

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

Civil Case 41 of 1996

DANIEL WAITE MATU PLAINTIFF

VERSUS

HOUSING FINANCE OF KENYA DEFENDANTS

RULING

The Notice of Motion dated 20th December 2007 is brought under Section 3A of the Civil Procedure Act and orders XLIX rule 5 of the Civil Procedure Rules. The defendant by that Notice of Motion seeks orders that the court be pleased to extend time within which to file the amended defence. Further it seeks that the amended defence filed herein be deemed to be properly filed and served within time. In support of that application the affidavit of the advocate who has the conduct of this case on behalf of the defendant stated that the plaintiff filed an amended plaint and served the same on their firm at the end of June 2007. That amended plaint was received by an advocate who subsequently left the firm. On receipt of that amended plaint that advocate gave the file a bring up date of September 2007. This bring up date was without filing an amended defence to the amended plaint. The error was not noticed in that firm until later and as result the defendant's advocate wrote to the plaintiff's advocate requesting them to consent to the amended defence being filed out of time. The plaintiff's advocate responded with a letter of October 2007 indicating that there was need for a formal application to be made. The defendant's advocate stated in the affidavit in support of the application that they thereafter sought their client's instruction on the filing of that application. It is deponed that the instructions from their client did not come to them until 10th December 2007. It is thereafter that the present application dated 20th December 2007 was filed.

The application was opposed by the plaintiff. The main thrust of opposition was that there had been inordinate delay in filing the present application. Accordingly the plaintiff argued that the defendant did not deserve the prayers sought.

The record of this matter shows that on 29th May 2007 the plaintiff sought by way of Chamber Summons dated 26th May 2007 to amend his plaint. The defendant even though they were served did not attend the hearing of that application. The court proceeded to grant the plaintiff the prayers sought for amending his plaint. That amendment was to be filed within seven days from the date of the court order. There was no leave that was granted to the defendant to amend his defence. That being the case one cannot understand what the defendant seeks by the present application. The defendant seems to be under the misconception that leave was granted to amend his defence. That is not borne out by the record. There cannot be an extension to file an amended defence when the court has not been moved under Order VI A of Civil Procedure Rules. The defendant's Notice of Motion therefore is incompetent and the orders sought cannot be granted in view of what is highlighted herein. But even if it was competent I find that the defendant is very economical with the truth surrounding the delay in filing the amended defence. The defendant fails to give dates when certain actions were taken. For example, the defendant first talks about consulting the plaintiff's advocate for the consent to file that amended defence. No date was given when this was done. It does however seem like by October 2007 the plaintiff had made it clear that he was not willing to give the defendant the concession he sought. What is not clear is why the defendant's advocate on getting that negative response needed to get instructions from the defendant on the filing of the present application. The defendant's advocate must after all have had those instructions when they instructed to file an amended defence. Those instructions were with them even before they wrote to the plaintiff's advocate. I do accept the plaintiff's advocate's submissions that the defendant is guilty of inordinate delay in moving the court. As stated before however the defendant is not on record as having been granted leave to file an amended defence for them to move the court to extend time for filing such an amended defence. The application by way of Notice of Motion dated 20th December 2007 for the reasons stated herein before is incompetent and is dismissed and the costs of that application are awarded to the plaintiff.

Dated and delivered at Nyeri this 3rd day of March 2008.

MARY KASANGO

JUDGE