



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. CIVIL NO. 20 OF 2019**

**MICHAEL JULIUS MACHAI CHEGE.....PLAINTIFF**

**V E R S U S**

**GRACE FLORENCE NYOKABI CHEGE.....1<sup>ST</sup> RESPONDENT**

**JAMES WILLIAM CHEGE.....2<sup>ND</sup> RESPONDENT**

**SERAH IRENE NJERI CHEGE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The issue which arose in this matter is whether the application dated 5/3/2019 was opposed. It was submitted that when the parties appeared in court on 26/3/19 the 1<sup>st</sup> and 2<sup>nd</sup> had not opposed the application. The 3<sup>rd</sup> respondent filed a replying affidavit outside the time given. The respondent had been directed to file the affidavit and serve it within 14 days. She served a notice to act in person by registered post on 21/5/2019. That 1<sup>st</sup> and 2<sup>nd</sup> respondent have not filed a replying affidavit and the application should therefore be allowed.

2. For the 1<sup>st</sup> and 2<sup>nd</sup> respondent it was submitted that they filed affidavits on 8/4/19 and were served on Mr. Teti through email.

3. Counsel for the applicant reiterated that the replying affidavits were filed out of time. That the application is not opposed and should be allowed.

4. I have considered the application. On 26/3/19 the respondents were given 14 days to file a replying affidavit. By then Mr. Jomo appeared for the respondent.

5. The 3<sup>rd</sup> respondent filed a notice to act in person and a replying affidavit. An authority to swear was also filed on 8/4/19 indicating that the 1<sup>st</sup> and 2<sup>nd</sup> respondent had given the 3<sup>rd</sup> respondent authority to swear. The counsel for the applicant submitted that she was served with the notice by registered post. The notice to act in person and the Replying Affidavit were filed within time though they were served outside time.

**Section 1A & 1B** provides for the overriding objectives of the **Civil Procedure Act**. The provision calls on the court to do substantive Justice. The objectives are meant to facilitate the justice, expeditious proportionate and affordable resolution of civil disputes governed by the Act. The court in exercise of its powers under the Act shall seek to give effect to the overriding objectives under the Act.

6. The question is whether the court would be giving effect to the provisions by ignoring documents which parties have filed and have not served. There was service by registered post which counsel for the applicant says. Counsel for the applicant stated that he was served on 28/5/19. As such by the time he appeared in court he had been served.

7. Striking out the documents would deny the party an opportunity to be heard. The applicant though served outside time is not likely to suffer any prejudice. He did not seek more time to respond.

8. My view is that objection on the ground that the applicant was served outside time is a procedural technicality which the court may, depending on the circumstances of the case overlook in favour of doing substantive justice. This is the spirit of **Article 159(2)(d) of the Constitution** which provides that:-

***“In exercising judicial Authority, the courts and tribunals shall be governed by the following principles –***

***Justice shall be done without undue regard to procedural technicalities.”***

9. The court should therefore lean towards considering the affidavit and determine the case other than strike it out. I am of the view that since the applicant was served though outside time, he did not suffer any prejudice. The affidavit served was sworn on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondent who had given authority to the 3<sup>rd</sup> respondent to swear the affidavit.

10. I find that the application was opposed and should therefore be heard on merits.

**Dated at Kerugoya this 14<sup>th</sup> day of November 2019.**

**L. W. GITARI**

**JUDGE**