



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 43 OF 2017

JOHN MUIKAMBA GITAU.....PLAINTIFF/RESPONDENT

VERSUS

THE TRUSTEES CARITAS MARIANA

HOLY FAMILY CHILDREN'S HOME, THIKA.....1ST DEFENDANT/APPLICANT

REV. FATHER BETHRAND NWACHUKWU.....2ND DEFENDANT/APPLICANT

RULING

The matter for determination is the **Notice of Motion Application** dated **23rd June 2020**, by the Defendants/ Applicants seeking for orders that;-

1. That the Defendants be allowed to file and serve their statement of Defence, Witness statements and Bundle of documents to the suit property out of time.

2. Costs of this Application.

The Application is premised on the grounds that on **7th May 2020**, the Court delivered a Ruling dismissing the Defendants'/ Applicants' Application seeking for an order to strike out the Plaint. That the Defendants/ Applicants have not filed a Statement of Defence and they are desirous of filing one upon being granted leave. Further that the Defendants/ Applicants were confident that their Application seeking to strike out the suit would succeed and such did not file a defence. That mistake of the Advocate should not be visited on Client who had sought the services of an Advocate. That the Defendants/ Applicants are apprehensive that the Plaintiff/ Respondent would set down the matter for formal proof culminating into a decision without their Defence. That the Defendants/ Applicants have a valid Defence with high chances of success. That the Application has been brought in the interest of substantive justice and without unreasonable delay.

In his Supporting Affidavit, Rev. **Fr. Bethrand Nwachukwu** averred that he is an innocent owner of the suit property and he has invested in a children home on the suit property. That he has lost valuable assets, money and time due to the continuous harassment by the Plaintiff/ Respondent and as their relationship had been acrimonious, he had to write to the Nigerian Embassy in Kenya for his arrest. That the instant suit is important and he seeks for leave of the Court to file his Defence. He urged the Court to allow the Application.

The Application is opposed and the Plaintiff/ Respondent filed a Replying Affidavit sworn by **John Muikamba Gitau** on **2nd July 2020**, and averred that he has been advised by his Advocates that the grounds advanced by the Defendants/Applicants do not meet the legal threshold, but is a mere afterthought. That where a Defendant has been served with **Summons to Enter Appearance**, he ought to file his/her Defence within **14 days** after he has entered Appearance in the suit and serve it upon the Plaintiff within 14 days of filing. That the suit was filed on **14th June 2016**, in **Kerugoya Environment and Land Court** and later transferred to this Court in **2017**. Further that despite entering appearance on **30th June 2016**, the Defendants/ Applicants have never bothered to file their Defence 4 years later. He averred that the delay in filing the Defence is deliberate and inordinate, which should not be entertained by the Court. That the Defendants / Applicants are represented by Counsel and should have known better.

He averred that he has been advised by his Advocates on record that an extension of time to file a defence out of time is not a right of a party, but an equitable remedy only available to deserving parties. That the Defendants/ Applicants have been participating in the suit since it was filed and have not explained the reason for the delay in filing the Defence on time which delay is inordinate. That the Defendants/ Applicants have all along been aware of their obligations to file a Defence as it is evident from the prayers sought in the Application dated **22nd March 2018**, when they sought to have the Court suspend the time for filing a Defence.

That as a matter of practice, Court's will not exercise discretion because of Advocates mistake as the Advocates must demonstrate genuine and acceptable mistakes. That the case belong to the Clients and it is their duties to take steps to progress their cases. He urged the Court to

dismiss the Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the Affidavits and the annexures thereto, the pleadings by the parties and the provisions of law and finds that the issue for determination is ***whether the Application is merited.***

The Defendants/ Applicants have sought for leave to file their Defence out of time. It is not in doubt that the instant suit was filed in 2017, and to date, no Defence has been filed. **Order 7 Rule 1 of the Civil Procedure Rules** provide 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.”

Therefore, it follows that within 14 days **After Entering Appearance**, the Defendants/ Applicants were required by law to enter appearance which they failed to do. It is the Applicant’s contention that they failed to enter appearance as they thought that their Application would succeed and there would therefore be no need for them to file a Defence. The Defendants/ Applicants have further blamed their Advocate’s inadvertence mistake on the failure to file the Defence and sought for the Court’s indulgence to be granted leave to file the Defence out of time. In the case of **Gerald Mwithia Vs Meru College of Technology & Another [2018] eKLR**, the Courts have held on several occasions before that; -

“Clients cannot continue to hide behind the failure of their advocates to perform certain required actions on their part and that it is incumbent upon the clients to follow up the progress of their case, this premised on the fact that the case does not belong to the advocate but the client.”

The Defendants/ Applicants have not informed the Court whether their Advocate who is still Counsel on record advised them not to file the Defence or that he simply failed to inform them that there was need to file the Defence. In the Court’s considered view, the provisions of the Civil Procedure Rules do not give the Defendant a leeway not to file the Defence when there is an Application pending and the justification by the Defendants/ Applicants that they were sure that the Court would uphold their Application and therefore saw no need to file a Defence does not hold any water. Further this instant Application was filed over a month after the Ruling to the alleged Application had been delivered.

It is not in doubt that in deciding whether or not to grant leave to extend time, the Court is called upon to exercise its discretion and be satisfied that there were sufficient cause that would allow it extend time. In this instant, the reasons that have been given by the Defendants/ Applicants do not hold water as they had even sought for time to extend time to file the Defence which time was not granted. It is therefore not in doubt that the Defendants/ Applicants were well aware of their obligations under the law to file their Defence on time, but negligently failed to do so. The Court is thus not satisfied that the Defendants/ Applicants have given a sufficient reason to warrant it to exercise its discretion in their favour.

However, this is a land case and in the instant case, there is no doubt that no interlocutory Judgment has been entered and that there is none that could be entered as the Plaintiff/ Respondent is expected to go for formal proof in the absence of any Defence. The Court has gone through the draft Defence and notes that the same raises triable issues. Further the Court has considered that the parties had not taken pretrial directions and while the Plaintiff/Respondent would be greatly prejudiced, by the delay caused by the Defendants/ Applicants, the said loss may be compensated by damages. See the case of **Sebel District Administration vs Gasyali & Others (1968) E.A. 300**, the Court, observed that:-

“In my view the Court should not solely concentrate on the poverty of the Applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the Court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”

The Court therefore finds and holds that in the interest of justice, the Defendants/ Applicants will be allowed to file their Defence and parties go for Pre Trial Conference and the same would however be conditional on the Defendants/ Applicants paying costs to the Plaintiff/ Respondent. See the case of **Beatrice Wanjiru Kamuri v John Kibira Muiruri [2016] eKLR** where the Court held that:-

“I on my part, have little sympathy for persons who deliberately file their documents late. If such party does not file his documents within time, he needs to give reasons as to why his documents need to be admitted, or else there is a risk that the same may be struck out. I agree, that striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the Court process and attempting to steal a march on the other party. But that does not mean that parties ought to take for granted what is prescribed in the rules. I do not think that a party who cannot give good reason why he/she has filed his/her documents late ought to go scot-free as if there has been no breach of rules. There ought to be sanctions, in the form of fines or costs meted out upon such party, or else litigants will have no incentive to file their documents within the prescribed period. There is a purpose why the rules prescribe for various time frames within which to file and serve documents and these time frames ought to be given the utmost respect. Simply because a matter does not invite the entry of interlocutory judgment is not a licence to any litigant to file his defence outside the time prescribed by Order 7 Rule 1.

12. In our case, I have not been given any reason as to why no defence was filed within the prescribed period. Ms. Wamae in her submissions did not bother to give any reasons why the defendant thought it fit to file his defence late. She instead appeared to me to be attempting to argue that the late filing of the documents was justified. I am sorry to say that there was absolutely no justification. In fact it does seem to me as if the defendant was deliberately waiting to file his defence at the eleventh hour so as to delay the plaintiff from proceeding. How else would one explain the fact that the defendant did not file any defence for close to one year since filing the memorandum of appearance. Why didn't the defendant file defence shortly after being served with the hearing notice in the month of February? I think he knew that if he files his defence just before the hearing date, the matter would be adjourned because then there would be need to have a pre-trial conference according to the Civil Procedure Rules of 2010. Courts should not have much leniency to such litigants.

13. That said, I do have serious respect to the right of every person to be heard. I will therefore admit the defence filed by the defendant though filed out of time. But as I have mentioned before, such a person needs to be sanctioned, to discourage other parties from flouting the prescribed time frames. It is clear to me that the plaintiff in this matter has been inconvenienced. She was made to believe that the defendant was not going to file a defence and took a hearing date trusting that her case would proceed as an undefended cause. It cannot be said that she has not suffered prejudice. She clearly has, since her case will now be delayed. To be fair to her, the defendant must pay her some costs as a condition for his defence being allowed out of time. I will in my discretion admit the defence out of time, but subject to the condition that the defendant pays to the plaintiff throw away costs of Kshs. 20,000/= within 14 days. If these costs are not paid within the time prescribed, then the defence will stand struck out and the plaintiff's suit will proceed as an undefended cause.

The Upshot of the above therefore is that in the interest of Justice and to allow the case be heard on merit, the Court will allow the Defendants/ Applicants Application dated 23rd June 2020, and grant the Defendants/ Applicants leave to file their statement of Defence out of time. The said Defence ought to be filed and served within **14 days** from the date hereof. Further the Defendants/ Applicants will pay the Plaintiff throw away costs of **Kshs.20,000/=** within **14 days** from the date hereof and failure to which the leave so granted will lapse and the matter will proceed as undefended.

It is so ordered.

Dated, signed and Delivered at Thika this 17th day of June 2021.

L. GACHERU

JUDGE

17/6/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Masinde holding brief for Mr. Mungai for the Plaintiff /Respondent

No appearance for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Applicant

L. GACHERU

JUDGE

17/6/2021