



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC. CASE NO.1 OF 2013**

**STEPHEN OKAL ODERO.....PLAINTIFF**

**VERSUS**

**RICHARD OBEWA OKUKU .....DEFENDANT**

**RULING**

1. **Richard Obewa Okuku**, the Applicant, moved this court through the notice of motion dated 17th June 2013 seeking to set aside the expate judgment entered on 11th February 2013 and further prays that he be accorded leave to defend this suit. The Applicant listed eight grounds on the notice of motion which is also supported by his affidavit sworn on 17th June 2013 and the supplementary affidavit filed on 17th February 2015 and deponed on 16.2.2013.
2. The Respondent **Stephen Okal Odero**, opposed the application through the replying affidavit sworn on 29th May 2014.
3. The application came up for hearing on 27th April 2016 when the Applicant and Respondent informed the court that they would rely on the contents of their affidavits in respect of the application.
4. The main issues for determination are as follows:
  - a) Whether the Applicant has given a plausible explanation as to why he failed to file his defence in time.
  - b) Whether the Applicant has a defence that establishes triable issues.
  - c) Who pays the costs.
5. The court has considered the grounds on the notice of motion, affidavit evidence by both parties, the contents of the proposed defence and come to the following findings;
  - a. That the Applicant was served with summons to enter appearance and other suit papers on 25th January 2013 and his 15 days to enter appearance ended on or about 9th February 2013. The memo of appearance dated 19th February 2013, and filed in court on 21st February 2013 by the Applicant, was therefore filed outside the time without leave and in any case interlocutory judgment had by then been applied for and entered on 11th February 2013.
  - b) That the Applicant filed his statement of defence and other documents dated 17th May 2013 on the 22nd May 2013 without first seeking to set aside the interlocutory judgment entered on 11th February 2013 or obtaining the leave of the court.

c) That even though there are no good reasons given by the Applicant on why he did not file his memorandum of appearance and statement in defence within the set time, the proposed defence raises triable issues that to go to trial for the dispute between him and the Respondent to be determined on merit. That the Applicant has expressed his desire for an opportunity to be heard and it is only fair and just he be accorded that opportunity.

d) That the Applicant would however meet the costs of this application which should be paid within the shortest time possible. The thrown away costs are assessed at Kshs.6,000/=

6. That having come to the determinations set out above, the court finds that the notice of motion dated 17th June 2013 has merit and is allowed in the following terms;

a) That the interlocutory judgment entered on 11th February 2013 is hereby set aside.

b) That the memorandum of appearance dated 19th February 2013, and filed in court on 21st February 2013, plus the statement of defence and other documents dated 17th May 2013, and filed in court on 22nd May 2013, outside the time and without leave of the court are hereby expunged from the court record.

c) That the Applicant/Defendant is granted fifteen (15) days to file and serve his statement of defence, list of documents, and witness statements.

d) That the Applicant/Defendant do pay the Respondent/Plaintiff thrown away costs of Kshs.6000/= (six) thousand within the next 30 (thirty) days.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016**

In presence of;

Plaintiff/Respondent Present

Defendant/Applicant Present

Counsel

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/6/2016**

8/6/2016

S.M. Kibunja J

Oyugi court Assistant

Parties present

Court: Ruling delivered in open court in presence of both the Plaintiff and Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/6/2016**