



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Civil Case 42 of 2007 (OS) (E.L.C)

IN THE MATTER OF CLAIM FOR THE TITLE TO LAND BY ADVERSE POSSESSION OVER

LR NO.1330/572 (ALSO KNOWN AS PLOT NO.154) IN THOME FARMERS NO. 5 LIMITED

BETWEEN

HAZEL WANJIKU WAMUTITU 1ST PLAINTIFF

T.M. KIMATHI 2ND PLAINTIFF

VERSUS

JORETH LIMITED DEFENDANT

RULING NO.1

I: Civil Practice and Procedure

I: Background

1. On 25 April 07, parties came before this court on an injunction application. It was agreed between them, in this land matter, that the status quo be maintained but that the plaintiffs be permitted to file a further affidavit within seven days. Seven days expired on the 2 May 2007. The plaintiff instead filed the further affidavit on 3 May 2007. This was out of time and the plaintiff orally applied for an extension of time.

2. The respondent defendants orally applied to file an intended further affidavit to counter act this affidavit.

B) Oral application

3. It has come to the courts notice that advocates who file their document out of time assume that the affidavit and or pleadings can remain on record and the court ignore whether they have been filed on time or not.

4. Where the said documents are filed out of time, the proper procedure is to expunge the said documents from the records. Where this occurs advocates orally apply for leave to have the documents deemed to have been filed on time. There is no provision in law to all this.

5. Under order L r 1 Civil Procedure Rules provides that:-

“All applications to the court save where otherwise expressly provided for under these rules shall be by motion and shall be heard in open court.”

6. There is no provision herein in the rules to make application for leave to file a pleading or document out of time. The parties require to use order L r 1 Civil Procedure Rules and make an application requesting the court for leave to file their pleading/document out of time. Attached to the motion should be an affidavit explaining why the said pleading/documents were not filed on time. Annexed to the said application ought to be the proposed affidavit and or documents to be relied on.

7. Under order XLIX r 5 it provides for the power of the court to enlarge time.

“Where a limited time has been fixed for doing any act or taking any proceeding under this 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 to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

8. Order XLIX Civil Procedure Rules does not provide the procedure to come to court to make such application. The party concerned must therefore go to order L r 1 Civil Procedure Rules and file a notice of motion seeking such leave.

9. There must therefore be an application to enlarge time filed. It cannot be done orally.

III Oral application.

10. The oral application in this application does not arise. When the plaintiff was given leave to file a further affidavit within seven days, the seven days expired on 2 May 07. There was a public holiday in Kenya on 1 May 07 being May Day.

11. Under Order XLIX r 2 it states that:-

“Where any limited time less than six days or after any date or event is appointed or allowed for doing any act or taking any proceeding, Sunday, Christ mass Day and Good Friday and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.”

12. This means that the public holiday would not be counted in taking on the computation of the number of days to file suit.

13. Under Order XLIX r 7 Civil procedure Rules

In any case in which any particular number of days not expressed to be clear days is prescribed under these rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.

14. The first day of the order is not counted but the last day is counted in filing a document or affidavit as was in this case.

15. In the case law of Mareen V Danson Bertly & Co. Ltd (1961) QBD 136

It clearly shows the computation of time to include the last day.

16. I hereby find that the said further affidavit has been filed on time and would accordingly allow it in the pleading.

17. IV: In summary

17.1 Where the Civil Procedure Rules does not provide for the method in which to make application, then that application must be made in writing by way of notice of motion (Order L r 1 Civil Procedure Rules).

17.2) Leave to file affidavit out of time should at all times comply with an application under order Lr 1 Civil Procedure Rules.

17.3. That the said application must be annexed with the proposed affidavit or pleading.

17.4. That enlargement of time is within the courts powers under Order XLIX r 5 Civil Procedure Rules

17.5 That public holidays, Sunday Christmas day and Good Friday are not taken into account when computing time.

17.6. That under order XLIX r 7, if not otherwise provide by court the number of days are computed by excluding the first day and including the last day see case law of Maureen V Dawson Bertly & Co. Ltd (1961) Q BD 136.

Dated this 9th day of May 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

S. Kingara for Kingara & Co. Advocates for the plaintiff/applicant

P.T. Kiiru and E.M. Njenga for Kimani Kairu & Co. Advocates for the defendant/respondent