



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS**

CIVIL SUIT 541 OF 2009

**GITONGA MWANIKI.....1ST PLAINTIFF
ONESIMUS MWANGI GICHUIRI.....2ND PLAINTIFF**

VERSUS

ANNUNCIATA WAITHIRA KIBUE.....DEFENDANT

RULING

1. By a chamber summons dated 14th June, 2010, Annunciata Waithira Kibue, who is the defendant in this suit, seeks to have the interlocutory judgment entered against her on 21st December, 2009, set aside. She also seeks to have her draft defence deemed as duly filed or in the alternative that she be allowed to serve her defence within 7 days. The defendant blames her previous advocate Kamau Kuria and Kiraitu Advocates for having failed to file her defence. The defendant claims that she has a good defence to the plaintiffs' suit. She has annexed a draft defence.
2. In support of the application, Mr. Mbichile who appeared for the defendant urged the court to allow the application maintaining that the defendant has a good defence to the plaintiffs' claim, and that the plaintiffs do not stand to suffer any prejudice if the application is granted. Mr. Mbichile relied on two authorities:
 - *Giro Commercial Bank Ltd vs Jaswinder Singh Dhadialla [2005] eKLR*
 - *Pharmaceuticals Products Ltd vs Development Bank of Kenya & 2 others [2004] eKLR*
3. The plaintiffs/respondents objected to the application through a replying affidavit sworn by the 1st plaintiff Gitonga Mwaniki. It was averred that it was well within the knowledge of the defendant that the firm of Kamau Kuria & Kiraitu Advocates had acted for both parties. Therefore the issue of representation should have been resolved. It was contended that the failure to file a defence cannot be blamed solely on the part of Kamau Kuria, Kiraitu & Company Advocates. It was maintained that the defendant was indolent and did not deserve the favourable discretion of the court. It was alleged that the defendant was not candid to the court, and had no good defence to the plaintiffs' claim. Mr. Kuria who appeared for the plaintiffs urged the court to dismiss the application maintaining that the defendant was guilty of laches and that she did not have a good defence to the plaintiffs' claim.
4. I have carefully considered the application, the affidavit in support and in reply, as well as the annexures thereto. I have also considered the submissions that were made by counsel as well as the authorities cited. It is clear from the court record that the firm of Kamau Kuria & Kiraitu Advocates entered appearance for the defendant on 23rd November, 2009. It is also evident from annexure AWK3, to the defendant's supporting affidavit that the firm of Kamau Kuria & Kiraitu Advocates was the firm which drew the agreement upon which the plaintiffs' claim is anchored. In the circumstances, the defendant's explanation that the firm of Kamau Kuria & Kiraitu Advocates failed to file a defence on the ground that they were acting for both parties, is not unbelievable. It would appear that the defendant was not given appropriate advice by the firm of Kamau Kuria & Kiraitu Advocates as this firm ought not to have entered appearance for the defendant in the first place. Secondly, the defendant has exhibited a draft defence which raises triable issues. Such issues ought to be canvassed and determined during a full trial. Further, the suit involves land and it would therefore be fair and just, that the case is fully heard and determined on merit.
5. For the above reasons, I do allow the application dated 14th June, 2010, and set aside the interlocutory judgment entered on 21st December, 2009. I order the defendant to file and serve her defence within 7 days from the date hereof. The defendant shall further pay costs of this application and thrown away costs to the plaintiff.

Orders accordingly.

Dated and delivered this 25th day of October 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Kuria for the plaintiffs/respondents

Ms Otieno H/B Mbichile for the defendant/applicant

B. Kosgei - Court clerk