



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE 57 OF 2006

NEUBERGER REINHARD

JOHN KABAU PLAINTIFFS

VERSUS

ATTORNEY GENERAL

POLICE COMMISSIONER

JACTONE SIMIYU LOKORITO

JAMES MAINA

CYRUS MIKUNU DEFENDANTS

R U L I N G

By an application by way of Chamber Summons dated 7th February 2007, under Order 9A Rule 7 of the Civil Procedure Rules, the applicant seeks orders:

- 1. That the plaintiffs/applicants be granted leave to apply for judgment.*
- 2. THAT the costs of this application be provided for.*

The application is based on the ground:

- 1. That the Attorney General has failed and/or neglected to file a written statement of Defence and the period for filing the same has long expired.*

The application is predicated upon the annexed affidavit of *Neuberger Reinhard* sworn on the 7th day of February 2007.

The respondent was served with a hearing notice for the said application as per the affidavit of one *Fredrick Kudo*, sworn on the 16th day of February 2007 but failed to attend the hearing. The application thus proceeded ex-parte with the leave of the court.

For the applicant, it was argued that the Attorney General was served with the plaint and entered appearance on 25th august 2006 but failed to file a defence. That consequently the plaintiff filed the

subject application for leave to apply for judgment against the Attorney General on 7th February 2006. That the delay in filing the defence is inordinate. That though there is a statement of defence dated 16th February 2007, it was filed out of time and without leave of the court.

I have carefully perused the court file and find as a fact that a statement of defence was filed on 16th April 2006 by the Attorney General for and on behalf of the 2nd, 3rd, 4th and 5th defendants. By that time no judgment had been obtained against the Government.

The defendant filed grounds of opposition to the application dated 21st March 2007 but failed to attend the hearing.

Order IX Rule 1 of the Civil Procedure Rules provides:

“A defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him, or, if no interlocutory judgment is so entered, at any time, before final judgment.”

It is clear to me from the record that the defence was filed on 16th April 2006 by the Attorney General. By that time no interlocutory judgment had been obtained against the defendant. No final judgment had equally been entered against him. Accordingly, the defence on record was properly entered as by law enjoined.

In the result, I find that this application is not merited. Accordingly, I dismiss it with no order as to costs.

Dated and delivered at Malindi the 18th Day of June 2007.

N.R.O. OMBIJA

JUDGE