



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO.217 OF 2016**

**PUMWANI CARWASH CO-OPERATIVE SOCIETY.....PLAINTIFF**

**=VERSUS=**

**NAIROBI CITY COUNTY.....DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 29<sup>th</sup> June 2016 in which the plaintiff/applicant seeks orders that the defence filed by the defendant/respondent be struck out and judgement be entered for the plaintiff as per request for judgement dated 10<sup>th</sup> May 2016.
2. The applicant contends that summons together with the plaint were served upon the respondent on 7<sup>th</sup> March 2016 but the respondent did not file defence within the stipulated time. The defence was filed on 31<sup>st</sup> May 2016 well outside the period required. The applicant further contends that it made a request for entry of judgement which request was not accepted as there was no affidavit of service accompanying the request. The applicant therefore seeks to have the defence struck out for having been filed out of time without leave of the court.
3. The respondent has opposed the applicant's application based on a replying affidavit sworn on 22<sup>nd</sup> August 2016. The respondent contends that failure to file defence within time was due to time taken by the respondent to retrieve the relevant documents before a defence could be filed. The respondent argues that there will be no prejudice suffered by the respondent if the defence on record is deemed to have been regularly filed as to strike out the defence will be driving away the respondent from the seat of justice.
4. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. I have to consider whether to strike out the defence and enter judgement as per the applicant's request for judgement made on 10<sup>th</sup> May 2016 and filed in Court on 11<sup>th</sup> May 2016.
5. The Court record shows that the plaint herein was filed on 7<sup>th</sup> March 2016. Summons to enter appearance were given on 9<sup>th</sup> March 2016. The respondent entered appearance on 24<sup>th</sup> March 2016. The respondent filed a request for judgement in default of a defence on 11<sup>th</sup> May 2016. When the matter was placed before the Deputy Registrar on 16<sup>th</sup> May 2016, the Deputy Registrar remarked that there was no affidavit of service. This meant that no directions could be given in respect of that request for judgement. In the meantime, a defence was filed by the respondent on 31<sup>st</sup> May 2016.
6. The applicant filed an affidavit of service on 9<sup>th</sup> June 2016. In the affidavit of service, the process server claims that he served summons to enter appearance together with plaint and other documents on 7<sup>th</sup> March 2016. It is not possible that the process server would have served summons to enter appearance which had not been issued. The case was filed on 7<sup>th</sup> March 2016 and summons were signed on 9<sup>th</sup> March 2016.
7. The respondent has raised the issue of not having been served with summons in their submissions. They have a point on that issue. However be that as it may, even if it were that summons were served as required which is not the case, the fact remains that there is a defence which was filed before any directions on the request for judgement could be given.
8. The concern of the court is to dispense with substantive justice as opposed to technical justice. The court cannot allow itself to be tied down with procedures which do not go to the root of the matter in controversy or those that do not cause any injustice to the opposite party. The applicant's application lacks merit. I proceed to dismiss the same and deem the defence filed herein to have been properly filed. Costs of this application shall be costs in the cause.

It is so ordered

**Dated, Signed and delivered at Nairobi on this 31<sup>st</sup> day of May 2018.**

**E.O.OBAGA**

**JUDGE**

In the absence of parties who were aware of the date and time for delivery of ruling.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**