



REPUBLIC OF KENYA



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**Peony Management Company Ltd v Oyatsi (Environment & Land Case 79 of 2020) [2023] KEELC 22220 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22220 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 79 OF 2020**  
**JO MBOYA, J**  
**NOVEMBER 30, 2023**

**BETWEEN**

**PEONY MANAGEMENT COMPANY LTD ..... PLAINTIFF**

**AND**

**DESTERIO OYATSI ..... DEFENDANT**

**RULING**

1. The Plaintiff/Applicant herein has approached the Honorable court vide the Application dated the 1<sup>st</sup> September 2023; and in respect of which, same Plaintiff/ Applicant, has sought for the following reliefs;
  - i. That this Honorable Court be pleased to enlarge time of the undertaking a valuation for purposes of determination of the reasonable compensation payable to the Defendant.
  - ii. That the costs of this Application be in the cause.
2. The instant Application is anchored and/or premised on assorted grounds which have been enumerated at the body thereof. Furthermore, the Application is supported by the Affidavit of one, namely, Mutua P Nzoka, who is (sic) the chairperson of Peony Estate; and by extension, the Chair of the Board of Management of the Plaintiff/Applicant. For good measure, the supporting affidavit is sworn on even date.
3. Though served with the instant Application, the Defendant/Respondent does not appear to have filed any Response thereto, whether by way of Replying affidavit; or Grounds of opposition.
4. Be that as it may, the subject Application came up for hearing on the 8<sup>th</sup> November 2023, whereupon the advocates for the respective Parties, covenanted to dispose of the Application by way of written



submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed the timeline for the filing and exchange of written submissions.

5. Suffice it to point out that thereafter the Plaintiff/Applicant proceeded to and filed written submissions dated the 14<sup>th</sup> November 2023; whereas the Defendant/Respondent filed written submissions dated the 26<sup>th</sup> November 2023.
6. For coherence, both sets of Written submissions are on record.

### **Parties' Submissions:**

#### **Applicant's Submissions:**

7. The Applicant herein adopted the grounds at the foot of the subject Application; as well as the averments contained in the body of the Supporting affidavit sworn on the 1<sup>st</sup> September 2023.
8. Furthermore, Learned counsel for the Applicant has thereafter raised, highlighted and canvassed one [1] salient issue for due consideration by the Honourable court.
9. It is the submissions by and on behalf of the Applicant herein that the instant suit was heard and determined vide Judgment of this court, albeit differently constituted; and wherein the court ordered and directed, inter-alia

“That for the portion of the Defendant’s land that the Plaintiff’s development has encroached on, parties are directed to take valuation on the land affected within 60 days from the date of this judgment, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If parties do not agree on the value of the portion affected within this time frame, they will file submissions for the court to determine the reasonable compensation payable to the Defendant”

10. Additionally, Learned counsel for the Plaintiff has submitted that despite the decree [ portion thereof], directing the Parties to undertake a valuation of (sic) the portion of the Defendant’s land, which had been encroached onto by the Plaintiff, the Parties herein were unable to agree on and/or instruct a valuer for purposes of undertaking the valuation, either in accordance with the decree of the court or at all.
11. Besides, Learned counsel for the Plaintiff has also submitted that the timeline which was prescribed vide the decree of the court, for purposes of undertaking the valuation, namely, 60 days from the date of the Judgment, has since lapsed and/or expired.
12. Be that as it may, Learned counsel for the Plaintiff has submitted that insofar as the Parties herein have since failed to agree on a common valuer, it is imperative that time be extended to enable the Plaintiff to appoint, engage and/or instruct a valuer, with a view to preparing a valuation report over and in respect of the portion of the Defendant’s land which has been encroached upon.
13. Other than the foregoing, Learned counsel for the Applicant has submitted that unless the extension of time sought is granted, it will not be possible for the Applicant herein to render informed submissions for purposes of enabling the Honourable court to determine and award reasonable compensation to the Defendant/Respondent herein.
14. In view of the foregoing, Learned counsel for the Applicant has thus implored the Honourable court to find and hold that it is in the interests of justice that the subject application be allowed; and the Plaintiff be granted the requisite timeline to engage and instruct a registered valuer.



15. In support of the submissions attendant to the extension of time, Learned counsel for the Applicant has invoked and relied upon on the provisions of Section 95 of the Civil Procedure Act, as read together with Order 50(6) of the Civil Procedure Rules, 2010.
16. Similarly, Learned counsel for the Applicant has also cited and relied on, *inter-alia*, the case of *Nicolas Kiptoo Arap Korir Salat versus IEBC & 7 Others*, Civil Application No. 16 of 2014 (2014)eKLR; and *Jane Jebet Moi vs Fuelex Oil Ltd & 2 Others* Nairobi HCC No. 305 of 2000 (UR), respectively.
17. Consequently and in a nutshell, Learned counsel for the Applicant has implored the Honourable Court to find and hold that the application is meritorious and thus ought to be granted.

#### **Respondent's Submissions:**

18. The Respondent herein filed written submissions dated the 16<sup>th</sup> November 2023: and in respect of which same has highlighted and amplified various issues, albeit in opposition to the current Application.
19. First and foremost, Learned counsel for the Defendant/Respondent has submitted that the Application by and on behalf of the Applicant herein is bizarre and absurd; and hence the Plaintiff/Applicant herein pretends to be a Decree holder, yet the terms of the Judgment and the consequential decree rendered on the 30<sup>th</sup> November 2020, are crystal clear and explicit.
20. Furthermore, Learned counsel for the Defendant has submitted that according to the terms of the said Judgment and decree, the Plaintiff's suit was dismissed, save for the aspect where the Honourable court directed that a valuation be undertaken over and in respect of the portion of the Defendant's land which has been encroached upon by the Plaintiff herein.
21. Based on the foregoing, Learned counsel for the Defendant has therefore contended that the Plaintiff herein was/is a Judgment debtor and hence cannot now purport to proclaim herself as the decree holder or at all.
22. Secondly, Learned counsel for the Defendant has submitted that a look at the various reliefs which were granted vide the Judgment of the court, would further clarify and ascertain , who between the Plaintiff and the Defendant, was the successful Party.
23. Other than the foregoing, Learned counsel for the Defendant has thereafter endeavored to reproduce the nature of the reliefs that were (sic) granted and thereafter ventured forward to amplify the various reliefs that were granted by the Honourable court; and which reliefs, it is contended, underscores that the Defendant was the successful party.
24. Finally, Learned counsel for the Defendant has submitted that same [ Defendant], does not have any objection to this Application insofar as it is part of (sic) the process of executing the Judgment of the court which was rendered on the 30<sup>th</sup> November 2020.

#### **Issues For Determination:**

25. Having reviewed the subject Application and upon taking into account the written submissions filed by and on behalf of the respective Parties; one [1], issue does emerge and which deserves consideration and determination by the Honourable court;
26. For coherence, the issue that does emerge relates to whether or not this Honorable court ought to extend and/or enlarge time to enable the Plaintiff herein to retain, instruct and/or engage a registered valuer, for purposes of undertaking the requisite valuation over and in respect of the Defendant's



portion of land; as a precursor to determining the quantum of compensation payable to the Defendant in accordance with terms of the Judgment rendered on the 30<sup>th</sup> November 2020.

## **Analysis And Determination**

### **Whether the Applicant herein deserves extension and/or enlargement of time, either as sought or at all.**

27. Before venturing to address the issues herein before mentioned, it is instructive to recall that the instant suit was filed by and on behalf of the Plaintiff herein and in respect of which, the Plaintiff sought for various reliefs as against the Defendants pertaining to and concerning a portion of L.R No. 330/561 and 330/1349, respectively [hereinafter referred to as the suit properties].
28. Subsequently, the suit beforehand was heard and determined vide Judgment rendered/delivered by this Honorable court [differently constituted] whereupon the court granted assorted reliefs, some of which were in favor of the Plaintiff, whilst the others were in favor of the Defendant.
29. Be that as it may, the portion of the Judgment that is instructive and relevant to the current Application provides as hereunder;[ verbatim];

“That for the portion of the Defendant’s land that the Plaintiff’s development has encroached on, parties are directed to take valuation on the land affected within 60 days from the date of this judgment, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If parties do not agree on the value of the portion affected within this time frame, they will file submissions for the court to determine the reasonable compensation payable to the Defendant”

30. By dint of the named clause of the Judgment, it is evident and apparent that both the Plaintiff and the Defendant were ordered and directed to appoint, engage and/or retain a registered valuer with a view to undertaking a valuation over and in respect of a portion of the Defendant’s land, which had been encroached upon by the Plaintiff’s development.
31. Furthermore, the valuation exercise arising from and/or attendant to the portion of the Defendant’s land encroached upon was to be undertaken within a duration of 60 days from the date of the delivery of the Judgment.
32. Nevertheless, it is evident and apparent that despite the clear and explicit terms of the Judgment, the Plaintiff and the Defendant herein failed to agree on and/or to appoint a valuer, for purposes of undertaking the intended valuation.
33. On the other hand, it is also evident that both the Plaintiff and the Defendant continue to [sic] misinterpret and misconstrue the import and tenor of the Judgment of the Honourable court. Pertinently, if both Parties were to properly appreciate and decipher the import of the Judgment, then the dispute beforehand will be easily resolved and sorted out.
34. Having made the foregoing observations, it is now appropriate to revert back to the issues that were highlighted herein before. In this regard, it is worthy to appreciate that what the Plaintiff/Applicant is seeking for is extension of time within which to undertake the valuation and thereafter to pave way for submissions pertaining to and concerning the quantum of Damages [compensation], payable to the Defendant, pursuant to and in line with the terms of the Judgment of the Court.
35. Arising from the terms of the Judgment, which was delivered on the 30<sup>th</sup> November 2020, it is apparent that unless and until both Parties undertake a valuation over and in respect of the portion of the



- Defendant's land, which has been encroached upon, then the compensation due and payable to the Defendant will not be determinable or otherwise.
36. Essentially, the non- retention of a registered valuer and the carrying out of a valuation exercise over and in respect of the impugned portion of land, will militate against the finalization/resolution of the subject matter.
  37. Consequently and in this regard, the question that does arise and which this Honourable Court needs to grapple with is; what then shall happen to and/or become of the Judgment of the court, if the extension of time sought for, is not granted.
  38. To my mind, unless and until the Parties herein file and exchange valuation reports, the Honorable court, shall be divested of the requisite mandate to undertake a critical exercise, [which is intended to enable the Defendant], to accrue due recompense and/or compensation, arising from the trespass by and on behalf of the Plaintiff herein.
  39. In the premises, and given the import of the current application, it is worthy to state and observe that this an Application which, for all intents and purposes, ought to be allowed and granted, towards and in pursuance of the Judgment of the Court.
  40. In any event, it is imperative to state and underscore that where an Applicant desires to have time extended, the court is seized and/or vested with the requisite Jurisdiction/discretion to consider such Application; and where appropriate, to extend/enlarge time to facilitate the doing on the act, which has been sought for.
  41. Furthermore, an Application for extension/ enlargement of time, [like the one beforehand], ought to be readily granted or allowed, unless there is a serious prejudice or grave injustice that is likely to arise and/or accrue, to the adverse Party, in this case, the Defendant/ Respondent.
  42. Nevertheless, in respect of the instant matter, no prejudice and/or grave injustice, has been adverted to and/or highlighted by the Defendant/ Respondent, either in their written submissions or at all.
  43. To the contrary, Learned counsel for the Defendant, after making very extensive submissions (sic) in opposition to the Application, has concluded the written submissions in the manner following; [verbatim]:
    35. In the premises, the Defendant does not have any objection to this application insofar as is part of the process of executing the forth determination of decision made in the decree of the court”
  44. Arising from the concluding remarks,[ details in terms of the preceding paragraphs], there is no doubt, that the Defendant/ Respondent herein is indeed conceding to the extension of time sought by the Plaintiff herein.
  45. Consequently and in the premises, what comes to the fore is that the instant Application is merited and thus same ought to and is hereby allowed.
  46. Further and in any event, it is also worthy to mention that the Applicant herein has established and demonstrated the existence of sufficient cause, to warrant the grant of the relief sought and essentially, the extension of time within which to engage, appoint and/or retain a registered valuer, with a view to carrying out valuation over the portion of the Defendant's property, which was (sic) encroached upon.
  47. Finally, it is instructive to adopt the ratio decidendi in the case of *Nicolas Kiptoo Arap Korir Salat versus IEBC & 7 Others* Civil Application no. 16 of 2014 (2014)eKLR, where the Supreme Court of Kenya,



considered the various factors to be satisfied before an Application for extension/ enlargement of time can be allowed and/or be granted.

48. For coherence, the Supreme Court distilled and thereafter highlighted numerous ingredients, inter-alia;

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

49. In a nutshell, I come to the conclusion that the Applicant herein has duly established and demonstrated the necessity to warrant the grant of the Application for extension/ enlargement of time beforehand.

50. Further and in any event, it is not lost on this Honourable court that unless the instant Application is granted, there is a likelihood that a segment of the decree of this court, [which was rendered on the 30<sup>th</sup> November 2020]; may not be realized and/or actualized.

#### **Final Disposition:**

51. Having analyzed the issues at the foot of the current Application and upon consideration of the rivaling submissions, it is evident and apparent that what is sought at the foot of the current Application is a desire by the Plaintiff/Applicant to retain a registered valuer for purposes of undertaking a valuation over and in respect of a portion of the Defendant’s property.

52. Besides, it has also transpired that unless the Application beforehand is allowed, then a critical segment of the claim by the Defendant [which was granted by the court], may very well be rendered redundant and otiose.

53. Consequently and in the premises, the Application dated the 1<sup>st</sup> September 2023; be and is hereby allowed on the following terms;

- i. Time be and is hereby extended for the Plaintiff to engage, instruct and/or retain a registered valuer for purposes of undertaking a valuation exercise over



and in respect of the Defendant's land, which has been encroached upon by the Plaintiff's development.

- ii. The intended valuation shall be carried out and/or undertaken by a registered valuer, duly nominated by the Plaintiff and the exercise to be undertaken within 60 days from the date herein.
- iii. The Valuation report arising from the inspection and valuation,[ in terms of clause (ii) hereof], shall thereafter be filed/lodged with the court vide an affidavit and same to be lodged within 7 days of the preparation of such a report.
- iv. Similarly, the valuation report prepared in accordance with clause (ii) hereof, shall also be served upon the Defendant herein.
- v. The Defendant herein shall be at liberty to make such comments and/or representation, if any, as pertains to the contents of the valuation report upon same being served.
- vi. The Plaintiff herein shall meet and/or bear the costs/professional fees of the registered valuer, retained and/or engaged by herself.
- vii. Upon the filing of the valuation report, the Plaintiff and the Defendants, respectively, herein shall be at liberty to file and exchange written submissions as a precursor to the determination of the reasonable compensation payable to and in favor of the Defendant on account of the portion of land encroached upon by the Plaintiff's development.
- viii. Costs of the Application herein shall be borne by the Plaintiff/Applicant.
- ix. The instant matter shall be mentioned on such a date to be agreed upon by the Parties, albeit after the delivery of the Ruling.
- x. Either party shall be at liberty to apply.

54. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**OGUTTU MBOYA**

**JUDGE.**

