REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 1506 OF 2013

PETER KARIUKI WAWERU ....PLAINTIFF

-VERSUS-

KIAMBU COUNTY GOVERNMENT ....1ST DEFENDANT

KIKUYU SUB-COUNTY ADMINISTRATOR...................................2ND DEFENDANT

RULING

1. Two applications filed herein on 5th August, 2014 by the Defendant and on 8th May, 2014 by the Plaintiff are for the court's determination. The first application by the Defendant seeks orders for extension of time in filing the defence. The other application dated 8th May, 2014 seeks orders for leave to enter judgment against the Defendant in default of defence. As the orders sought in the two applications are not completely exclusive of one another the court on 9th October, 2014 directed that the two applications be heard simultaneously by way of written submissions.

2. The background facts and the chronological steps are these. The Plaintiff filed suit on 11th December, 2013. He sought an injunction against the Defendants as well as general damages and costs. Alongside the plaint the Plaintiff also filed an application for interlocutory injunction. The claim related to an unregistered and unnumbered parcel of land measuring approximately 0.055 hectares in Kikuyu Town. The Defendants were duly served and an appearance entered by the law firm of Gathii Irungu & Company Advocates on 17th January, 2014. On 17th February, 2014 upon realizing that the Defendants had not filed any defence statement the Plaintiff requested for judgment in default. That was irregular. On the Deputy Registrar's directions, the Plaintiff on 8th May, 2014 applied formally for interlocutory judgment to be entered against the Defendants for failing to file/or serve their defence statements in time. In the mix too the Plaintiff filed two applications for injunctive orders. The court struck out one application, the one dated 24th July, 2014 for being an abuse of the process of the court.

3. To the applications both parties filed replying affidavits as well as grounds of objection.

4. The parties also filed written submissions. The Defendants submissions were filed on 6th

November, 2014 whilst the Plaintiff's submissions were filed on 28th October, 2014 with supplementary submissions on 30th October, 2014. The Defendants relied entirely on their submissions whilst the Plaintiff opted to highlight the same to the court on 6th November, 2014.

5. My reading of the relevant Orders and rules of the Civil Procedure Rules under which the two applications have been brought reveals that the said rules are not couched in mandatory terms. It is not mandatory that once an application is made under Order 10 Rule 8 and the non-filing of a defence or late filing of a defence is shown an interlocutory judgment will be issued. It is all about the court's discretionary jurisdiction. Likewise the power to extend the time limited for the performance of a particular act or filing of a particular document under the Rules is a purely discretionary matter. The discretion is to be exercised judiciously and in the course of such jurisdiction the court is expected to take into account relevant factors and ignore irrelevant factors.

6. The applications are not mutually exclusive of one another. The discretion thus ought to be exercised whilst basically taking into account the same related factors. Firstly, it would be appropriate to know the reason for the delay in filing the defence statement whilst also considering the period of delay. The court must then also consider the nature of the claim as well as of the defence proposed to be tendered. In the course of exercising such jurisdiction, the conduct of the parties is also important. Likewise, the prejudice to the Plaintiff or lack of the same is also to be considered.

7. I have read the submissions filed by the parties. I also listened carefully to what the Plaintiff's counsel Mr. Gachichio had to say to the court. I have likewise read through the entire court file.

8. The Defence statement was supposed in accordance with the Civil Procedure Rules to be filed by the latest, on 31st January, 2014. It is not contested that it was not and has not been filed. As the application was being filed in May, 2014 for judgment in default, the Defendants were still nowhere to be seen. They only motioned the court on 5th August, 2014. That was six months later. The Plaintiff's counsel is of the view that the delay has not been explained. Apparently, that is not so. The affidavit in support of the application for extension of time has, especially at paragraphs 3 and 4 given the reason for the delay. The summary is that, there was a challenge in obtaining instructions. The challenge was that he the new constitutional dispension meant a transition from the old administrative order to a new one. There was now a county government instead of the old council and this had seen not only documents moved and shuffled but also personnel.

9. Secondly, the Plaintiff's counsel also submitted that the proposed defence is not tenable. The Plaintiff filed a last minute Replying Affidavit in an attempt to demonstrate that the Plaintiff genuinely and legally occupies the subject land.

10. I would agree and accept the Defendant's explanation that the challenges the advocate faced in obtaining instructions impacted on the ability to file the defence statement in time. The Plaintiff's claim is pegged on the fact and documents of allotment effected in the year 1992. That is over twenty years ago. Any documents relating to the matter were only in the custody of officers of the now defunct Kikuyu County Council. Some of the officers, we are told, are nowhere to be seen within the new administrative structure. The Defendant is entitled to the benefit of the doubt that there were difficulties in retrieving the documents. I do not in the circumstances consider a delay of six (6) months to be so inordinate as to imperil and prejudice the Plaintiff beyond compensation in costs.

11. I have also perused the proposed defence. The defence cannot be said to be frivolous. A couple of issues which can be easily picked therefrom is from the contention that the defendants or their predecessors in title did not have the authority to allocate land. The Defendants plead that the allocating authority was the Ministry of Lands or the Commissioner of Lands. Secondly, the Defendants also submit that there was no unsurveyed plot or unnumbered plot to be allocated to the Plaintiff. The Defendants state that the Plaintiff is occupying a road reserve. The Plaintiff of

course contests this and has exhibited a letter from the Director of Surveys. However, at this stage it is not for the court to confirm the veracity of such documents or contentions but only to look at the proposed defence and ascertain whether on the face of it, it is a tenable defence. The Plaintiff will be at liberty to prove otherwise at trial as the court is not to make final determinations now.

12. I come to the now rather obvious conclusion that the Defendant's application should be allowed. I do not for one moment doubt that the Plaintiff will not be prejudiced by reason of the fact that the Plaintiff's suit will stall for a while but the overriding objective and principle is that parties as much as possible ought to be given the opportunity to put across their case in court. That is what a just resolution of disputes is all about.

13. It would effectively leave the Plaintiff's application for interlocutory judgment facing the obvious fate of denial or dismissal by the court. If the defence is allowed to be filed then no judgment ought to be allowed. First though, I would need to point out that going by the reliefs sought in the plaint, such an application cannot lie. The application could only be made under the same circumstances a request for interlocutory judgment may be made against a party not being the Government. The instances are obtained under Order 10 Rules 4, 5 and 6 of the Civil Procedure Rules. The Plaint herein sought only unliquidated damages and an injunction plus costs. The proper course should have been for the Plaintiff to proceed under Order 10 Rule 9 of the Civil Procedure Rules and set the suit down for hearing. I would consequently not, have allowed the Plaintiff's application dated 8th May, 2014 in any event.

14. The upshot is that the Plaintiff's application dated 8th May, 2014 is dismissed while the Defendants application dated 5th August, 2014 is allowed with the following consequential directions.

    a. The Defendants will file and serve their defence statement together with the requisite witness statements and list or bundle of documents within the next Twenty one (21) days.

    b. The costs of the two applications will abide the outcome of the case.

15. Orders accordingly

Dated, signed and delivered at Nairobi this 21st day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

.... for the Plaintiff

.... for the Defendant