



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 93 OF 2008

FLORENCE WAIRIMU KARIUKI..... 1ST PLAINTIFF/APPLICANT

ELIZABETH W. MUTEMBEI.....2ND PLAINTIFF/APPLICANT

JANE ELIZABETH MUNA.....3RD PLAINTIFF/APPLICANT

**HELLEN WANGARI KAMAE (Suing as the legal representative
of the Estate of Wilfred Kamae).....4TH PLAINTIFF/APPLICANT**

PETER CYRUS MUNIOH.....5TH PLAINTIFF/APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT/RESPONDENT

RULING

This is an application dated **5th August 2014** filed by the Plaintiffs seeking an order that the Court be pleased to strike out the Defence as it was filed out of time and after an interlocutory judgment had been entered. The application is premised on grounds outlined thereunder and supported by an affidavit sworn by **Kimandu Gachohi**, Advocate on record for the Plaintiffs.

It is deposed that the Plaintiffs instituted this suit on **16th October 2007** seeking Specific Performance against the Defendant to identify the beacons of the Plots allocated to the Plaintiffs or give possessions thereof and issue

beacons/boundary certificates for their respective plots. The Plaint together with summons to enter appearance dated **12th March 2008** was served upon the Defendant on **20th June 2008**. However, the Defendant failed to enter appearance and consequently, interlocutory judgment was entered on **5th August 2008** upon request by the Plaintiffs to the Deputy Registrar of the Court on **22nd July 2008**. The Defendant filed a defence on **26th April 2010**, out of time and long after the interlocutory judgment was entered, and without seeking leave of the Court to set aside the Judgment and file the Defence out time. The deponent states that the Defence out to be struck out for being irregular, un-procedural and an abuse of the Court process.

The application was further supported by submissions dated **21st April 2015**. Counsel referred to **Order 7**

Rule 1 of the Civil Procedure Rules and deposed that it requires the Defendant to file a Defence within **14 days** of entering appearance and in default, the provision makes it mandatory for the Defendant to seek leave to file a Defence out of time. It was further submitted that where there is an interlocutory judgment, it must be set aside before a Defendant can seek leave to file a Defence out of time. Counsel submitted that the Court is empowered under **Order 2 Rule 15 of the Civil Procedure Rules** to strike out any pleading on the premise that there is no reasonable defence in law, if it may delay the fair trial of the action or otherwise an abuse of the Court process. Similarly, that **Order 10 Rule 3** allows the Court to strike out a Defence on its own motion or upon an application, as in this instance, and make such order as it deems fit. Counsel urged the Court to allow the application, effectively striking out the Defence and direct that the matter proceeds to formal proof to facilitate the entry of final Judgment.

This application was served upon the Defendant's counsel, but no Replying Affidavit has been filed in response. There are Affidavits of Service sworn by **Ancent Ndambuki Mutuku** sworn on **5th February 2015, 12th June 2015, 4th September 2015 and 19th November 2015** with annexed Hearing Notices which bear a stamp of the Defendant's advocate acknowledging service. There are also invitation notices addressed to the Defendant's advocates which also bear a stamp which is indicative that service of the application and hearing notice was effected. Despite such service, there is no response filed. The Court record also shows that the Defendant's advocate appeared in Court on **27th November 2012** ready to prosecute an application for dismissal of the suit for want of prosecution only to be served with a Preliminary Objection to the effect that there was already and interim Judgment entered. Counsel for the Defendant proceeded to withdraw the said application.

In essence, the Defendant is well aware that there is interim Judgment entered and therefore its Defence was not only filed out of time, but the same was filed after the interim Judgment was entered and without leave of the Court. Despite of this knowledge, the Defendant has not bothered to rectify the irregularity and has also not filed a response to this application. Striking out a pleading is considered a draconian measure particularly where the lapse can be cured or there is no prejudice occasioned to the adverse party. In the case of **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & another v Francis Bahati Diwani & 2 others Malindi Civil Suit No. 28 of 2012 [2014] eKLR**, Angote J. opined as follows:

15. In my view, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rule does not expressly provides so, which has been filed out of time is **an extreme measure which is resulted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.**

16. **The court ought to look at the issues raised in a holistic manner before making a decision as to whether it can strike out a pleading which has been filed contrary to the provisions of the Rules.**

17. **I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules.**

18. **The approach of the court should therefore not to strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the Civil Procedure Rules and Article 159 of the Constitution.**

I agree with the Honorable Judge, *that court ought to look at the issues raised in a holistic manner before making a decision as to whether it can strike out a pleading and to first examine whether the striking out will be in conformity with the overriding objective set out in the Civil Procedure Rules.* The overriding objective provided in **Section 1A and 1B of the Civil Procedure Rules** is that the rules are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes.

The instant application seeking to strike out the Defence has been brought to the attention of the Defendant through its counsel through service of the said application and the hearing notices. It is also noteworthy

that when counsel appeared before Court, he learnt of the interim Judgment but took no steps to have it set aside. The Defendant has not made any steps to cure the procedural defect of the defence filed out of time and after the entry of an interim judgment. The conclusion inferred from the conduct of the Defendant is that it is in fact unbothered to defend the suit. Looking at the matter holistically, I am of the considered view that it would serve justice to the Plaintiffs to have the Defence struck out as the matter is ripe for formal proof, and in that regard, disposing off the suit expeditiously.

On the foregoing, the Plaintiff's application is hereby allowed with costs. The Plaintiff is directed to take a hearing date for formal proof without delay.

It is so ordered.

Dated, Signed and Delivered this *24th* day of *June*, 2016

L. GACHERU

JUDGE

In the Presence of:-

M/s Wangui holding brief for Gichihi Kimondu for the Plaintiffs

Mr Sagana holding brief Mr Mboya for the Defendant/Respondent

Hilda : Court Clerk

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above stated advocates.

L.GACHERU

JUDGE