



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 2 OF 2012**

MULU MBUVI.....PLAINTIFF

VERSUS

JOHN SYANDA.....DEFENDANT

**RULING**

This matter came before me this morning. It had been listed for hearing. Mr. Mutune, counsel for the defendant, applied that he be allowed to prosecute the application dated 6<sup>th</sup> June 2014 before the hearing of the case commenced. That application seeks leave to amend the defence. Miss Muumbo, counsel for the plaintiff, opposed the application to prosecute that application. I orally allowed the counsel for the defendant to argue the application promising to give my reasons for so doing in writing. These are my reasons for allowing the application.

After my oral ruling, Miss Muumbo, who had been served with the application this morning, said she was able to respond to it without filing an affidavit in response. The application was argued with Mr. Mutune explaining the circumstances leading to the delay in amending the defence as soon as the firm of Nyamu & Nyamu Advocates was served with the amended defence. In brief, after being served with the amended defence, the counsel who was handling this matter on behalf of the defendant left the firm of Nyamu & Nyamu Advocates without handing over the files to another counsel. By the time the defendant learned that no action had been taken towards amending the defence, it was too late and this case had been listed for hearing. It is admitted that the mistakes in causing that delay are those of the advocate and not the defendant. Counsel urged the court to allow the application in the interest of justice.

Miss Muumbo opposed the application. She submitted that the plaintiff has not introduced new matters in the amended plaint but has only split the issues for clarity and better presentation of the plaintiff's claim. She also submitted that the defendant and his counsel ought to take court matters seriously; that the defendant was served in good time and that an application such as this one prejudices parties and wastes court's time.

I have considered the application and the response and I agree with Miss Muumbo on the issue of taking court matters seriously.

It is the view of this court that no party who knocks at its door seeking justice should be turned away without an opportunity to be heard. The appropriate time to file the amended defence was soon after service of the amended plaint. However, the defendant did not do so due the circumstances explained in the two affidavits in support of the application. It is the view of this court that the mistakes in delay to file the amended defence were purely by counsel for the defendant. I am sure even if one colleague leaves work without handing over files, it is vital that the other advocates in that firm ought to know of the existence of such files and exercise due diligence in perusing them to see if there are any urgent matters that require attention. This was not done and it took the defendant to enquire as to the progress of the case only for the Nyamu & Nyamu Advocates to realize no action had been taken. It has always been the practice of the courts not to visit the mistakes of advocates on their clients.

This court is interested in substantive justice and chooses to give all the parties fair playing field so that they can articulate all their issues for fair and just determination of the case. It is on this principle that I allowed the application to amend the defence.

On the issue of costs, I was tempted to award costs for today to the plaintiffs and charge them to Nyamu & Nyamu Advocates, but the situation has been rescued when Miss Muumbo for the plaintiff told the court that she was ready to proceed with her case today. For this reason costs will be in the cause. I make orders accordingly.

**Dated, signed and delivered on 9<sup>th</sup> of June 2014**

**S.N.MUTUKU**

**JUDGE**