



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

MISC APPLICATION NO. 2 OF 2021

JYOTI JIGISH.....APPLICANT

-VERSUS-

DICKSON ODINGO CHIRO.....1ST RESPONDENT

YASKA PETROLEUM LIMITED.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR.....3RD RESPONDENT

RULING

Yaska Petroleum Limited, the 2nd Respondent herein filed a Notice of Motion Application dated 2nd March 2021 seeking for orders that

1. The Application be certified urgent (spent).
2. The proceedings of this court of 25th February 2021 be set aside.
3. The Applicant be granted leave to put a response to the Respondent's Application dated 13th January 2020.
4. Upon payment of the requisite fees, the Applicant's annexed Replying Affidavit be deemed properly on record.
5. The costs of this Application be provided for.

The Application was supported by the Affidavit of Salome Tanui who stated that on 8th February 2021, she began to exhibit COVID-19 symptoms and therefore proceeded on self-quarantine and later on tested positive. She was in isolation for the month of February 2021 and therefore resumed work on the month of March 2021.

That upon resuming work, she learnt that the matter had come up for hearing on 25th February 2021 and the date had not been noted in the firm's diary. That the other parties do not stand to suffer any prejudice if the Applicant's Application is allowed and the response is ready for filing.

GEORGINE J. IMBAYA filed a Replying Affidavit on 12th April 2021 in response to the Application dated 2nd March 2021 where she stated that the Application is misconceived, an afterthought, an abuse of the court process and meant to obstruct justice and delay expeditious disposal of this application.

The Application was filed on 14th January 2021 and a hearing dated of 25th January 2021 was filed ex-parte. On 20th January 2021, the Application together with the hearing notice was served to the 1st and 2nd Advocates on record on 20th January 2021. That the Applicant's Advocates filed their Grounds of Opposition on 1st February 2021 and the same was served to the Respondents on the same date.

It is stated that on 25th February 2021 when the matter came up for hearing, the court directed that the Application be canvassed by way of written submissions and fixed the matter for Ruling on 17th May 2021. That the Advocates on record complied with the court's directions.

It is the Applicant's case that throughout the proceedings, the firm of HMS Advocates LLP was not on record for the 2nd Applicant. The said firm did not seek leave to come on record for the 2nd Applicant in place of the current Advocates on record. The Applicant further stated that

the said firm is a stranger to the proceedings and that by allowing the Application, it will delay expeditious disposal of the Application. The Application was canvassed by way of written Submissions.

2nd Respondent's Submissions

The 2nd Respondent in its Submission stated that this court has unfettered discretion to enlarge time within which a specific action is to be done and relied in the case of **Latimer Rugaru Gacanja (Suing as Trading as Zoea Transporters Limited v Trustees of the Lutheran World Federation; Paul Kang'ori & Another (Applicants (2021) eKLR** where the court laid down the principles guiding extension of time which include the following:

“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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

v. whether there will be any prejudice suffered by the respondents, if extension is granted;

vi. whether the application has been brought without undue delay

The 2nd Respondent stated that the delay was occasioned by the Advocates mistakes which have been admitted which should not be revisited upon the client. Reliance was also place in the case of **FM vs EKW (2019) eKLR** where the court stated as follows:

“In my considered view, the excuse tendered by counsel for the Appellant for his failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the ex parte proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates the mistake of the counsel should not be visited on the appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits.”

It was the 2nd Respondent's submission that the Applicant herein does not stand to suffer any prejudice if the court allows Its Replying Affidavit and the court should exercise its discretion and allow the Application.

Applicant's Submissions

The Applicant herein filed his Submissions on 18th October 2021. On the issue of whether the firm of HMS Advocates LLP is properly on record, it was submitted that this matter emanated from Winam SPMCC ELC No. 31 of 2018 Jyoti Jigish vs Dickson Odingo Chiro & 2 Others which was finalized on 16th March 2021. After filing of the Application dated 13th January 2021, the firm of HMS Advocates LLP prepared a Notice of Appointment to come on record on behalf of the 2nd Respondent herein filed and served the same.

It is the Applicant's case that the Notice was prepared under Order 9 Rule 5 of the Civil Procedure Rules and this was not proper as the matter had been concluded. The 2nd Respondent should have filed the Notice under Order 9 Rule 9 of the Civil Procedure Rules by filing consent between itself and the firm of ADISO, OTIENO, ONYANGO Advocates or seeking leave to record a consent as one of the prayers in its Application. The Applicant herein therefore submitted that failure by HMS Advocates LLP to follow the laid procedure before coming on record for the 2nd Respondent has made them strangers in this suit.

On the issue of whether the 2nd Respondent has met the threshold required in granting the orders sought; it was submitted that the 2nd Respondent has not demonstrated on what basis they were to be notified of the hearing date and that sickness of one counsel in the firm cannot be a justified reason for non-attendance since the law firm has several advocates and therefore the reason is not sufficient to grant enlargement of time.

The Applicant further submitted that the enlargement of time is not merited as the Advocates are not properly on record and a response to the said Application was already filed by the Advocate who was representing the 2nd Respondent. If this court allows the Application, it will amount to illegality which will prejudice the Applicant as the Applicant is willing to proceed with the intended Appeal if leave is granted. The Applicant therefore submitted that the Application is not merited and the same should be dismissed with costs.

The main issues for determination in this Application are as follows:

1. Whether the 2nd Respondent is entitled to the orders sought.

2. Whether the firm of HMS ADVOCATES LLP is properly on record.

Whether the 2nd Respondent is entitled to the orders sought;

Order 50 Rule 6 of the Civil Procedure Rules provides 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.”

The 2nd Respondent has not met the threshold for enlargement of time. Although the 2nd Respondent has given out reasons for the delay in its Supporting Affidavit this court finds that the reasons are not sufficient. The 2nd Respondent has not demonstrated the degree of prejudice that the Applicant herein is likely to suffer in the event the orders sought in the Application are granted.

Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 (unreported) cited by the Applicant, when it held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the Respondent if the application is granted.”

In the case of Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet [2018] eKLR, the court held that: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

The court has to exercise discretionary powers while granting orders for enlargement of time. Based on the above case laws, this court finds that the 2nd Respondent has not explained the reasons for the delay to its satisfaction and that its Advocate are not properly on record as they failed to follow the laid down procedures. Whether the firm of HMS ADVOCATES LLP is properly on record;

Order 9 Rule 5 of the Civil Procedure Rules states as follows:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Order 9 Rule 9 of the Civil Procedure Rules states that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

In the present Application, it is clear that the firm of HMS ADVOCATES LLP came on record after Judgment had been delivered. The said firm did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules by either filing a consent between themselves and the firm of ADISO, OTIENO, ONYANGO ADVOCATES or they could as well sought leave to come on record from this court. This court finds that the firm of HMS ADVOCATES LLP is not properly on record as they did not follow the right procedure as required by law. Based on the above, this Application is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic

and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.