



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO.28 OF 2020**

**ROBERT OKERI OMBEKA.....APPELLANT**

**VERSUS**

**PETER NG'ANG'A CHEGE.....RESPONDENT**

**(An appeal from the ruling of the Honourable Resident Magistrate Mrs. M. Chesang**

**delivered on the 10<sup>th</sup> February 2015 in CMCC No.1267 of 2014.)**

**RULING**

1. This Appeal arises from the ruling and orders of Hon. Mrs. M. Chesang (Resident Magistrate) in CMCC Number 1267 of 2014.
2. The Honourable learned trial Magistrate stated as follows:-

**“.....As rightly stated by the Respondents, there is no provision in the Civil Procedure Rules that allows a statement of defence to be filed out of time and my hands are tied for lack of such procedure. The failure to file a statement of defence was negligent and there is nothing like “bona fide negligence known to law as the applicants would want me to believe. Perhaps as stated in Harun Rashid Khator vs Sudi Hamisi and 1 (eleven) Others, we can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice is better served by allowing the consequences of the negligence of the lawyers to fall on their own head.**

**For this reason the application is dismissed and costs to follow the cause”**

3. The Appellant being dissatisfied with the said ruling file a memorandum of appeal dated 22<sup>nd</sup> June 2015 on the following grounds:-
  1. The learned trial Magistrate erred in both law and fact in dismissing the Appellant’s notice of motion dated 2<sup>nd</sup> October 2014.
  2. The learned trial Magistrate erred in both law and fact in holding that there is no procedure for filing the defence out of time, while the application was brought under section 50 rule 4 which allow for enlargement of time in filing pleadings.
  3. The learned trial Magistrate erred in both law and fact in holding that the advocates for the defendant were negligence while the delay was only for a day.
  4. The learned trial Magistrate erred in both law and fact and applied the wrong principal of law in total disregard of the overriding objectives of the Civil Procedure Act and Rules thus arriving at a wrong decision.
4. IT IS PROPOSED to ask the honourable court for:-
  - a. This appeal be allowed with costs against the Respondent.
  - b. That the ruling of the Subordinate Court dated 10<sup>th</sup> February 2015 be set aside and the same be substituted with an order allowing the Appellant’s Notice of Motion dated 2<sup>nd</sup> October 2014.

**c. Such other and /or further relief be granted as this Honourable Court might deem fit and just to grant in the unique circumstances of this matter.**

5. On the 23<sup>rd</sup> September 2021, the court with the consent of the parties directed that the Appeal be canvassed by way of written submissions.

#### **The Appellant's submissions**

6. They are dated 12<sup>th</sup> October 2021.the Appellant confined his submissions to the following grounds of appeal;

**a. That the learned trial Magistrate erred in both law and fact in holding that there is no procedure for filing the defence out of time.**

**b.That the learned trial Magistrate erred in both law and fact in holding that the Advocates for the Defendant were negligent.**

7. On the issue whether there is a procedure for filing a defence out of time, he submitted that while Order 7 Rule 1 of the Civil Procedure Rules provides that a Defendant ought to file defence 14 days after entering appearance, Order 50 Rule 6 grants the court power to enlarge time where a limited time is fixed for doing any act or taking any proceedings under the Rules. He added that Section 3 A of the Civil Procedure Act gives the court inherent powers to make such orders as may be necessary for the ends of justice.

8. He urged the court to consider provisions of Section 19 of the Environment and Land Court Act as well as provisions of Article 50 of the constitution on the right to fair hearing and of Article 159 (2) (a) and (d) of the constitution.

9. On the issue of whether the delay was caused by the Advocates' negligence, he submitted that there was a delay of about 7 days which was a bonafide mistake/oversight and it is not inordinate to warrant condemnation. He further submitted that the delay was excusable as it would not have prejudiced the Plaintiff's case and justice would be properly served by giving the Defendant a chance to present his case so that the Honourable court is in a position to dispose of all issues with finality. He relied on the case of **Sebel District Administration v Gasyali & Others [1968] E.A 300.**

10. He also submitted that while the Plaintiff in the Subordinate court claims that the suit parcel of land belongs to him, the Defendant who is in possession claims to be the owner of the disputed land thus the court should hear all parties in order to determine the dispute with finality. He relied on the case of **John Muikamba Gitau v Trustees Caitas Mariana Holyfamily Children Home & another [2021]e KLR** and the case of **Noniko Holdings Limited & 2 Others v Atticon Limited & 5 Others[2020]e KLR.**

#### **The Respondent's submissions**

11. They are dated 2<sup>nd</sup> November 2021.The Respondent submitted that the trial court was correct when it dismissed the Appellant's application since the Appellant did not seek the court's intervention for enlargement for time to file a defence but instead applied the wrong and incorrect provisions of the law.

12. He cited the cases of **Aviation Cargo Support Ltd v St Mark Freight Services Limited [2014]e KLR** and **Samuel Mwaaura Muthumbi v Josephine Wanjiru Ngugi [2018] e KLR** to submit that enlargement of time is a discretionary power of the court thus the court must satisfy itself on the reasons offered for the delay and in this case, the Appellant failed to advance satisfactory grounds on why he failed to file his defence on time and instead relied on grounds that only point at the sloppiness and casualness with which the Appellant approached the matter. He urged the court to dismiss the appeal.

13. I have considered the grounds of appeal and the response thereto. I have also considered the written submissions filed on behalf of the parties and the authorities cited.

14. I note that the grounds of appeal and intertwined and I will consider them together.

15. The Respondent herein filed a plaint dated 12<sup>th</sup> March 2014 seeking a permanent injunction restraining the Defendant and or his agents from trespassing into his property known as Plot Number 1B at Makongeni-Kaloleni Youth and Women Groups and Kaloleni Primary School sites –CP/TP/Zone 08/093/12/06 among other prayers.

16. A memorandum of appearance was filed on 15<sup>th</sup> September 2014 on behalf of the Defendant (Appellant herein). However the advocates did not file defence within 14 days. By a notice of motion dated 2<sup>nd</sup> October 2014, the Defendant sought leave to file his defence out of time. In the ruling delivered on 10<sup>th</sup> February 2014, the court dismissed Defendant's application hence this appeal.

17. **Order 7 rule 1** of the Civil Procedure Rules provides that:-

**“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”**

18. **Order 50 Rule 6** of the Civil Procedure Rules provides that:-

“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.”

19. From the foregoing provisions it is not true as the learned trial Magistrate observed that:-

**“there is no provision in the Civil Procedure Rules that allow a statement of defence to be filed out of time and my hands are tied for lack of such procedure”.**

I find that the learned trial Magistrate erred in holding that there was no procedure for filing the defence out of time.

20. I disagree with the counsel for the Respondent’s submissions that the learned trial Magistrate could not resort to order 50 rule 6 of the Civil Procedure Rules to allow the enlargement of time within which to file defence as the Appellant’s (Defendant’s) notice of motion was brought under the wrong provisions, order 50 rule 4 of the Civil Procedure Rules.

21. In my view the learned trial Magistrate ought to have been guided by **Article 159 (2) (d)** of the Constitution in which provides that:-

**“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**a. ...**

**b. ....**

**c. ....**

**d. justice shall be administered without undue regard to procedural technicalities**

**e. ....”**

22. The learned trial Magistrate ought to have been guided by the reasons advanced by the Defendant explaining the delay in filing the defence. In any case there was a delay of about seven (7) days only.

23. **Article 50(1)** of the Constitution provides 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.”**

24. I find that the learned trial Magistrate ought to have realized by disallowing the application the Defendant would not have an opportunity to give his side of the story. This would have only been possible if he was allowed to file his defence.

25. Another, reasons by the learned trial Magistrate dismissing the application was:-

**“The failure to file a statement of defence was negligence and there is nothing like bonafide negligence”**

It appears the learned trial Magistrate blamed the failure to file defence in the negligence of the Defendant’s advocates.

26. As stated the delay was of about seven (7) days. No prejudice would have been occasioned to the Plaintiff if the Defendant was allowed to file his defence then. In the case of **Jackson Biegon V Charles Too & 3 Others [2005] eKLR**, Kimaru J found pertinent the words of Ainley J adopted with approval by Sheridan J in **Sebel District Administration v Gasyali (1968) EA 300**

**“In my view the court should not solely concentrate on the poverty of the applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered. The question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of court, it is wrong under all circumstances to shut out a Defendant from being heard”**

27. The power to enlarge time is discretionary. The court is called upon to consider some factors listed on the case of **Board of Trustees of African Independent Pentecostal Church of Africa vs Peter Mungai Kimani & 12 Others [2016] eKLR** which are:-

i. Whether there has been indolence or unexplained delay on the part of the applicant.

ii. Whether the applicant is guilty of abuse of the court process.

iii. Whether the enlargement will prejudice the Defendant.

iv. Whether the denial of enlargement period will occasion prejudice to the Applicant given the circumstances of the case.

v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.

vi. Whether it is just and fair to enlarge time in the circumstances of the case.

Had the learned Trial Magistrate considered the above factors, she would have found that a delay of seven days was not inordinate.

28. I also find that the learned trial Magistrate erred by visiting the mistake of counsel on the Defendant. In the case of **Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR** the Court of Appeal stated that mistake of counsel should not be visited upon the litigant.

29. In the case of **Aviation Cargo Support Ltd vs St. Mark Freight Services Limited [2014] e KLR** the Court of Appeal held that:-

**“For the court to exercise its discretion in favour of the applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable”.**

I find that a delay of seven (7) days was not inordinate.

30. It is the Respondent’s claim that the parcel of land belongs to him and the Appellant who is in possession claims to be the owner. It is in the Respondent’s interest that the suit is heard on its merits so that the issue of ownership can be determined once and for all.

31. This is a matter where the Respondent ought to have conceded to the Appeal but chose to oppose it. For this reason, I will order that each party do bear own costs. In conclusion, I find merit in this Appeal and the same is allowed in the following term:-

**a. That the ruling of the subordinate court dated 10<sup>th</sup> February 2015 is hereby set aside and the same is substituted with an order allowing the Appellant’s notice of motion dated 2<sup>nd</sup> October 2014.**

**b. Each party do bear own costs.**

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Nyaga for the Appellant

Mr. Ndambiri for the Respondent

**Steve - Court Assistant**