



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**ELC NO. 49 OF 2018**

**MARGARET NJOKI KAMAU.....PLAINTIFF/RESPONDENT**

**VS**

**REUBEN NDIVO MWANGI.....DEFENDANT/APPLICANT**

**RULING**

1. The Applicant moved the Court vide an application under ORDER 51 Rule 1 of the CPR and all other enabling provisions seeking the following orders;

- a. The Court be pleased to grant leave to file defence out of time.
- b. The annexed statement of defense be deemed as properly filed as per record
- c. Costs of the application be provided for.

2. The application is based on grounds annexed thereto and the supporting affidavit of the Applicant where he depones that on the 24/6/19 the Court granted the Applicant leave to file defence within 7 days. That the Advocate on record failed to file the said defence within 7 days. That the failure to file the defence within time was a mistake of the previous advocate on record which mistake should not be visited on him. That the current advocate took over the matter on the 9/10/2020. That the failure was not intentional on the part of the Applicant and that the defense raises triable issues and urged the Court to grant the application.

3. The application is opposed. That the Defendant is not serious with the prosecution of the case and that explains why 3 months down the road he is yet to comply with the orders of the Court and file the statement of defence in accordance with the leave granted on the 9/10/2020. That the application is frivolous as leave was already granted and perhaps the right application was to extend time under order 50 rule 6.

4. That no reason has been given to warrant extension of time.

5. The issue is whether the Applicant is deserving of the orders of extension of time to facilitate filing of statement of defence.

6. Order 50 rule 6 provides that where a specific time is fixed for doing an act or taking any proceedings the Court has powers to enlarge such time on terms notwithstanding that the application is brought after the time prescribed has lapsed. The Courts power to enlarge time is unfettered. The discretion must however be exercised judiciously and not capriciously

7. It has been argued by litigants that mistake of counsel should not be visited to them. I am of the contrary view in that the case belongs to the litigant who enjoys a professional and contractual relationship with his counsel who is for all purposes his agent. Any mistake by agent entitles the litigant to a remedy and recourse in law.

8. That said I will be guided by art 159 (2)(b) of the constitution to tend to the substantive justice of the case. The delay in this case has not been explained. The delay is inordinate even if it attributed to the Applicant's counsel. It is not in dispute that such delay has prejudiced the Respondent. I will take this in **consideration** of the orders that I shall give in the end.

9. I allow the application on conditions;

- a. That the Applicant shall file and serve the statement of defence, witness statements and list of documents within 7 days from the date hereof.

b. The Applicant shall pay to the Respondent throw away costs in the sum of Kshs 20,000/- payable within 7 days from the date hereof.

c. Thereafter the parties to expeditiously fix the matter for pretrial under Order 11 of the CPR.

d. The cost of the application shall be in favour of the Respondent

10. It is so ordered

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14<sup>TH</sup> DAY OF JANUARY 2021**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff: Macharia HB Mrs Kimani

Defendant: Omulara HB Mbiyu

Kuiyaki: Court Assistant