

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 35 of 2005

PETERSON NDAMBIRI KARAGU)

DANIEL MURIUKI & 105 OTHERS) PLAINTIFF

VERSUS

KERUGOYA/KUTUS MUNICIPAL COUNCIL DEFENDANT

R U L I N G

Kerugoya/Kutus Municipal Council hereinafter referred to as the Defendant seeks to have the ex-parte judgment entered against it on the 12th May 2005 set aside and leave granted for their defence to be filed out of time and the draft defence to be deemed to have been duly filed and served subject to the payment of the appropriate fees.

Mr. Wilson Mwita Maroa who is the town clerk of the Defendant Council claims that he was served with the summons on 15th April 2003 and that he forwarded the same on 16th April 2005 to the Defendant's advocate to represent the Defendant. On the same day i.e. 16th April 2005 the Defendant's town clerk left for Kenyatta University where he is pursuing a master's degree. He was away until 14th May 2005. He further explained that the Deputy town clerk and the treasurer were also away between 13th and 30th April 2005 attending a seminar.

In the absence of the Senior Officers of the Defendant, the Defendant's advocate was unable to obtain instructions for filing the defence hence the default. The Defendant claims it has a good defence a draft of which is exhibited.

Upon carefully considering the supporting affidavit and the annexures thereto, it is evident that the Defendant's town clerk has been less than candid.

First it is apparent from the affidavit of service filed by the process server that the town clerk was personally served with the plaint and summons to enter appearance on the 13th April 2005 and not 15th April 2005 as the town clerk claims in his supporting affidavit. This is evident from the copy of summons duly signed by the town clerk and clearly dated 13th April 2005.

Secondly the town clerk claims that he forwarded the plaint and summons to the Defendant's advocate on the 16th April with instructions to represent the council however no explanation has been given as to why no appearance was entered within 15 days from the date of service as no further instructions were necessary for this.

Thirdly the town clerk has explained that in addition to his absence, other Senior officer's such as the Deputy town clerk and the Treasurer were away between 13th and 30th April 2005 attending a Seminar. However it is evident from Annexure WMM-4 that there were many different seminars taking place within that period and the defendant's officers were only expected to attend the Seminar concerning their local authority which was to take place from 17th to 19th April 2005. Their alleged absence from 13th to 30th April 2005 was therefore a distortion of the truth.

Notwithstanding the above, the suit filed against the Defendant raises issues of public interest. The

Defendant has availed a draft defence which raises issues which the court should properly adjudicate upon. The fact that the default judgment was due to negligence on the part of the Defendant can be easily addressed through an order for costs. Case of **Kenya Safari Lodges & Hotels Ltd. v/s Tembo Tours & Safaris Ltd. [1985] KLR 441**, is a case in point.

I do therefore allow the application and set aside the judgment entered against the Defendant on 12th May 2005.

I further order that the Defendant shall file and serve its defence within 15 days from the date hereof and that the Defendant shall pay costs of this application and all thrown away costs to the Plaintiffs.

Dated signed and delivered this 21st day of July 2005.

H. M. OKWENGU

JUDGE