



REPUBLIC OF KENYA



Savani & another v Estate of Bhagwanji Tribhovanbhai Patel & 2 others (Civil Case 130 of 2014) [2023] KEHC 3538 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3538 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 130 OF 2014
FG MUGAMBI, J
APRIL 28, 2023

BETWEEN

JITU TRIBHOVANBHAI SAVANI 1ST PLAINTIFF

RAJENDRA TRIBHOVANBHAI HANSRAJ SAVANI 2ND PLAINTIFF

AND

ESTATE OF BHAGWANJI TRIBHOVANBHAI PATEL 1ST RESPONDENT

MANJULA BHAGWANJI TRIBHOVAN PATEL 2ND RESPONDENT

PARAG BHAGWANJIBHAI SAVANI 3RD RESPONDENT

RULING

Brief Facts

1. Before the court is an application dated 4th May 2022. It is brought under sections IA, IB and 3A of the *Civil Procedure Act*, Order 51 rule 1 of the *Civil Procedure Rules* 2010 and all enabling provisions of the law. The application seeks an extension of time for filing a Further Amended Plaintiff dated 29th May 2020 and substituted witness statements dated 28th May 2020, pursuant to the ruling of this court dated 29th April 2020.
2. The motion is premised on the grounds on the face of it and on the supporting affidavit sworn by Jitu Tribhovanbhai Savani dated 4th May 2022. The affidavit is further substantiated by the plaintiffs'/ applicants' submissions dated 2nd June 2022. In summary the applicants' case is that vide a ruling dated 29th April 2020, the applicants were granted leave to file a further amended plaintiff and substituted witness statements. The gist of the application is captured in the applicants' submissions that this window is the one we seek to extend noting that counsel formerly in record on the matter after being frustrated on receiving a copy of the ruling after the expiration of the 14-day window for



reconsideration of the amendments wrongly opted for a fresh Notice of Motion dated 29th May 2020 which this court dismissed with its ruling dated 21st April 2022. The applicant has now filed the present application seeking extension of the time previously granted by the court in the ruling of 29th April 2020, to put in the further amended pleadings and witness statements.

3. The applicants urge that the error made in filing a second application for leave and its eventual disposition have resulted to the current delay and that the mistake of counsel should not be visited on an innocent client. It was also submitted that the amendments are sought before the hearing has begun and as such the same should be considered.
4. The application is opposed through a replying affidavit filed by Parag Bhagwanjibhai Savani, the 3rd defendant/respondent, on behalf of the 1st and 2nd respondents. The said affidavit is dated 18th May 2022 and substantiated by the submissions filed on behalf of the respondents, dated 14th June 2022.
5. In brief, the respondents case is that the Court in the ruling of 29th April 2020 made observations regarding the proposed amendments to the pleadings. Paragraphs 32, 33 and 39 of the said ruling have been brought to the attention of the court relating to three issues. First the court noted that the amendments sought to introduce a new cause of action, second, that the amendments were prejudicial having been made against the 1st defendant who was since deceased and could not respond and finally that there was no reason adduced by the plaintiffs as to why the additional facts could not have been pleaded at the time of filing the suit.
6. The defendants also argue that instead of the plaintiffs complying with the 14-day opportunity that they had been magnanimously extended by the court despite its observations, the plaintiffs instead chose to file another similar application which was dismissed on 29th April 2022 for being barred by the doctrine of issue estoppel.
7. The defendants further point out that even in the current application for expansion of time, the plaintiffs have still not heeded to the directions of the court in regard to the proximity and observations for reconsidering the proposed amendments to the pleadings. The defendants refute the statement that the error in bringing the second application was made by a previous advocate on record as stated by the plaintiffs. They argue that this is untrue as the same firm of advocates was on record for the plaintiffs.

Analysis and determination

8. I have gone through the pleadings rival submissions and authorities produced by counsel in argument of their respective submissions. As to whether the application for extension of time is warranted, two reasons have been given for the inordinate delay by the plaintiffs to file the further amended pleadings and substituted witness statements within 14 days from 29th April 2020;
 - a. That counsel on record was unable to access the ruling within time so as to comply
 - b. That due to an error by a previous advocate on record, a second fresh application for extension of time was filed instead of an application for extension of time, occasioning further delay
9. Section 95 of the *Civil Procedure Act* and Order 50 rule 6 of the Civil Procedure Rules 2010 clothes this Court with unfettered jurisdiction to enlarge time set for the doing of any act or taking of any proceedings under the rules. It is not lost on me that this right is to be exercised as the justice of each case may require. The gist of the authorities that have been produced for the courts consideration are in furtherance of this provision. The test to be applied is whether the delay was excusable, inordinate, whether it can be satisfactorily explained with valid and clear reasons and whether justice can still be



served to the parties despite the delay. This is the key to the exercise of the discretion granted under Order 50 rule 6.

10. I have noted that there was a one-year time lapse between the date of the alleged erroneous application and when the court finally made its ruling. The period of delay is not explained. It is not clear when the present firm came on record, from whom it took over the conduct of the matter, when the error was noted and what was done to interject and correct the erroneous application. For these reasons it would appear that the diligence put in by the plaintiffs was wanting and that there was inordinate delay in bringing this application.
11. Having said this, the applicants have beseeched this court not to punish an innocent client for the admitted inadvertency of his advocate. It has also been urged that there will be no prejudice to the defendant who will get an opportunity to put in his amended statement of defense in the matter which is still in its pre-trial stages. Finally, it has been urged that it would be in the interest of justice for all the disputed matters to be placed before the court for a fair and just determination. I have taken these submissions into account. I do agree that the justice of this case demands that all the questions in controversy be placed before the court for determination. I do not however intend to compromise the expeditious hearing and determination of this longstanding matter.

Disposition and orders

12. As such, in order to balance out these two interests, the application dated 4th May 2022 is hereby granted on the following terms:
 - i. The plaintiffs are hereby granted leave to amend, file and serve their further amended plaint and amended witness statement within five (5) days from the date of this ruling. For the avoidance of doubt, this shall be done by close of business on 8th May 2023
 - ii. The plaintiff shall abide by the directions of the Learned Judge given vide the ruling of 29th April 2020 more specifically to desist from amendments which introduce a new cause of action, desist from amendments that would be difficult to prove being in the personal knowledge of the 1st defendant who is since deceased and finally to reconsider the prolixity of the plaint.
 - iii. Concurrent leave is granted to the defendants to file and serve their amended statement of defence and amended witness statements within five (5) days after service. For the avoidance of doubt this shall be done by close of business, 16th May.
 - iv. Thereafter parties will appear before the Deputy Registrar Hon. Bett to confirm compliance with these directions and other pre-trial directions on 18th May 2023.
 - v. The matter will be mentioned before this court on 31st May 2023 for purposes of taking a hearing date.
 - vi. The plaintiff/applicants shall bear the costs of this application.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2023

F. MUGAMBI

JUDGE

