



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 77 OF 2014

MUGO RIAKATHARI.....PLAINTIFF/RESPONDENT

VERSUS

MUTHIKE MIANO.....1ST DEFENDANT/APPLICANT

JOHN MURIMI GITHUI.....2ND DEFENDANT/APPLICANT

PHILIP WAMETHI NJIRU.....3RD DEFENDANT/APPLICANT

RULING

The application before me is the Notice of Motion dated 20th February 2019 brought under **Article 159 (2) (d) of the Constitution of Kenya, Section 1A and 1B CPA, Order 45 Rule 1 (a) and Order 50, Rule 6 CPR**. The applicant is seeking the following orders:

- 1. That the Honourable Court be pleased to review the order given on 20th July 2018 and be pleased to extend the time for complying with Order II of the Civil Procedure Rules beyond the 60 days granted by the Court.***
- 2. That the Honourable Court be pleased to order that the plaintiff's list of witness and exhibits filed on 13th February 2019 be deemed as properly filed.***
- 3. That the Honourable Court be pleased to order that the suit be set down for hearing.***
- 4. That the Honourable Court be pleased to give further relief as it may deem fit and just to.***
- 5. That the costs of this application be in the cause.***

The application is supported by the affidavit of Onesmus Muthee Mugo and grounds apparent on the face of the application. The application is opposed by the 3rd defendant.

On 3rd March 2019, the firm of Ochieng Ogutu & Co. Advocates for the defendants filed another application under **Order 1A, 3A, CPA and Order 51 Rule 1 CPR** seeking an order that the suit herein stands dismissed. When this matter came up for directions, it was agreed by consent that the two applications be heard simultaneously. The second applicant by the firm of Ochieng Ogutu & Co. Advocates is essentially opposing the first application by Magee Wa Magee & Co. Advocates.

The background to the two applications is that on 20th July 2018, S.N. Mukunya J. delivered a ruling in the following terms:

- 1. That this suit that was dismissed be and is hereby reinstated.**
- 2. That the same be fast tracked for hearing by complying with Order II Civil Procedure Rules within the next 60 days failing which the suit will be dismissed.**
- 3. That the parties to fix this suit for hearing upon complying with Order II of the Civil Procedure Rules.**
- 4. That there shall be no order as to costs.**

In his application to review the said orders dated 20th February 2019, the plaintiff deponed in the supporting affidavit that unfortunately in August 2018, the Honourable Justice S.N. Mukunya who made the orders in review passed on and his advocates informed him that the Court had notified parties that upon demise of the said Judge, ELC matters would be pending until another Judge is posted to the station. At the time the present ELC Judge was posted to the station, the 60 days had lapsed and there was therefore need to extend the 60 days period granted by the Court. The plaintiff further stated that coupled with that, the Court diary for 2018 was full and a mention date could not be fixed. He deponed that in order to expedite the matter, he filed his list of witness and exhibits and wanted the same to be deemed as duly filed.

In reply to those averments, the defendant deponed that by failing to comply with the order of the Court, this suit stands dismissed as directed.

I have considered the first application by the firm of Magee Wa Magee & Co. Advocates dated 20th February 2019 and the subsequent application by the firm of Ochieng Ogutu & Co. Advocates. As stated herein above, the second application ostensibly opposes the first application. It is not in dispute that my brother, the late S.N. Mukunya J. on 20th July 2018 had ordered the suit herein be fast tracked for hearing by complying with **Order II** within 60 days failing which the suit will be dismissed. The plaintiff has attempted to give some explanation for failing to comply with the order. The explanations being given now in my view is too little too late. The plaintiff should have given those reasons before the expiry of the 60 days given. Having said that, I am alive to the principles for dismissal of suits for failure to comply with certain orders and directions given by a Court which is geared towards the requirement of expediency in prosecution of land cases. That principle is founded in **Article 159 (2) (b) of the Constitution** that justice shall not be delayed. In the same vein, **Section 3A of the Civil Procedure Act** also gives the Courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. The Courts are also empowered under **Section 1A and 1B of the Civil Procedure Act** to ensure that the overriding objectives of the **Civil Procedure Act** and the Rules made thereunder are attained in the administration of justice in a just, fair and expeditious manner.

The provisions of the law must also be read in conjunction with the provisions of **Article 48 of the Constitution** that access to justice should not be impeded, as well as **Article 50 (1) of the Constitution** on the right to a fair hearing. In **Agip (K) Ltd Vs Highlands Tyres Ltd (2001) K.L.R 630, Visram J.** (as he then was) stated:

“It is clear that the process of the judicial system requires that all parties before the Court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules committee intended to leave the plaintiff without a remedy and to take away the authority of the Court when it made Order IVL Rule 5 of the Civil Procedure Rules”.

Section 50 Rule 5 CPR provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under those

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 time is not made until after the expiry 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”.

In the case of ***Kakuzi Limited Vs Samuel Mungai & 2 others ELC No. 302 of 2017*** reported in (2018) e K.L.R, J.G. Kemei J. stated as follows:

“The Court in exercise of its powers under Article 159 (2) (d) of the Constitution and in upholding its role to do substantive justice to the parties is inclined to grant the application. The Court has considered that this case was filed in 2005 and in the interest of justice that the parties have their day in Court the Court is satisfied that no prejudice will be visited on them if the matter is heard on its merit the Court hereby directs the Applicant to fix the matter for hearing within the next 30 days failure to which this matter shall stand dismissed”.

The explanation given by the applicant in my understanding is an afterthought as the unfortunate demise of our learned brother S.N. Mukunya did not relieve him of his obligation to comply with the orders of the Court to comply with ***Order II CPR***. That notwithstanding, the overriding interest of every dispute in our Courts is to allow parties to have their day in Court unless substantial prejudice which cannot be remedied by costs has been caused to the opposite party. In the circumstances of this case, I find that the interest of justice demand this matter do proceed to full hearing.

In the final analysis, I allow the application dated 20th February 2019 in the following terms:

- 1. The order of this Honourable Court issued on 20th July 2018 requiring the parties to comply with Order II of the Civil Procedure Rules within 60 days is reviewed and/or set aside.***
- 2. The plaintiff’s list of documents and witness statements filed on 13th February 2019 are deemed as duly and properly filed and served.***
- 3. The Plaintiff/Applicant to pay the costs of this application assessed at Ksh. 10,000/= within seven (7) days from today.***
- 4. The plaintiff to take steps to prosecute this suit within 30 days.***
- 5. Failure to comply with paragraph 3 and 4 above, this suit shall stand dismissed.***

READ and DELIVERED in open Court at Kerugoya this 11th July, 2019.

E.C. CHERONO

ELC JUDGE

11TH JULY, 2019

In the presence of:

- 1. Ms Githaiga holding brief for Magee for Plaintiff*
- 2. Mrs. Makworo holding brief for Ochieng’ Ogotu for Defendants*