



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 932 OF 2013**

**EMRIS INVESTMENT LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**CYRUS SHAKHALAGA JIRONGO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CYPERR ENTERPRISES LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**OFF-SHORE TRADING CO. LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 8<sup>th</sup> November 2013 in which the Defendants/Applicants seek for the following orders:

1. Spent.
2. There be a stay of execution of the interlocutory judgment entered in favour of the Plaintiff on the 16<sup>th</sup> August 2013 pending the interpartes hearing of this Application;
3. Ditto
4. That the interlocutory judgment entered in favour of the Plaintiff against the Defendants on 16<sup>th</sup> August 2013 and all the consequential execution proceedings thereafter be set aside and the Defendants be granted leave to defend this suit unconditionally.
5. That costs of this Application be awarded to the Defendants.
6. Such other or further relief as the Honourable court may deem just and mete to grant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Defendant/Applicant, Cyrus Shakhhalaga Khwa Jirongo, sworn on 8<sup>th</sup> November 2013 in which he averred that this suit was instituted by the Plaintiff in the Commercial & Admiralty Division after which it was transferred to the Environment and Land Court by Justice Hatari Waweru on 26<sup>th</sup> July 2013. He further averred that his advocates subsequently filed the Statement of Defence of all the Defendants dated 13<sup>th</sup> August 2013 on 14<sup>th</sup> August 2013. He further averred that as at the time of filing defence, no application for judgment had been filed and no judgment in default of defence had been entered against the Defendants. He further averred that upon perusal of the file on 6<sup>th</sup> November 2013, his advocate's clerk was shocked to learn that the Plaintiff's advocate had applied for and obtained entry of interlocutory judgment against the Defendants on 16<sup>th</sup> August 2013. He further stated that the Plaintiff's

advocate has gone on to instruct an auctioneer who has already obtained court warrants of attachment. He further denied his advocates being served with the notice of entry of judgment and stated that the same does not bear any stamp or signing to confirm receipt.

The Application is contested. The Plaintiff filed the Replying Affidavit of Mutembei Marete sworn on 20<sup>th</sup> November 2013 in which he stated that he is the Plaintiff's advocate in this matter. He averred that the Defendants entered appearance on 26<sup>th</sup> July 2013 after which the Defendants were to file their Statement of Defence within 14 days from that date. He further averred that the Defendant failed to file their Statement of Defence within the prescribed period of 14 days and never made an application for extension of time. He further averred that in the circumstances the Plaintiff was within its right to request for judgment in default which they did. He further added that the Defendants proposed defence does not raise any triable issues and further that the Defendants admitted to being indebted to the Plaintiff in the sum of Kshs. 32 million as per paragraphs 11, 12, 13, 15 and 16 of their purported defence.

In their submissions, the Defendants admitted that having entered appearance on the 26<sup>th</sup> July 2013, they had up to the 9<sup>th</sup> of August 2013 to file the Defence but that since 9<sup>th</sup> August 2013 was a Friday, they could file the Defence on 12<sup>th</sup> August 2013. They however submitted further that they filed their Defence on 14<sup>th</sup> August 2013 with a delay of two days occasioned in part by the difficulty of tracing the file.

The law is clear on the issue of timing within which to file a defence. **Order 7 Rule 1 of the Civil Procedure Rules, 2010** has this to say:

**“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.”**

The timelines prescribed by the law are there to be adhered to. This ensures a level playing field for all litigants. By their own admission, the Defendants agree that they filed their Defence outside of the prescribed time by the law. The excuse offered for this is that the file could not be traced. As far as I can tell, that is not a valid excuse for the late filing of the Defence by the Defendants. The Defendants cannot therefore turn around and claim that the Plaintiff was out of order in applying for interlocutory judgment to be entered against the Defendants. **Order 10 rule 10 of the Civil Procedure Rules, 2010** entitles the Plaintiff to apply for and obtain interlocutory judgment in default of defence which is what happened in this case. On that ground alone, I hereby decline to grant the Application and proceed to dismiss it with costs to the Plaintiff.

**DELIVERED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2015.**

**MARY M. GITUMBI**

**JUDGE**