



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 669 OF 2017**

**DR ONSOMU ONCHONGA .....PLAINTIFF**

**VERSUS**

**FORTY PLACE LIMITED.....DEFENDANT**

**RULING**

1. On 27/11/2019, this court conditionally reinstated the plaintiff's suit. The condition was that the plaintiff was to pay the defendant throw-away costs of Kshs 10,000 within 30 days. In default, the reinstatement order would stand vacated, and the suit would stand dismissed. The plaintiff did not comply with the above condition. Consequently, the suit stood dismissed upon expiry of 30 days.
2. Arising from the foregoing, the plaintiff brought a notice of motion dated 17/7/2020, seeking enlargement of time within which to comply with the order of 27/11/2019. He further sought a consequential order reinstating the suit. The said application dated 17/7/2020 is the subject of this ruling. The application was supported by an affidavit sworn on 17/7/2020 by the plaintiff's advocate, Mr Andrew Ombwayo.
3. Mr Ombwayo deposed that the plaintiff resided in Minnesota, United States of America; was at all material times ready and willing to pay the sum of Kshs 10,000; and he made strides to comply with the order of 27/11/2019 by availing funds and procuring preparation of a cheque dated 16/12/2019 which was promptly given to the plaintiff's advocates' clerk to deliver to the defendant's advocates. Their Law Firm thereafter closed for Christmas Holidays and resumed on 15/1/2020. In January 2020, the court clerk called to request for two weeks leave to attend the burial of his uncle in Siaya County, slated for end of January 2020. Counsel added that he was not aware that the cheque he had issued had not been delivered to the defendant's advocates until 21/2/2020 when he received a letter dated 202/2/2020 from the defendant's advocates. On learning about the default, he engaged Ms Nyaguthie, counsel for the defendant, with a view to resolving the issue amicably. Counsel for the defendant asked him to wait for the mention of the matter on 14/5/2020 when they were to amicably settle the issue. Come 14/5/2020, counsel for the defendant did not attend court. When he reached out to her on the same day, she was non-committal, prompting the plaintiff to bring the present application.
4. The plaintiff's advocate's office clerk, Mr Wycliff Muga, also swore an affidavit dated 17/7/2020 in which he deposed that he tried to deliver the cheque to the defendant's advocates on 17/12/2019 and 18/12/2019 but failed to effect delivery because the said advocates had closed their offices. Owing to his involvement in the treatment of his paternal uncle who eventually died, he forgot to deliver the cheque thereafter.
5. The defendant opposed the application through a replying affidavit sworn on 7/10/2020 by M/s Paula Njuguna. She deposed that the plaintiff failed to comply with the order of 27/11/2019 even after the defendant wrote to them on 21/2/2020. She added that the plaintiff was deliberately delaying the adjudication of the dispute in this suit by failing to comply with the orders of the court. Counsel further deposed that the lapsed injunctive order which the plaintiff had previously enjoyed had caused extreme hardship, suffering, and loss to the defendant. She added that though the injunctive order had lapsed, the plaintiff had continued to unlawfully use the common area within the suit premises as his private property and had erected a metal gate, thereby denying the other residents access to the common area. She urged the court not to reinstate the suit.
6. The application was canvassed through written submissions dated 18/1/2021 which I have duly considered. I have similarly considered the defendant's submissions dated 26/2/2021.
7. The single question falling for determination in this application is whether the plaintiff/applicant has satisfied the criteria upon which this court exercises the discretionary jurisdiction to enlarge time. The broad guiding criteria was summed up by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** in the following words:

a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

- b) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;
- c) Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis;
- d) The party seeking an extension order is obligated to demonstrate a reasonable reason for the delay, to the satisfaction of the court;
- e) Whether there will be any prejudice suffered by the respondents of the extension is granted is a relevant factor to be considered;
- f) The court is similarly required to consider whether the application has been brought without undue delay, and
- g) Public interest, in relevant cases, is a factor that should be a consideration for extending time.

8. I have considered the explanation contained in the two affidavits tendered in support of the application. What emerges from the evidential materials placed before the court is that the default culminating in the automatic vacation of the reinstatement order was occasioned by three factors: (i) closure of offices due to Christmas festivities; (ii) sickness of, and eventual death of, the paternal uncle of the office clerk delegated to deliver the cheque of Khs 10,000 to the defendant's advocates; and (iii) forgetfulness by the clerk, attributed to the sickness and death of the said uncle. Delay in bringing the application has been explained without any controversion. In my view, these are circumstances which justify exercise of discretion in favour of the applicant, subject to him indemnifying the defendant through modest costs.

9. In taking the above view, the court is guided by the broad equity approach outlined by Apaloo JA in **Philip Chemwolo & Another v Augustine Kubade (1982-88) KAR 103** in the following words:

***“ Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs.”***

10. Counsel for the defendant argued that the now lapsed injunctive order had prejudiced the defendant. It is not lost to the court that the plea for reinstatement of the injunctive order was declined in the preceding ruling rendered on 27/11/2019. Secondly, there is no evidence of any prejudice to be suffered if the plaintiff's suit is reinstated.

11. Consequently, it is my finding that the applicant has satisfied the criteria upon which this court exercises the discretionary jurisdiction to enlarge/extend time. The plaintiff's application dated 17/7/2020 is accordingly disposed in the following terms:

***a) The time for complying with the order of this court made on 27/11/2019 is extended by 30 days from today and the plaintiff's suit herein is accordingly reinstated.***

***b) The defendant shall be indemnified through an award of costs in the sum of Kshs 10,000, in addition to the costs awarded in the preceding ruling dated 27/11/2019, both payable by the plaintiff within 30 days from today.***

***c) In default of compliance with (a) or (b) above, the reinstatement order made herein shall stand vacated and the suit herein shall stand dismissed with costs to the defendant.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF MAY 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Court Assistant: June Nafula