



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 258 of 2010

JOHN GITONGA KIHARA.....PLAINTIFF/RESPONDENT

- VERSUS -

NATIONAL BANK OF KENYA.....1ST DEFENDANT/RESPONDENT

DOVE COURT LIMITED.....2ND DEFENDANT/APPLICANT

RULING

1. Before the court is a **Notice of Motion** application dated **11th June 2012**. It is brought under **Article 159** of the **Constitution, Section 3(a)** and **33** of the **Civil Procedure Act**. The application seeks as the substantive prayer the arrest of the Ruling scheduled for **24th July 2012** on the **Plaintiff's Notice of Motion** dated **25th January 2012** pending the hearing of this application. The other substantive prayer is that this court extends the time within which the Applicant can file grounds of opposition and submit written or oral submissions.

2. The brief history of this application is that the application dated **25th January 2012** was scheduled for hearing on **7th June 2012**. On the said date, counsel for the Applicant was appearing in the Consolidated Petitions under Article 89 of the Constitution on Determination of Constituency and County Assembly Wards Boundaries before a 5 bench Judge constituted for that purpose. The dates given for hearing of the consolidated petitions by the 5 Judge bench was dictated by the bench and the **90 days** time limit in the Constitution within which the Boundary Commission suits could be heard and determined. The Advocates for the Applicant wrote to the Advocates for the Plaintiff/Respondent and **1st Defendant/Respondent** advising them that she would be requesting for the adjournment due to that engagement. That application was made but the court rejected the same and the matter proceeded. The Applicant now wants to arrest the proceedings and the Ruling to enable the Applicant be heard either orally or through submissions or grounds of opposition and replying affidavit. The Applicant submits that it is in the interest of justice that the **2nd Applicant** be heard in this matter.

3. The application is supported by affidavit of **KETHI D. KILONZO** dated **11th June 2012** with two annexures, being letters '**A**' and '**B**' addressed to M/s Rachuonyo & Rachuonyo Advocates for the **1st Defendant**, and Mwihi Mutai Advocates for the Plaintiff. The annexure '**B**' is a letter addressed to the counsel which held Kethi Kilonzo's brief. This letter instructs the brief holder accordingly and indicates why Kethi Kilonzo would not be available.

4. The application is opposed by affidavit in reply by **JAPHETH K. MUTAI**, who submitted *inter-alia* that on **7th June 2012**, when the application dated **25th January 2012** came up for hearing the Applicant herein had not filed any document in opposition of the same.

5. I have considered the entire application and the opposing submissions. This court has unfettered discretion in this matter provided that the said discretion is judiciously applied.

6. I have considered the annexures 'A' to the affidavit of Kethi D. Kilonzo. It was a letter addressed to the Plaintiff's advocates. It is dated **30th May 2012**, **8 days** before the hearing on **7th June 2012**. A good notice was given to Mr. Mutai of the unavailability of M/s Kilonzo on **7th June 2012**. Mr. Mutai ought, in the least, to have responded to that communication. Courtesy serves counsel well. This rule should be observed by all counsel. Mr. Mutai could have saved the court's time since he was aware of that communication between them.

7. In consideration of the above, I allow the application herein and I direct the 2nd Defendant to file a **replying affidavit, grounds of objection and submissions** to the **Plaintiffs Notice of Motion application** dated **25th January 2012** within seven (7) days from the date of this Ruling. Any party that wishes to respond thereto shall file and serve such response within **seven (7) days** of such service. The matter will be mentioned on **17th September 2012** for further directions. The costs of the application shall be in the cause.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF JULY 2012.

E. K. O. OGOLA

JUDGE

Present:

Mutai for Plaintiff/Respondent

Sijenje H/B for Kilonzo for 1st Defendant/Respondent

M/s Wambugu for 2nd Defendant/Applicant

Teresia – Court clerk