



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 28 OF 2012**

1. CHAIRMAN, SECRETARY AND TRESURER, SCHOOL

MANAGEMENT COMMITTEE OF SIR ALI BIN SALIM PRIMARY SHCOOL

2. HALDUN MAHMOUD VAE.....PLAINTIFFS

=VERSUS=

1. FRANCIS BAHATI DIWANI

2. ERNEST KILIRO KIMNAI

3. MUNICIPAL COUNCIL OF MALINDI.....DEFENDANTS

**RULING**

**Introduction**

1. The Notice of Preliminary Objection was filed by the Plaintiff's advocate on 6<sup>th</sup> September 2013 in which the Plaintiff has averred that the 2<sup>nd</sup> Defendant's statement of defence and list of documents are improperly on record as the same was filed contrary to the applicable law. The Plaintiff is seeking for an order that the said Defence should be expunged from the court record.
2. The parties' advocates appeared before me on 20<sup>th</sup> March 2014 and argued the Preliminary Objection.

**The Plaintiff's case:**

3. Mr. Muranje, the Plaintiff's counsel, submitted that the Plaintiff's case should be allowed to proceed as an undefended suit and that the 2<sup>nd</sup> Defendant's defence is not properly on record because it offends the provisions of Order 7 Rule 1 of the Civil Procedure Rules.
4. Counsel submitted that the Rule required a Defendant to file a defence within 14 days and the same to be served within 14 days from the date of filing.
5. According to counsel, under the repealed Rules, it was possible for one to file a defence at any time before Judgment. However, that position changed under the 2010 Rules.
6. The Plaintiff's counsel further submitted that on 20<sup>th</sup> March, 2012, the court ordered that the parties should file their documents within 30 days. However, the Defendants filed their documents after the said 30 days. No attempt, it was submitted, was made to have the time within which to file the documents enlarged. Consequently, it was submitted, those documents should also be expunged from the court record.

### **The Defendant's response:**

7. Mr. Gicharu, the Defendant's counsel, relied on the provisions of sections 1A and 1B of Civil Procedure Act. Counsels submitted that the interests of justice required that parties should be allowed to ventilate their cases. What is being raised, it was submitted, will deny the Defendants their day in court.
8. Counsel submitted that the Plaintiff will not suffer any prejudice if the Defence which is on record is deemed as having been filed and served within time.
9. Counsel submitted that where a party has files a Defence, a court can still set aside judgment that has been entered in default of such a Defence.
10. The Defendants' counsel supplied to the court a bundle of authorities to buttress his arguments which I have considered.

### **Analysis and findings:**

11. Order 7 Rule 1 of the Civil Procedure Rules provides that where a Defendant has been served with 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. The Rule does not state what would happen where a defence is filed outside the stipulated period of 14 days.
12. Order 10 of the Civil Procedure Rules provides for consequences of non-appearance and or default of defence. In my view, the consequences of what would happen to a party who does not file his Defence within 14 days in unliquidated claims like the current one should have been provided for under this Order.
13. Order 10 Rules 2 of the Civil Procedure Rules provides that where any defendant fails to appear and the Plaintiff wishes to proceed against such defendant, he shall file an affidavit of service. On the other hand Rule 4 provides that where a Plaintiff makes a liquidated demand only and the Defendant fails to appear, the court shall, on request enter judgment against the Defendant for the sum claimed. There is no corresponding Rule to deal with unliquidated claims, especially in matters for recovery of land, which provides for entry of judgment in default of a defence, thus giving a Defendant room to file his defence before the matter proceeds for hearing.
14. The question that arises is this: what happens to a defence that is filed after 14 days from the date when the Defendant enters appearance considering that judgment cannot be entered until the matter is heard? Can such a Defence be struck out so as to allow the claim to proceed as if it is undefended?
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. This is the position that the Court of Appeal (with Kiage J.A. Dissenting) took in the case of **NICHOLAS KINTO ARAP KORIR SALAT - Vs- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIONS & OTHERS (2013) e KLR** as follows:

**“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and**

**technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”**

19. Earlier on, Justice Ringera in **Welcome Properties Vs Karuga (2001) KLR 402** in his usually clarity held as follows:

**“I am in agreement with the main thrust of Mr. K’Owade’s submissions that a procedural defect does not oust the jurisdiction of the court and that unless injustice or prejudice is shown defects of form and other procedural lapses cannot vitiate the proceedings. In the instant case, the Respondents do not complain of any prejudice or injustice.”**

20. In view of the above holdings by the courts, which I am in agreement with, and considering that the Plaintiffs have not shown the injustice or prejudice they will suffer because of the filing of the Defence outside the prescribed period, I find and hold that the Preliminary Objection by the Plaintiff is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **9<sup>th</sup>** day of **May**, 2014.

**O. A. Angote**

**Judge**