



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 43 OF 2015**

**JENNIFER AKEYO.....PLAINTIFF**

**VERSUS**

**JOSEPH ONDIEK OLWENY.....DEFENDANT**

**RULING**

1. The Defendant filed the notice of motion dated 7<sup>th</sup> February 2018 seeking for enlargement of time for filing the Defendant's defence and counterclaim. He also prays that the defence and counterclaim dated 8<sup>th</sup> January 2018, and filed on the 10<sup>th</sup> January 2018 be deemed filed and served within time. The application is based on the eight grounds marked (a) to (h) on the face and supported by the affidavit of Joseph Ondiek Olweny, the Defendant, sworn on the 7<sup>th</sup> February 2018.

2. The application is opposed by the Plaintiff through the grounds of opposition dated 8<sup>th</sup> February 2018.

3. The application came up for hearing on the 14<sup>th</sup> March 2018 and Counsel for the Plaintiff asked the Court to rely on the grounds and affidavit filed and prepare its ruling as Counsel for the Defendant was absent.

4. The following are the issues for determination;

**a) Whether the Defendant has made a reasonable case for extension of time to file and serve a defence and counterclaim.**

**b) Whether the Defendant defence and counterclaim annexed to the supporting affidavit contains a reasonable defence and counterclaim to the Plaintiff's suit.**

**c) Who pays the costs.**

5. The Court has carefully considered the grounds of the Defendant's notice of motion, affidavit evidence, grounds of opposition and come to the following determinations:

a) That this is the second time that the Defendant is moving the Court for extension of time to file defence. The first time was through the notice of motion dated 1<sup>st</sup> September 2016 and time was extended by 14 days from the date of the ruling of the 22<sup>nd</sup> November 2017.

b) That the main explanation for failure to file and serve the defence in 14 days as directed vide the ruling on the 22<sup>nd</sup> November 2017 is that Counsel on record closed their chambers early for Christmas and that their file was misplaced until 8<sup>th</sup> January 2018. That though the Plaintiff has opposed the application, the fact that the Defendant prays that the defence and counterclaim dated 8<sup>th</sup> January 2018, and filed on the 10<sup>th</sup> January 2018 be deemed duly filed and served shows there will be no further delay if the application is granted.

c) That as the Defendant's counterclaim discloses a reasonable cause of action, it is only fair and just that the extension of time be granted, and the defence and counterclaim filed be deemed as duly filed and served to enable the parties be heard and their claims determined on merit.

d) That as the Defendant's delay in complying with the order of 22<sup>nd</sup> November 2017 is the one that made the current application necessary, it is only fair and just that he pays the Plaintiff's costs in this application.

6. That following from the foregoing, the Defendant's Notice of Motion dated the 7<sup>th</sup> February 2018 is hereby allowed in the following

terms;

a) That time to file and serve defence for the Defendant is hereby extended and the defence and counterclaim dated the 8<sup>th</sup> January 2018 and filed on the 10<sup>th</sup> February 2018 deemed as properly filed and served.

b) The Defendant do pay the Plaintiff costs of the application in any event.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF MAY 2018**

**In the presence of:**

Plaintiff      Absent

Defendant     Absent

Counsel       Mr. Orenge for the Plaintiff

M/s Mwaro for Odeny for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**