



**Thiongo & another v Gathuru (Environment & Land Case  
133 of 2017) [2022] KEELC 3200 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3200 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 133 OF 2017**

**JG KEMEI, J**

**JUNE 9, 2022**

**BETWEEN**

**JOHNSON KIHATU THIONGO ..... 1<sup>ST</sup> PLAINTIFF**

**MAHIRA HOUSING COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPH GATHURU ..... DEFENDANT**

**RULING**

1. The Defendant/Applicant filed the instant Notice of Motion dated 16/2/2022 under Order 51 *Civil Procedure Rules*, Sections 1A, 1B and 3A *Civil Procedure Act* and Articles 50 and 159 Constitution of Kenya seeking orders that;
  - a. Spent.
  - b. The Defendant/Applicant be granted leave to file his defence, List of Documents, List of Witnesses and witness statement out of time.
  - c. The Defence, List of Documents, List of Witnesses and witness statement annexed to this Application to be deemed as properly on record.
  - d. The costs of this application be in the cause.
2. The application is based on the grounds thereto and the Supporting Affidavit of the Defendant's Counsel, Peter Mwenda Njagi of even date. He deponed that failure to file the defence and attendant documents within the prescribed timelines was inadvertent and not willful on his part as Counsel. That the failure to file a defence was partly due to the filing of this suit by way of Certificate of Urgency. That the defence raises triable issues and since the mistake of Counsel ought not be visited on his client and the Plaintiff would not suffer any prejudice if the application is allowed as prayed.



3. On the face of it, the Application is not opposed. However, according to the Respondents written submissions on record they have alluded to opposing it vide his Replying Affidavit sworn on 21/3/2022. The Replying Affidavit is not on record.
4. On 24/2/2022, directions were taken to canvas the Application by way of written submissions. Only the Respondents complied with the orders of the Court and filed their submissions on the 8/4/2022 through the firm of Arusei & Co. Advocates.
5. The Respondents submitted that the provisions of Order 7 rules 1 & 5 of the Civil Procedure Rules provides in mandatory terms for clear timelines for filing a defence and supporting documents. That on various Courts dates, the Defendant had numerous opportunities to put his house in order to no avail and the Plaintiffs having testified and closed their case, they stand to be prejudiced if the application is allowed. That it is over six years since this suit was filed and the delay in filing the defence is inordinate and contravenes the equitable doctrine of laches. That the argument that the filing of this suit by way of certificate of urgency occasioned the non-filing of the defence is not tenable. The Plaintiffs reiterated that Article 50(1) of *the Constitution* of Kenya recognizes the right to a fair trial which includes a party's right to be served with documents and scrutinize them ahead of a hearing.
6. The Respondents placed the blame at the doors of the Respondent for failing to take reasonable steps to follow up on his case as a litigant and therefore the filing of this application is an afterthought causing delay in the expeditious determination of this suit. They added that equity does not aid the indolent and urged this Court to dismiss the application with costs. Several authorities were cited in support of the submissions including the cases of *Concord Insurance Co. Ltd v NIC Bank* [2013] eKLR, *Leslie Okubo Atuma v National bank of Kenya Ltd* [2015] eKLR, *Johanna Kipkemei Too v Hellen Tum* [2014] eKLR, *Owoyo v African Highlands & Produce Co. Ltd* [2002] 1 KLR, *Andrew Mang'uu Kaboi v Wellington Kibato Wamburu* [2022] eKLR and *Purdy v Cambrian* [1999] ALL EER 1518.
7. The main issue for determination is whether the Application is merited.
8. A background of the parties' suit is necessary. This suit was filed on the 8/2/2016 in ELC Milimani. Summons to enter appearance were issued on the 18/3/2016 and the Defendant filed a memorandum of appearance on the 15/6/2016 through the law firm of Mwenda Njagi & Co Advocates. On the 11/7/2017 the Defendant filed a Replying Affidavit in response the Plaintiffs notice of motion dated the 8/3/2016 and went on to file written submissions in opposition to that application.
9. On the 13/10/2017 the Court determined the application in favour of the Defendant and it would appear that the Defendant went into deep slumber in defending the suit. I say so because this matter proceeded on many instances such as 3/7/2019, 26/9/2019, 18/2/2020 25/11/2020 and 15/2/2021 in his absence despite service.
10. On the hearing date, 24/11/2021, the matter was set down for hearing with the Plaintiff testifying in the presence of both parties with the Plaintiffs witness being cross examined by the Defendants Counsel. It is only at the close of the Plaintiffs case that the Defendants Counsel sought an application for leave to comply with Order 7 rule 5 and Order 11 of the Civil Procedure Rules. This is what provoked the instant application.
11. The relevant legal provision is anchored Order 7 Rule 1 of the Civil Procedure Rules 2010, 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.”

12. Order 7 rule 5 of the Civil Procedure Rules provides as follows;

“The Defence and Counter-Claim filed under rule (1) and (2) shall be accompanied by-

- a. an affidavit under Order 4 Rule (1) and (2) where there is a counter-claim;
- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses except the expert witness; and
- d. copies of documents to be relied upon at the trial.

Provided that statements under sub-rule (c) may with leave of the Court be furnished at least fifteen days prior to the trial conference under Order 11.”

13. From the onset it is clear that pleadings long closed before the Defendant complied with the provisions of Order 7 rule 5 of the Civil Procedure Rules.

14. The reason advanced by the Applicant’s Counsel as to the reason why the Defendant failed to file a defence in time is that that the suit was filed under of certificate of urgency. That is not a factual disclosure of the record. What was filed under a certificate of urgency was the notice of motion that was determined in his favour. And even if it was the case, the reason being propagated for this infraction is superfluous. I say so because the Applicant’s Counsel has not explained how failure to file a defense was occasioned by a pleading brought under Certificate of Urgency.

15. The second reason is that the delay in filing the defense was occasioned by the Applicants Counsel and the same should not be visited on the Applicant. Indeed the said Counsel actually filed the Supporting Affidavit in support of the application. The Defendant, being essentially the party in this case did not bother to explain to the Court the reasons why the defense was not filed. Could it be that the failure to swear an affidavit of support of the application was a sign of disinterest in the suit? That said, the Advocate on record being an officer of this Court ought to know that he has a duty to the client and to the Court and at the very least to comply with the overriding objectives of the Court with respect to the expeditious disposal of the suit.

16. The fact that the Applicants Counsel attended Court and cross examined the Respondent is a sign that the Respondent was not interested in offering any defence to the suit. The Applicant acquiesced and took part in the hearing of the suit and cross examined the witnesses of the Plaintiff. Equity cannot aid the indolent. The Applicant had all the time to comply with the provisions of Order 7 and 11 of the Civil Procedure Rules and prepare for the trial of the case.

17. In the case of *Johana Kipkemei Too vs Hellen Tum* (2014) eKLR the Court while dealing with similar facts stated that it would be unfair to the Plaintiffs if the Defendant is allowed at this late stage to file a defence when the Plaintiffs have closed their case. And that doing so will violate the provision of fair hearing as enunciated in Article 50 of *the Constitution*. I agree with the holding of the Court tin that respect. The Applicant has brought the application too late in the day and allowing it now will occasion a high chance of prejudice to the Plaintiff as the Plaintiff will not have the chance to rebut the defence of the Applicant. I have perused the draft statement of defence in which the Defendant has pleaded fraud as against the 1<sup>st</sup> Plaintiff in the manner in which he acquired the suit land. The Plaintiffs having closed their case means they will not have the chance to address this claim which has altered the character of their case to one that they did not contemplate when presenting their evidence.



18. I agree with the dictum of Ringera J in the case of Omwoyo Vs African Highlands & Produce Co Limited (2002) 1KLR when he stated as follows;

“Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s Advocates ...”

19. In this case it is the Advocate who has admitted failure to his client. Equally the client is under a duty to ensure that he follows up the prosecution of his case. In this case he is enjoying orders of this Court as he is in possession of the land. In whichever case the Defendant will not be left without a remedy. I say no more.

20. Under Article 50 of *the Constitution* guarantees the right to a fair hearing 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. The Plaintiffs have already testified and rightly so, deserves the final determination of their case. The same article provides for the right to have adequate time to file a defence. In this case no cogent reasons have been advanced as to why the Defence and the associated documents were not filed within time.

21. Further under Section 1B (b) *Civil Procedure Act*, the Court is required to ensure the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Allowing this application will go contrary to the above provisions.

22. Final orders and disposal;

- a. The application is unmerited. It is dismissed.
- b. The costs shall be in favour of the Respondent.

23. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 9TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms Kiget holding brief for Arusei for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff

Defendant – Absent

Court Assistant - Phyllis

