



Engen Kenya Limited (now known as Vivo Marketing Kenya Limited) v Tinek Limited; National Land Commission & 3 others (Proposed Defendant) (Environment & Land Case 624 of 2020) [2023] KEELC 16969 (KLR) (19 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 624 OF 2020**

A NYUKURI, J

APRIL 19, 2023

BETWEEN

**ENGEN KENYA LIMITED PLAINTIFF
NOW KNOWN AS VIVO MARKETING KENYA LIMITED**

AND

TINEK LIMITED DEFENDANT

AND

**NATIONAL LAND COMMISSION PROPOSED DEFENDANT
PETER NZUKI PROPOSED DEFENDANT
CHIEF LAND REGISTRAR PROPOSED DEFENDANT
THE REGISTRAR OF TITLES PROPOSED DEFENDANT**

RULING

1. Before court is a Chamber Summons dated March 8, 2023 filed by the defendant seeking the following orders;
 1. Spent.
 2. That this honourable court be pleased to reinstate its orders made on February 8, 2022.
 3. That pursuant to prayer (2) above, this honourable court be pleased to issue an order directing the enjoinder of the Proposed defendants to this suit.
 4. That pursuant to prayer (2) above, this honourable court be pleased to grant leave to the applicant to serve a third party notice on the proposed defendants out of time.



5. That pursuant to prayer (2), this honourable court be pleased to grant leave to the applicant to amend its defence out of time. The defendant attached orders made on July 16, 2021 and extracted on February 8, 2022 together with return of service.
2. The application is premised on the supporting affidavit sworn by Abdinoor Shariff Ahmed a director of the defendant. The applicant's case is that the defendant had made a similar application dated January 26, 2021, whereof in a ruling dated February 8, 2022, this court allowed the Defendant leave to join the Proposed Defendants and to amend its defence. That however due to an inadvertent mistake on the part of the defence counsel, he only served the defence on the Proposed Defendants but failed to serve a third party notice and amend its defence. He adds that there was an appeal in the Court of Appeal vide Civil Appeal No. 124 of 2020 pending judgment in respect of Civil Suit Number 60 of 2018 which decision was stayed, leading to this matter slipping counsel's mind.
3. The application is opposed. The plaintiff filed grounds of opposition dated March 5, 2023. They stated that the delay on the part of the defendant was inordinate and unexplained which disentitles them to discretionary reliefs. Further the plaintiff averred that since the matter was certified urgent, the defendant is estopped from seeking the orders herein and that the court's discretion cannot be exercised in vain or to endorse non compliance of court orders as the defendant has not complied with orders made on February 13, 2023 and that there is nothing capable of being reinstated in the orders of February 2, 2022.
4. The application was canvassed by way of written instructions. On record are the defendants' submissions filed on April 4, 2023 and the plaintiff's submissions filed on March 30, 2023.

Submissions

5. Counsel for the defendant/applicant submitted that the plaintiff's argument that the order sought to be reinstated as being non-existent is not plausible as the said order was attached to the application herein. Counsel maintained that the reference to February 8, 2022 was an inadvertent reference to the date of the extraction of the order which was made on July 16, 2021. Counsel invoked article 159 of the Constitution and the case of Samuel Mbugua Githere v Kimungu [1984] eKLR, for the proposition that the lapse in indicating the correct date ought not to be a ground of striking out the application.
6. In addition, counsel contended that mistakes of counsel should not be visited upon the litigants and relied on the case of Belinda Muras & 6 others v Amos Wainaina [1978] KLR. It was further submitted for the defendant that natural justice dictate that a defendant ought not be driven away from the seat of justice without a hearing however weak his case may be. Counsel pointed out that the matter had been scheduled for its first hearing on May 3, 2023 and that therefore the defendant ought to be given a chance to present his case. Reliance was placed on the cases of Martha Wangari Karua v IEBC Nyeri Civil Appeal No 1 of 2017, Richard Nchapi Leiyagu v IEBC & 2 others Civil Appeal No 18 of 2013 (unreported) and Okwombo v South Nyanza Sugar Company [2021] eKLR, all of which the court has considered.
7. On their part, counsel for the plaintiff submitted that the record shows that no proceedings were conducted on February 8, 2022 on this matter and that therefore this court cannot reinstate a non-existent order, as doing that would be acting without jurisdiction. Counsel pointed out that the only orders made in February 2022 was to certify the matter as being ready for hearing.
8. On the issue of joinder and failure to amend, counsel submitted that vide the court's ruling delivered on July 16, 2021, the court granted leave to the defendant to amend the defence for purposes of joining the proposed defendants. It was counsel's contention that where the court does not give specific time



frame for compliance with orders to amend pleadings, Order 8 Rule 6 of the Civil Procedure provides that such amendment ought to be done in 14 days from the date of the order. Counsel pointed out that leave to amend was granted on July 16, 2021, that therefore time to amend lapsed on July 31, 2021, and that it was more than 586 days since the order to amend was granted.

9. It was further argued for the plaintiff/respondent that a party seeking the court's discretion in their favour must come to court with clean hands, which the defendant had not done by not complying with the orders of July 16, 2021. Counsel contended that there were no reasons given for the grant of the orders sought and referred the court to the case of Jumbo v Commodities Limited & others.
10. Besides, counsel stated that when this matter came up for hearing on February 13, 2023, the defence counsel sought for adjournment on account of illness of the defence witness and sought to substitute their witness which has not been done to date. Therefore, counsel argued that the application and conduct of the defendant amounts to an abuse of the court process. Counsel also submitted that the defendant has not annexed a proposed amended defence to enable the court exercise its discretion in their favour.

Analysis and Determination

11. I have carefully considered the application, grounds of opposition and submissions. The issue that emerge for consideration are whether the defendant herein is deserving of the orders sought.

12. Order 50 Rule (6) provides for the power of the court to enlarge time as follows;

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

13. The power to extend time is discretionary and an order for extension of time is an equitable remedy where the Applicant ought to explain the reason for the delay to the courts satisfaction, as such order is not a right of the parties. In the case of Nicolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR, the Supreme Court discussed the principles governing extension of time as follows;

It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

We derive the following as the underlying principles that a court should consider in exercising such discretion;

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



4. Whether there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. Similarly, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, the Supreme Court underscored the need for an Applicant seeking extension of time to satisfactorily declare and explain the whole period of delay to the court.
 15. In the instant case, the application is premised on the assertion that failure to file amended defence on time was inadvertence on the part of the defence counsel and that mistake of counsel should not be visited on the defendant. I note that in this suit the defendant obtained leave to amend defence on July 16, 2021 and the court granted them leave to amend defence after service of amended plaint. Although time was not stated, and the Plaintiffs had been granted 14 days to file and serve their amended plaint, Order 8 rule 6 of the *Civil Procedure Rules* provides that where no specific period to amend is stated, the amendment ought to be done in 14 days.
 16. The application for extension of time was filed on March 13, 2023. That is nineteen months after the time granted for amendment had lapsed. This is despite the fact that the defence counsel attended court on March 7, 2022, July 7, 2022, November 2, 2022 and February 13, 2023; when the matter came up for mention and hearing, yet there was no attempt by the defence to seek extension of time. The averments by the defendant that there is an Appeal No. 124 of 2020 which stayed the decision in respect of Civil Suit Number 60 of 2018, which made this matter to slip counsel's mind, in my view, is not a satisfactory explanation for the delay of nineteen months, considering that the same counsel appeared in court more than three times for hearing of the suit before he filed the application herein.
 17. In the premises, the application having been brought with undue delay and there being no satisfactory explanation for the delay of nineteen months, it is my considered view that the defendant is undeserving of orders of extension of time.
 18. As the prayer for reinstatement of orders made herein in regard to leave to amend defence is the other face of the coin for the prayer for extension of time, that prayer is equally rejected.
 19. In the premises, I find no merit in the Chamber Summons dated March 8, 2023, and the same is hereby dismissed with costs to the Plaintiff.
 20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Mwangi holding brief for Mr. Luseno for Plaintiff

Ms. Wanjau holding brief for Mr. Hassan for Defendant

Ms Josephine – Court assistant

