

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Suit 105 of 1999

JOSEPHAT MATIRI M'AMIRU.....PLAINTIFF

VERSUS

JOEL NCHOORO & 9 OTHERS.....DEFENDANT

R U L I N G

The application before the court is dated 31.1.2003 and is brought by the plaintiff. The plaintiff in it seeks leave of the court to enter judgment against certain Government Offices and Ministries or departments as required under O.IXA of the Civil Procedure Rules. In particular, the applicant wishes to get leave to file judgments against the Committee Buri Njeru Primary School defendant No.11, the Committee, Maua Polytechnic defendant No.12, the Trustee Maua Hospital, defendant 13; The District Commissioner Meru North District, defendant 14, The Director of Lands & Settlement, defendant No.15, the Minister of Lands & Settlement, defendant No.16; and the Attorney General, defendant No.17.

The applicant/plaintiff's basis for seeking such judgment is that the defendants were duly served with summons to enter appearance through the State Counsel, Meru and he filed appearance on 12.10.99. But that thereafter, the State Counsel failed to file defence within the prescribed time for which reason the applicant finds it necessary now to get leave as required by law, to enter the judgments, argued the plaintiff.

Mr. Njogu for the respondents however, replied that he had actually filed defences, for the concerned defendants except the 13th defendant who is being represented by Mr. Ondari, and that the defences are on the record. He agreed that he filed the defences out of the prescribed period but within the period authorized by O.9 rule 1 where a defendant can file a defence any time before judgment is entered by court. This, he added, was particularly so in relation to the Government under O.9A rule 7, which requires that a judgment against the Government cannot be entered without leave of court.

On the part of defendant No.13, Mr. Ondari for it stated that defence had been filed within the prescribed time. He added that the plaintiff may have been misled to the effect that such defence had not been filed only because it may not have been served upon the plaintiff.

I have carefully considered the application before the court. The plaintiff does not deny the fact that defences in question are actually on record although they were indeed filed much later. He does not also deny that the 13th defendant filed its defence in time although it was not served upon him. It is my finding that a defendant can file a defence, any time before an interlocutory judgment is entered against him as per the provisions of O.9 rule 1. And where the defendant is the Government, no such judgment can be entered against it at all unless the leave of court is obtained to that effect.

In this case the defendants had filed defences before the plaintiff has effectively obtained leave to enter the judgment he seeks to enter. The court cannot therefore ignore the defences on the record to grant the leave sought.

For the above reasons, this application is misconceived. It must fail. It is dismissed. It is however noted that the respondents filed their defences after this application was filed except for the 13th defendant who had filed its defence earlier. I do not therefore see any reason why the said

defendants/respondents should not be condemned to pay the plaintiffs costs for this application.

As concerns the 13th defendant, it filed its defence in time but failed or ignored to serve the same on the plaintiff/applicant. This defendant should also suffer costs for negligency.

The suitable order therefore, is that this application is dismissed but costs of the same shall be met by the 11th, 12th, 13th, 14th, 15th, 16th and 17th defendants. Such costs are fixed at Kshs.7,000/= to be shared at 1000/= for each defendant and payable before the defendants are allowed to proceed to defend the suit. Orders accordingly.

DATED AT MERU THIS 22ND DAY OF SEPTEMBER, 2005

D. A. ONYANCHA,

JUDGE