



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 46 OF 2010

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

WILSON GACANJA.....1ST DEFENDANT

WILLIAM KIPSEREM BUSIENEL.....2ND DEFENDANT

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....3RD DEFENDANT

RULING

1. This is a ruling on the application dated **16/7/2018** and filed in court on **17/7/2018**. That application has been brought by the 2nd defendant. It prays for order that this suit be struck out and in the alternative the applicant be granted leave to file a defence out of time. The 2nd defendant also prays that the costs of this application be in the cause.
2. The plaintiff filed a replying affidavit sworn by one Wilson Mutiga, an Investigator with the Ethics and Anti-Corruption Commission on **9/8/2018**. He avers that the 2nd defendant was served with summons to enter appearance on 2/7/2010; that an affidavit of service was filed in that regard on 14/7/2010; that a further copy of summons was served upon the 2nd defendant's advocates on 21/5/2010.; that pursuant to that summons the 2nd defendant entered appearance through the firm of Lel & Bungei; that later the 2nd defendant appointed the firm of Bungei & Murgor; that on 8th March 2017 Mr. Murgor appeared in court and applied for an adjournment on the ground that he was freshly appointed; that on 22/1/2018 the 2nd defendant appointed another advocate, a Mr. Mwara to come on the record on his behalf and the latter advocate also sought an adjournment on the same ground as his predecessor Mr. Murgor; that now the 2nd defendant has appointed the firm of R.E Nyamu & Co Advocates to represent him. It is alleged that the foregoing is evidence that the 2nd defendant was served but he has been employing delaying tactics by changing advocates on or on the eve of the hearing date.
3. I have examined the record and confirmed that the original of the affidavit of service annexed to the replying affidavit dated **9/8/2018** is in the record.
4. There is no supplementary affidavit filed by the applicant to controvert the contents of the replying affidavit. On the basis of the contents of the record, I find that the 2nd defendant was properly served with plaint and summons.
5. I find that the application for orders striking out the suit on the basis of non-service is not well founded.
6. The provisions of **Order 7 Rule 1** are that a defendant who is served with summons should file his defence within 14 days after entry of appearance in the suit. He should serve the defence within 14 days of filing and file an affidavit of service. In my view and based on the analysis of the documents on the record there is no good reason why the defendant, who was duly served, failed to file and serve his defence on the other parties.
7. However this is a court of justice. Though the hearing of this suit has commenced, only one witness has testified.
8. Although I find the 2nd defendant's conduct to be improper, I am of the view that the substantive justice would be done to all the parties if all the parties who wish to file their documents were allowed to do so, especially now that the hearing of the suit has not progressed to a great degree.

9. However this court must condemn the 2nd defendant to punitive costs if it is to allow him to file a defence despite his egregious conduct.

10. I therefore order that the 2nd defendant shall file his defence and comply fully with **Order 7 Rule 5** of the Civil Procedure Rules.

11. The timelines for compliance with the said order shall be as contained in **Order 7**.

12. The 2nd defendant shall bear the costs of this application set at **Kshs.30,000/=** to the plaintiff within **14 days**, failure to which the order granting him leave shall stand vacated.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of January, 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Mokuu for the plaintiff

N/A for the respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019