



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 60 OF 2016**

**BENARD NDICHU MWAURA.....PLAINTIFF**

**VERSUS**

**GODFREY GITAHU KEEN .....DEFENDANT**

**RULING**

1. In the Notice of Preliminary Objection dated 23<sup>rd</sup> August, 2018, the Plaintiff has averred that the Defence dated 21<sup>st</sup> May, 2018 is bad in law because it offends the rules of procedure and contravenes Order 2 Rule 13 of the Civil Procedure Rules; that the Defence was filed out of time and without the leave of the court and that the Defence is intended to delay the trial process.

2. The Notice of Preliminary Objection proceeded by way of written submissions. The Plaintiff submitted that the Defence was filed out of time and without the leave of the court contrary to the provisions of Order 7 Rule 1 of the Civil Procedure Rules; that where a Defence is filed out of time, the Defendant must first seek the leave of the court and that on that ground alone, the Defence should be struck off the record.

3. In his submissions, the Defendant's advocate submitted that due to the two Applications filed on 25<sup>th</sup> July, 2016 and 2<sup>nd</sup> February, 2017, the Defendant did not file his Defence due to a mix-up; that upon taking instructions, the Defendant filed his Defence on 21<sup>st</sup> May, 2017 and that the mistake of filing the Defence out of time without the leave of the court was not intended.

4. According to the Defendant's advocate, the Defendant sought to regularize the anomaly by filing the Application dated 7<sup>th</sup> May, 2019 seeking to extend time to regularize the Defence filed out of time and that the Preliminary Objection is purely a technicality which can be cured.

5. The record shows that although this matter was filed on 25<sup>th</sup> July, 2016, it was not until 21<sup>st</sup> May, 2018 that the Defendant filed its Defence, contrary to the provisions of Order 7 Rule 1 of the Civil Procedure Code which states as follows:

***“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his Defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the Defence and file an affidavit of service.”***

6. The Defendant has admitted that he filed the said Defence out of time and that the filing of the Defence out of time without the leave of the court was a genuine *bona fide* mistake. To correct the anomaly, the Defendant filed a Notice of Motion dated 8<sup>th</sup> May, 2019 in which he is seeking for the extension of time to file the Defence out of time and for an order that the Defence filed on 21<sup>st</sup> May, 2018 be deemed as properly filed.

7. Although this court has the power to strike out a pleading which has been filed out of time without leave, the court also has powers to extend time within which a pleading may be filed. Considering that the Defendant has admitted that he filed his Defence out of time without the leave of the time, and in view of the pending Application dated 8<sup>th</sup> May, 2019 for the extension of time, it is in the interest of justice that

the Application dated 8<sup>th</sup> May, 2019 be heard first.

8. If the Defendant does not convince the court that he is entitled to an order for the extension of time for the filing of the Defence out of time, then the Defence would be struck out with the consequence that no other Application for filing of a Defence out of time can be filed.

9. For those reasons, I direct that the Preliminary Objection dated 23<sup>rd</sup> August, 2018 be heard alongside the Notice of Motion dated 8<sup>th</sup> May, 2019.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**