



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL SUIT NO. 84 OF 2010**

**MUNEER HAROON ISMAIL.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL .....DEFENDANT**

**RULING**

The suit herein was filed on 17<sup>th</sup> December, 2010. The Defendant entered appearance on 13<sup>th</sup> January, 2011. As defence was not filed within the prescribed time, the Plaintiff applied on 2<sup>nd</sup> February, 2011 for leave to have judgment entered against the Defendant (*Attorney General*).

On 16<sup>th</sup> February, 2011 the Defendant filed defence and grounds of opposition to the application seeking leave to have judgment entered.

When the application seeking leave to have judgment entered came up for hearing, the learned counsel for the Plaintiff, **Mr. J.K. Kirui**, on behalf of **Advocate Mitey**, urged the court to grant leave because the defence was filed out of time (and after the filing of the application for leave) and was served late. He urged the court to strike it out although there was no application to strike it out.

**Mrs. Kerubo**, learned counsel for Defendant, resisted the application and invoked **Article 159(2) (d)** of the **Constitution** and contended that the case should be determined on merit. She submitted that technicalities of procedure should be disregarded.

It is correct that courts of law and tribunals are enjoined under **Article 159(2) (d)** of the **Constitution** to administer justice without undue regard to procedural technicalities. But this is not to say that rules of procedure are unimportant or should not be complied with. Rather, where there is breach of rules of procedure, courts are enjoined to determine issues on the basis of what serves the interest of justice rather than procedural technicalities.

In the present case, the Defendant has filed defence. There is no application to strike it out. The application for leave to enter judgment was filed before the defence was filed. Under **Order Rule 8** of **Order 10**, “**no judgment in default of appearance or pleading may be entered against the Government without leave of the court**”. This is why the Plaintiff sought leave. This rule is understandable and it is borne out of the need to give the Government sufficient notice as litigation against Government may affect any Government Ministry or Agency and the Attorney General needs to take instructions. Where, as here, appearance and defence have been filed, the court will be less inclined to grant leave for

judgment to be entered unless the delay is inordinately long and inexcusable and/or undermines fair play in the suit and/or is very prejudicial to the claimant Plaintiff.

In the instant case, the delay cannot be said to be so inordinately long and/or inexcusable nor can it be said to have undermined fair play. Appearance and defence have been filed. It is desirable that the case is determined on merit. For this reason, I decline to grant the leave sought and I dismiss the application and order that costs shall be in the cause.

**DATED** at **KERICHO** this 22<sup>nd</sup> day of March, 2011

**G.B.M. KARIUKI, sc**  
**RESIDENT JUDGE**

**Advocates**

Mr. J.K. Kirui advocate for Advocate Mitey for the Plaintiff

Mrs. Kerubo advocate for the Attorney General

Court Clerk – Mr. Koech