



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

**CIVIL DIVISION**

**CIVIL CASE NO. 395 OF 2010**

**JOSEPH GITAHU NDUNG'U..... PLAINTIFF**

**V E R S U S**

**MARY WAIRIMU  
(T/a WAIRAGU & WAIRAGU  
ADVOCATES).....DEFENDANTS**

**R U L I N G**

This is an application by the Defendant (**notice of motion dated 16/06/2011**) for the main order that time be enlarged to file defence. The application is made under **Order 50, rule 6 of the Civil Procedure Rules**.

There are two supporting affidavits. The first is sworn by the Defendant while the second is sworn by one **MOSES CHEGE KIBATHI**, the Defendant's advocate. There are various documents annexed to both affidavits.

The grounds for the application as set out on the face thereof and emerging from the supporting affidavits are:-

1. That delay in filing defence was caused by the fact that the Defendant's insurers had instructed a different firm of advocates who had filed notice of change of advocates before the advocates appointed by the Defendant filed the statement of defence, thus causing confusion in representation.
2. That in any event a statement of defence was filed on 26<sup>th</sup> April, 2011 but that the same is missing from the court file.
3. That the intended defence raises triable issues, particularly in regard to competency of the suit and jurisdiction of the court to hear it.
4. That in the interests of proportionality of justice the Defendant should be allowed to defend the suit.

The Plaintiff has opposed the application as set out in the two replying affidavits filed on 28<sup>th</sup> June, 2011, one in respect to each supporting affidavit. The grounds of opposition emerging therefrom are:-

1. That summons to enter appearance was duly served upon the Defendant's firm, Wairagu & Wairagu, Advocates.

2. That the defence filed on 26<sup>th</sup> April, 2011 was invalid as it was filed by an advocate then not properly on record.
3. That the intended defence raises no triable issues.

I have considered the submissions of the learned counsel for the Defendant and the one case cited. I have also considered the submissions of the Plaintiff who appeared in person.

The court has power, under Order 50, rule 6 of the Rules to enlarge time for doing any act or taking any proceedings fixed under the Rules, or by summary notice, or by order of the court. Such enlargement may be upon such terms (if any) as the justice of the case may require. The enlargement may be ordered notwithstanding that application for the same is not made until after expiration of the time appointed or allowed.

Time for filing defence is limited by **Order 7, rule 1** of the Rules. Unless some other or further order is made by the court, defence shall be filed within fourteen (14) days after entry of appearance.

In the present case the Defendant entered appearance on 11<sup>th</sup> April, 2011. So, defence ought to have been filed on or before 25<sup>th</sup> April, 2011 (if it was a working day). 25<sup>th</sup> April, 2011 was not a working day; it was a public holiday (**Easter Monday**). The next working day was 26<sup>th</sup> April, 2011.

Indeed a statement of defence was filed on 26<sup>th</sup> April, 2011. A copy of the same is exhibited in the 1<sup>st</sup> supporting affidavit. The copy exhibited bears the clear date-rubber-stamp of the court.

But as it happened, the advocates who filed the defence (Wairagu & Wairagu), duly instructed by the Defendant, were at that moment not on record for the Defendant because the Defendant's insurers had instructed another firm of advocates (Mohammed Muigai, Advocates) to take over the matter, and those new advocates had filed a notice of change of advocates. The notice of change had at the material time not been served upon Wairagu & Wairagu. The insurers subsequently withdrew instructions from the new advocates and Wairagu & Wairagu resumed conduct of the defence.

So, were it not for this hitch, there would have been no delay in filing defence. But the defence filed on 26<sup>th</sup> April, 2011 having been filed by advocates then not on record, the same was invalid. That is why application has been filed for leave to file a fresh statement of defence.

The present application was filed on 17<sup>th</sup> June, 2011. I am satisfied this was as soon as the hitch came to the notice of Wairagu & Wairagu, and the need to apply became apparent. There was no delay in applying.

With the advent of **Article 159 (2) (d)** of the new **Constitution**, and **sections 1A and 1B** of the **Civil Procedure Act, Cap 21**, the courts should now be preoccupied more with doing expeditious, proportionate, affordable and substantial justice to litigants, rather than adjudicating over procedural and technical issues.

I therefore have no hesitation in allowing this application. The Defendant shall file and serve her statement of defence within ten (10) days of delivery of this ruling. I will award costs of the application to the Plaintiff in any event.

Those shall be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF AUGUST, 2011.**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED THIS 5<sup>TH</sup> DAY OF AUGUST 2011**