. The Attorney General on behalf of the Defendant filed grounds of opposition dated 14/9/2012 and avers that the application is overtaken by events since a Defence dated 14/9/2012 has already been filed. The Defendant further avers that the mistakes of counsel should not be visited upon an innocent litigant, and that the issues raised in the Plaint are weighty and ought to be determined by full trial. Further, that it is in the interest of justice and in the public interest that this matter be determined by a full trial, and that in any event the Plaintiff has not suffered any prejudice.

The application was heard on 19/9/2012 and the learned Counsel for the Plaintiff submitted the Defendant was served with summons within thirty days from their date of issue, and has waited until two days from the date of hearing of the application to file a defence. Further, that the said defence is not properly on record as the Defendant did not seek leave to file the same out of time, and has not complied with Order 7 Rule 5 as it is not accompanied by a written statement and documents to be relied upon.

Learned Counsel for the Defendant on his part argued that a Defence has already been filed, and that this court has discretion under Order 7 Rule 5 of the Civil Procedure Rules to give directions as to when statements and documents can be filed by parties. Counsel also relied on the provision of Article 159 (2) (d) of the Constitution that justice ought to be done without undue regard to technicalities. The learned Counsel referred the court to Order 2 Rule 14 of the Civil Procedure Rules which provides that no

objection is to be raised to any pleadings for want of form, and also sought to rely on the inherent powers of the court under Section 3A of the Civil Procedure Act.

Lastly, the learned Counsel submitted that public interest requires that the matter goes for full hearing as it involves public land, and that it had applied to enjoin the City Council of Nairobi and John Njenga Mungai as third parties to so as to have the matter fully determined. Counsel conceded that there was a delay in filing the defence, but stated that the delay was occasioned by the need to get details from the Land Registrar who needed to undertake investigations.

I have read and carefully considered the pleadings, evidence and submissions by the Plaintiff and Defendant. On perusal of the court file, it was indeed confirmed by the Court that the AG on behalf of the Defendant had filed a defence, an application seeking leave to issue a third party notice upon City Council of Nairobi and one John Njenga, together with a draft Third Party Notice on 17<sup>th</sup> September 2012.

The issues before the court for determination are whether leave for judgment to be entered against the Defendant can be granted in the circumstances of this suit and if not, whether the Defence filed on 17/9/2012 is properly on record. It is not disputed that the AG entered appearance on 3/4/2012 upon service of the summons by the Plaintiff. The Defence was, however, not filed until 17/9/2012 which was five months after the 14 days period prescribed by Order 7 rule 1 of the Civil Procedure Rules which states 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 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.”

Order 10 of the Civil Procedure Rules provides for consequence of non-appearance, default of defence and failure to serve. A Plaintiff under the provisions of Order 10 of the Civil Procedure Rules can request for judgment where a Defendant fails to enter appearance or file a defence within the prescribed time. It is provided in Order 10 Rule 10 that the provisions of rules 4 to 9 of the Order on default or interlocutory judgment for non-appearance shall apply where any Defendant has failed to file a Defence. The Defendant herein being the Government, an application for request of judgment is filed in the terms of the provisions of Order 10 Rule 8 which reads,

“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.”

Ordinarily such leave would be granted unless good reason is shown. The Government is under an obligation to obey the Civil Procedure Rules for the same reasons as all other parties, namely, for the purposes of establishing and maintaining orderliness as was held in by this Court (Onyancha J.) in **MA Bayusuf & Sons Ltd – Vs- Attorney General (2002) 2KLR 279**. However, for the leave to be granted it must first be established that the plaint filed by the Plaintiff falls within the remit of Order 10 Rules 4 to 9. An assessment of rules 4 to 9 of the Order show that default and interlocutory judgment can only be entered where the Plaintiff’s claim is for liquidated demand, pecuniary damages or for the detention of goods. The Plaintiff herein is seeking prayers for the restatement of title to L.R No. 209/13539/79 and a permanent injunction against the Defendant. As the Plaintiff’s claim is one in which default judgment is not available, the Plaintiff should proceed to set the suit down for hearing pursuant to Order 10 Rule 9.

This leads me to a consideration of the second issue as to whether the Defendant’s Defence is properly on record. The Defendant filed a defence on 17/9/2012 after this application had been filed and before it could be heard. Counsel for the Plaintiff submitted that since the Defendant did not seek leave to file defence out of time, the defence as filed was not properly on record. Order 7 rule 1 in my considered view, gives this Court discretion to allow a defence that has been filed out of time, since there is no procedural provision for seeking leave of court to file a defence out of time when judgment has not been

entered.

The Courts discretion in this case will be exercised in favor of extending time. This finding has been reached for three reasons. Firstly there is a *bona fide* defence on file. Secondly, the Defendant has given reasonable cause for the delay in filing the Defence, namely that it was obtaining information from the Registrar of Lands, who in turn had to conduct investigations into the issues that resulted to the suit herein. Lastly, as the issue for determination touches on public land, it is in the public interest that the suit herein be heard and judgment given on its merits. For these reasons, the Defendants Defence dated 14/9/2012 and filed on 17/9/2012 is hereby deemed to have been filed with the leave of the Court and admitted as part of the court record. The Defendant shall however pay the costs of this application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_18<sup>th</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**