



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MILIMANI COMMERCIAL & TAX DIVISION**

**HCCC NO. 277 OF 2012**

**NATIONAL BANK OF KENYA LIMITED .....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOSEPH KITTONY.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**KIPRUTO KANDIE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**KIPTUI KANDIE.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**KIGEN KANDIE.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated 12<sup>th</sup> February 2019, brought under the provisions of; Articles 159 (2) (d) of the Constitution of Kenya, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, 2010 and Order 51 of the Civil Procedure Rules 2010

2. The Applicant is seeking for orders: -

- a) *That pending hearing and determination of the suit, the Honourable court be pleased to appoint an independent government valuer to value the suit property and file the report with the court before hearing of the suit.*
- b) *That the 4<sup>th</sup> defendant be restrained either by himself, his agents and or representatives from disposing, parting with possession, charging and or in any way dealing with the suit property pending hearing and determination of the suit.*
- c) *That the 1<sup>st</sup> defendant/applicant be granted leave to file defence to the amended plaint and counterclaim out of time.*
- d) *That the draft statement of defence and counterclaim be deemed as duly filed and served upon payment of the requisite filing fees.*
- e) *That the pending hearing and determination of the suit, the plaintiff and the 4<sup>th</sup> defendant be directed to deposit sufficient security in court to secure settlement of the decretal sum in the event that; the 1<sup>st</sup> defendant succeeds in his counter claim.*
- f) *That the costs of this application be provided for.*

3. The Applicant avers that, upon being served with the plaint and summons to enter appearance, he instructed the firm of; Auta Nyakundi & Company Advocates to represent him and they filed a notice of appointment dated 10<sup>th</sup> May 2012. Thereafter he instructed the firm of; Hernia Anzala & Company advocates to take over from the firm of; Auta Nyankundi & Company Advocates and they filed a notice of change dated 21<sup>st</sup> May 2012. After representing him in several applications, he disagreed with them whereupon the firm filed an application to cease acting and it was granted.

4. He then instructed the firm of; Wambasi & Co. Advocates to represent him who also filed a notice of change dated 5<sup>th</sup> December 2018. However, he was shocked to learn that neither the previous law firms nor that law firm had filed a statement of defence in response to the plaint dated 26<sup>th</sup> April 2012, nor defence to the amended plaint dated 31<sup>st</sup> July 2012, despite his instructions to all the lawyers to do all that

was necessary to defend his interest and make sure that justice is done in his favour.

5. That, he had instructed all the Advocates to file a counter claim against the plaintiff to recover the money he had paid as deposit towards the purchase of the subject suit property. However, he was later served with a ruling delivered on 4<sup>th</sup> February 2013, directing him to vacate to the suit property. Subsequently he was evicted from the suit property on the ground that, the 4<sup>th</sup> defendant who is the son of the late Aaron Kimosop Kandie had paid the balance of the purchase price to the plaintiff.

6. He therefore seeks to be allowed to file the defence and the counter claim to enable him fully participate in the proceedings. He avers that, the draft statement of defence and the counter claim he has annexed to his supporting affidavit raises reasonable issues which can only be determined upon hearing of the suit. Further, the mistake to file the defence and counter claim to the plaintiff's suit was occasioned by the previous firms of Advocates and should not be visited upon him. That, as the plaintiff and the co-defendants have physical possession of the property, they will not suffer any prejudice if the application is allowed.

7. However, the Plaintiff/Respondent opposed the application by filing grounds of opposition dated 2<sup>nd</sup> April 2019 which state as follows

- a) *That the 1<sup>st</sup> defendant/applicant is not entitled to the orders sought. There has been an inordinate delay in bringing this application;*
- b) *That the reasons for the delay in filing defence by the 1<sup>st</sup> defendant/applicant are lame and unacceptable. The same disentitles the 1<sup>st</sup> defendant/applicant to the orders sought;*
- c) *That an extension of time to file a defence out of time will further prolong the hearing of this suit to the detriment of the other parties;*
- d) *That the proposed counter claim to be filed does not disclose a prima facie case with a probability success;*
- e) *That were the application be allowed, the same would cause a lot of prejudice to the plaintiff and the other parties as the same would further lead to prolonging of this suit which has already taken unnecessarily long to conclude;*
- f) *That the proposed counter-claim to be filed is time bared by the provisions of limitation of actions Act. No cogent reason has been advanced as to why the counter claim was not filed on time.*

8. In the same vein, the 4<sup>th</sup> Defendant/Respondent opposed the application vide a replying affidavit dated 3<sup>rd</sup> April 2019; in which he deposed that it has been seven (7) years since this suit was instituted by the Plaintiff and the Applicant has all along been represented and yet he did not make any effort to follow the progress of the matter. He is the author of his own misfortune. Further he has not attached any documentary evidence to prove his averments.

9. He averred that his late father, one Aaron Kimosop Kandie bequeathed the suit property to him pursuant to the confirmed grant of his estate and he took over the loan with the Plaintiff and entered into an agreement with them and the property was transferred to him. Therefore, there was not fraudulent transfer of the property to him. The property has never been transferred to the 1<sup>st</sup> Defendant and he cannot claim ownership thereof.

10. Finally, the he averred that the counter claim and defence does not raise any triable issues and the application has no merit, is an abuse of the court process and intended to delay the hearing of the main suit.

11. On 7<sup>th</sup> April 2019, the Applicant filed a response to the Plaintiff/Respondent's grounds of opposition and reiterated his averments in his affidavit in support of his application save to add that the failure to file defence and counter claim was not realized by any of the parties to this suit hence there was no request for judgment filed against him, neither was it realized by the Honourable Deputy Registrar during the pre-trial conference.

12. The application was disposed of through submissions. The Applicant invited the court to determine the following issues: -

- a) *Whether the 1<sup>st</sup> Defendant should be granted leave to file a statement of defence and counterclaim out of time;*
- b) *Whether the statement of defence and counterclaim raises triable issues;*
- c) *Whether the plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants will suffer prejudice in the event the application is allowed;*
- d) *Whether the 1<sup>st</sup> defendant has any recourse for the monies advance to the plaintiff and the 4<sup>th</sup> defendant for the purchase of the suit property; and*
- e) *Whether the suit property should be valued by an independent government valuer;*
- f) *Whether the 4<sup>th</sup> defendant deposit security in court to secure settlement of the decretal sum?*

13. The Applicant relied on the case of; *Patriotic Guards Ltd v James Kipchirchir Sambu [2018] Eklr;* to argue that courts will readily

excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. It was reiterated that, the defence and counter claim raises triable issues and in that regard the Applicant relied on the case of; Irene Wangui Gitonga v Samuel Ndungu Gitau [2018] eKLR where the court adopted the case of; Kenya Trade Combine Ltd versus Shah Civil Appeal No. 193 of 1991 and stated that a defence which raises triable issues does not mean a defence that must succeed.

14. However, where a defence discloses a bonafide triable issue the court has no discretion but to allow the applicant to defend the suit as held in the case of; Banque Indosuez versus DJ Lowe & Co. Ltd Civil Appeal No.79 of 2002, nor should a suit be summarily dismissed unless, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption by way of an amendment as held in the case of; D.T. Dobie & Co. Ltd versus Muchina & another [1982]KLR 1.

15. The applicant relied on the case of; Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & Others [2013] eKLR to argue that the Plaintiff/Respondent and the co-defendants would not suffer prejudice if the orders sought are granted.

16. The Applicant deposed that the Plaintiff has admitted having received money from him and therefore he should be given a right of hearing based on that admission. He relied on the case of Guardian Bank Ltd vs Jambo Biscuits (K) Ltd (2014) eKLR which apparently dealt with judgment on admission.

17. It was further submitted that, the court should order for valuation of the property by an independent government valuer to afford the court an opportunity to apportion damages to the Applicant or any other parties in the event the court is of the view that compensation in terms of damages would be the best remedy at the end of the trial.

18. The Applicant further submitted that, he is apprehensive that, the 4<sup>th</sup> Defendant having transferred the suit property to another Third party will not be able to settle the dispute in the event that, the suit is decided in his favour. He prayed for the 4<sup>th</sup> defendant be ordered to deposit security in court. He relied on the case of; Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 others (2014) e KLR

19. The Plaintiff/Respondent invited the court to address the following issues: -

a) *Whether there is an inordinate, unexplained delay by the 1<sup>st</sup> Defendant/Applicant in bringing this application and the same disentitles him to the orders sought;*

b) *Whether the extension of time to file defence out of time will further prolong the hearing of this suit to the detriment of the other parties;*

c) *Whether the proposed counter claim to be filed discloses a prima facie case with a probability of success. The same is also time barred by the provisions of the Limitation of Actions Act;*

d) *Whether there is proof that the plaintiff may not be able to pay any decretal sum arising from the counter claim to warrant if (the plaintiff) being ordered to deposit security with the court.*

20. The Plaintiff/Respondent submitted that, the delay in filing the defence and counter claim is inordinate and should not be entertained by the court. That, the failure to file a defence by four law firms is not inadvertent neither can it be described as a bona fide mistake or a mistake by an advocate. The Plaintiff relied on the case of; Bayo Food Products Ltd v Elegand Freighters Ltd [2007] e KLR, where the court dismissed an application to extend time to file a defence after a delay of ten years. The Plaintiff respondent reiterated that; to allow the prayer for filing defence and counter claim out of time will disrupt the hearing of case on 20<sup>th</sup> May 2019.

21. That, the decision whether to extend time or not is at the discretion of the court as stated in the case of; James Kamau Gachau v Dorcas Wairimu Kamau[2009] eKLR where the court held that to determine whether to grant an order or whether to extend time the court must consider inter alia; the length of the delay, the reason for the delay, the chances of the success of the pleading filed out of time and the degree of prejudice that the respondent would suffer.

22. Further as the Applicant has failed to prove that, he paid the purchase price in full the court cannot issue an injunction order to restrain the 4<sup>th</sup> Defendant/Respondent from dealing with subject property as state the application.

23. The plaintiff respondent submitted that, there is no provision in law for the court to order a Plaintiff to provide security for costs and that Order 26 Rule 1 of the Civil Procedure, 2010 relates to an order that; security be provided for the whole or any part of costs of any defendant or third or subsequent party. The request for security of costs is also premature as the Applicant is still seeking for leave to file a counter claim out of time and therefore, he has no suit before the court.

24. Further the Plaintiff/Respondent is a big corporation and a going concern and there is no evidence that it will be unable to pay any decretal sum or costs adjudged against it. Having failed to establish a prima facie case the application cannot succeed.

25. I have considered the application, the grounds and affidavit in support and the submissions and I note that the Applicant seeks for several prayers therein. However, it is noteworthy that, some of those prayers can only be granted if the Applicant is participating already a party to the suit. It would therefore have been more appropriate for the Applicant to have first sought for leave to file his defence and counter claim out of time before seeking for any other prayer.

26. In that regard the prayer seeking for the appointment of an Independent Government Valuer, injunctive order and security for costs cannot be granted unless the prayer for leave to file defence and counter claim is granted.

27. Having considered the arguments advanced in relation to the prayer to file a defence and counter claim out of time, I find that, the only reason advanced for the delay is that, the law firms which the Applicant instructed to file the same did not execute his instructions. But it suffices to note that, the matter has been in court for a solid period of seven years, from the date of the filing of the plaint to the date of the filing of this application.

28. It is not plausible that a litigant can lose interest in his own case for that long period of time. As much as an Advocate has the legal and professional responsibility to represent a party in court, the primary legal and moral responsibility lies and remains with the litigant. Even then, the reasons as to why all the Advocates did not file the defence have not been advanced. It can only be deduced, at most, from the fact that the Applicant kept on changing the law firms. Thus, it may as well have been his conduct that contributed in the delay in filing. Equity assists the vigilant and not the indolent. The applicant cannot therefore be heard to argue that, the Respondents would not suffer prejudice in the given circumstances.

29. Indeed, the provisions of; Article 159 (2) (b) of the Constitution of Kenya, provides that justice shall not be delayed. In the same vein; the provisions of; section 1A and 1B of the Civil Procedure Act states that; stipulates that the overriding objective of the Act and the rules made thereunder is to; facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

30. That a party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

*(a) the just determination of the proceedings;*

*(b) the efficient disposal of the business of the Court;*

*(c) the efficient use of the available judicial and administrative resources;*

*(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

*(e) the use of suitable technology.*

31. Based on the aforesaid it will not be in the interest of justice to delay this matter any-more. However, the provisions of Article 48 of the Constitution of Kenya provides that; the state shall ensure access to justice for all persons. Similarly, the provisions of Article 50 of the constitution states that; every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body and Article 25 thereof states that this right cannot be limited.

32. Therefore, the question that arises is whether it will be in the interest of justice to compensate the Respondent with costs for the delay and allow the Applicant a right to be heard or to rule otherwise. In my considered delay can be compensated with costs but the right to access justice cannot be compensated with costs.

33. In that case, I allow the application in terms of; prayers (3) and (4) that; is the prayer for filing of; the defence and counter claim out of time and the draft amended defence and counter claim annexed to the affidavit in support of application be deemed as properly filed on the following conditions: -

*a) The applicant to file and serve the draft defence and counter claim within three (3) days of the date of this order;*

*b) The respondent to file and serve a reply to defence and defence to counter claim within fourteen (14) days from the date of service;*

*c) The applicant to file their reply to defence to the counter claim within seven (7) days of service by the respondent;*

*d) The pleadings must be filed with their respective documents;*

*e) The applicant to pay thrown away costs to the defendant in the sums of; Kshs 30,000, to be paid within 15 days from the date of this order*

34. In case of default by the Applicant the order 3 and 4 granted shall stand vacated without recourse to court. The matter will be mentioned within 30 days to confirm compliance.

35. Those then are the orders of the court.

**Dated, delivered and signed on this 30<sup>th</sup> day of June, 2020**

**G. L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Ratemo for the Applicant

No appearance for the Respondents

Robert-----Court Assistant