



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 2835 of 1988

JACOB KIOI WAMBUGU.....1ST PLAINTIFF

SHELMITH GATHONI WAMBUGU.....2ND PLAINTIFF

VERSUS

NAIROBI CITY COMMISSION.....1ST DEFENDANT

IRENE NJERI KARIUKI.....2ND DEFENDANT

R U L I N G

By a Notice of Motion dated 12th June 2012 expressed to be brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya; Order 50 rule 7, Order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, the Plaintiffs pray for orders that the Honourable Court grant leave to the Plaintiffs, enlarge time and issue Summons to enter appearance against the Defendants and for an order that the costs of the application be in cause.

The application is based on the following grounds:

- (i) The plaintiffs filed this case in 1988 seeking injunctive orders and compensation against the Defendants.**
- (ii) Together with the suit and subsequent thereto the Plaintiffs filed several applications for injunctive relief.**
- (iii) Consequent thereto the Plaintiffs acted in person and subsequent thereto being desirous to proceed with the case they have appointed an Advocate to act for them.**
- (iv) In the circumstances it is just, mete and in the interest of justice that given the nature of the claims herein, the honourable court ought to enlarge the time for issuance and service of summons so that the Defendants can subsequent thereto enter appearance and file defence to enable the case proceed for hearing.**
- (v) Unless sought orders are issued the Plaintiffs will suffer irreparably whilst the Defendants will suffer no prejudice if the application is allowed.**

The application is supported by an affidavit sworn by **Shelmith Gathoni Wambugu**, the 2nd plaintiff herein on 12th June 2012. According to the said affidavit, this suit was filed in 1988 seeking orders of

injunction and compensation against the Defendants. Together with the suit, the plaintiff also filed several applications seeking injunctive orders. According to the deponent they have since instructed advocates who have informed them that the suit cannot proceed without the issuance of summons and entry of appearance and filing of defence, facts which the plaintiff's being laymen were not aware of. It is therefore in the interest of justice that the time be enlarged for issuance and service of summons since unless the orders sought are granted the plaintiffs will suffer irreparably while the defendants will suffer no prejudice if the application is allowed.

There is a replying affidavit sworn by **Karisa Iha**, the 1st Defendant's director, legal affairs on 24th September 2012, in which it is deposed that the application is bad in law and does not disclose justified reason on why the suit should be revived after being in limbo for 5 years and that the plaintiff does not have locus standi to sue the 1st defendant and that the 1st defendant will be prejudiced if the application is allowed as the same has been overtaken by events.

This suit was filed on 14th July 1988. At that time there was no requirement that summons be filed together with the plaint since that requirement was introduced by Legal Notice No 5 of 1996. The current Rules, however, provide that summons ought to be filed together with the plaint. One would have expected that the plaintiffs would have moved the Court as soon as the amendments to the Civil Procedure Rules were effected in order to regularise their suit. A party who sleeps on his rights for too long does not expect favourable exercise of the Court's discretion and where the respondent shows that the exercise of the Court's discretion is likely to prejudice the respondent's case, the Court will be reluctant to allow the applicant to revive the suit after such long period of time. In this case the 1st defendant on 20th September 2012 entered unconditional appearance. In the said replying affidavit, the nature of prejudice is not disclosed. Whereas the delay in this matter is deplorable, since no prejudice is disclosed, I have to consider this application in light of the provisions of Article 159(2) of the Constitution which provides:

(2) 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.

Further the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to **section 1A(2)** "*the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective*" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. In **Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, Nyamu, JA on 20/11/09 held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

The same Judge in **Kenya Commercial Bank Limited vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case”.

In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal expressed itself as follows:

“The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”.

The pre-Overriding Objective decisions must now be looked at in the light of the said provisions without necessarily ignoring them. What is required is that they be interpreted in a manner that gives effect to the said objective.

Accordingly, I am inclined to allow the application dated 12th June 2012 in the wider interest of justice. The plaintiff to file summons to enter appearance and serve the same on the defendants within 30 days from the date hereof and in default this suit shall abate. The costs of this application are awarded to the 1st defendant.

Dated at Nairobi this 24th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of Mr. Ngugi for Mr Adawa for Plaintiff