



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO.9 OF 2000

HESBON JUMBA SHABAN.....1ST PLAINTIFF/RESPONDENT

PHANICE AGEYO JUMBA.....2ND PLAINTIFF/RESPONDENT

VS

NATIONAL BANK OF KENYA LTD.....DEFENDANT/APPLICANT

RULING

On 19/5/2009 the Plaintiffs filed an application under sections 3A, 34 and 63 of the Civil Procedure Act, Order 39 rule 2, Order 41 rule 4 and Order 50 rule 1 of the Civil Procedure Rules to restrain the Defendant, or its agents, from selling land parcels Bungoma township/586, East Bukusu/South Nalondo/2308 and East Bukusu/South Nalondo/2192 pending the determination of the application and stay of execution of the ruling and order given by Justice A. Mbogholi Msagha on 9/7/2008, among other prayers. On 29/9/2009 the Defendant through Damaris Wanjiku Gitonga swore a replying affidavit to oppose the application. When the application came for *interparte* hearing on 13/10/2009 the defence counsel noticed an error in the affidavit and sought its withdrawal. The court accepted and ordered the affidavit to be expunged from the record. The Defendant was given 7 days to file another affidavit and the application was rescheduled for 6/7/2010. On that day the matter did not proceed because it had not been cause-listed and also because the Plaintiffs had filed a notice of preliminary objection which they had just served. The application was adjourned to 30/11/2010 when the Plaintiffs were allowed to urge their objection. One of the grounds of the objection was that the Defendant had filed its replying affidavit on 26/11/2009 which was outside the 7 days that had been allowed. No leave had been sought or obtained to file the affidavit out of time. On this ground, the court sustained the objection in its ruling delivered on 9/3/2011.

On 20/4/2011 the Defendant filed the present application seeking, among other things, the extension of

time to be able to file a replying affidavit. The proposed replying affidavit was annexed to the supporting affidavit. The Defendant basically seeks to be allowed to defend the Plaintiffs' application that was filed on 19/5/2009.

In the affidavit sworn to support the application, Damaris states that if the application is heard unopposed the Plaintiffs may obtain an injunction to stall their right to recover over Ksh.25,501,983/75 which they owe the Defendant following a loan that was advanced to them and which they have to date not repaid. It is notable that the properties subject of the application were charged to the Defendant to secure the loan. Damaris states that, save for the technicalities above, the Defendant has always sought to defend the application, and that the delay to bring the application was not intentional but was caused by the need to trace and retrieve the many documents that the bank has kept regarding the transaction. It is notable that this suit was commenced by amended plaint dated 21/6/2000 for transactions between the parties that must have begun much earlier. The judgment for the Plaintiffs in this case was delivered by Justice A. G. Ringera (as he then was) on 28/6/2002. There is a ruling by Justice A. Mbogholi Msagha that was delivered on 9/7/2008. Both will be subject of the present application.

The Plaintiffs responded to this application by way of grounds of opposition, which means that the factual basis of the application was not challenged. The grounds alleged that the application was *res judicata*; had been brought after inordinate delay; is an abuse of the process; and was incompetent because it was brought under the wrong provisions of the law; or offends the provision of the law.

I was addressed on the application by Mr. Odhiambo for the Defendant and Mr. Ng'eno for the Plaintiffs.

The present application was slated to be brought under Order 22 rule 22, Order 50 rule 6 and Order 51 rule 1 of the Civil Procedure Rules and section 1A, 1B, 3A, 63 (e) and 95 of the Civil Procedure Act. I have indicated in the foregoing that the application largely seeks the extension of time for the Defendant to file a replying affidavit to defend the Plaintiffs' application filed on 19/5/2009.

Under Order 50 rule 6:

"6. 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 shall be borne by the parties making such application, unless the court orders otherwise."

It is clear to me that the application that seeks to extend time has been properly brought. The jurisdiction of the court has been properly invoked under Order 50 rule 6. The Defendant was given 7 days to file a replying affidavit and filed in after that time. The question to be asked is whether the discretion of the

court can be exercised in favour of the Defendant.

The law is that in dealing with an application to extend time, all relevant factors should be taken into account in exercising the discretion of the court. These factors include the length of the delay; the reasons for the delay; the degree of the prejudice to the Respondent if time is extended; and whether such prejudice cannot be compensated by way of costs. (**Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd & 31 Others [2003] KLR 733**).

The delay in this case was for 42 days from the date of ruling by Justice Muchemi. I do not find the delay inordinate and, in any case, it has been explained by the supporting affidavit and the explanation did not receive rebuttal. The Plaintiffs did not indicate what prejudice, if any, will be suffered if the Defendant is allowed to defend their application. It must always be remembered that justice is better served when it is based on the determination of a matter on merits, after the hearing of the parties to the dispute. This is the spirit of article 159 (2) (d) of the Constitution of Kenya, 2010 and sections 1A and 1B of the Civil Procedure Act.

The other serious ground raised by the Plaintiffs was that the application is *res judicata*. The essential elements of *res-judicata* under section 7 of the Civil Procedure Act are that there should have been a dispute between the same parties involving the same cause of action which was finally adjudicated by a competent court and there was no appeal brought against that decision. (**Gichuki v Gichuki [1982] KLR 285**). The application that was under consideration when the objection raised was the one filed by the Plaintiffs on 19/5/2009. It did not seek extension of time to file a replying affidavit as one of its prayers. In the objection, the Defendant had filed a replying affidavit out of time and without leave and the Plaintiffs wanted it struck out. The Plaintiffs' request was granted. The application to extend time was not before the court and neither was it determined. The present application is therefore not *res judicata*.

In conclusion, I allow the application and extend time by 14 days for the Defendant to file and serve a replying affidavit. The Plaintiff will have corresponding leave to file any supplementary affidavit. The Defendant has been indulged and will therefore pay the costs of the application.

Dated and delivered at Bungoma this 7th day of May, 2012.

A. O. MUCHELULE

JUDGE

