



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 5 OF 2016

AMIT AGGARWAL(Suing as administrator of the Estate of
GURCHARAN DASS AGGARWAL.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

The Application

1. The application dated **12/3/2020** and filed in court on the same date has been brought under **Sections 1A & 3A** of the **Civil Procedure Act, Order 7, 50 Rule 6 and Order 51** of the **Civil Procedure Rules, Articles 50 & 159** of the **Constitution of Kenya**. The defendant seeks the following orders:-

1. ...spent

2. That this honourable court be pleased to enlarge time for filing of the statement of defence and counterclaim and the witness statements and documents in support of the defence and counterclaim, and the set of documents filed on the 18/9/2019 be deemed as having been duly filed and served; and

3. That in the alternative, this honourable court be pleased to grant leave to the defendant/applicant to file the defence and counterclaim as well as witness statements and documents in support of the defence and counterclaim out of time and that the annexed draft defence be deemed duly filed upon payment of the requisite court fees.

4. That costs of this application be in the cause.

2. The application is supported by the affidavit sworn on **12/3/2020** by the counsel for the defendant. The grounds on the face of the application are that the defendant did not file its defence and cross claim and the witness statements and documents in support thereof within time; that the defendant's said documents raise serious triable issues and that should the matter proceed to hearing without the said documents being admitted into the record then the defendant would end up being condemned unheard contrary to the rules of natural justice. Further it is averred that the court would benefit from allowing the said documents as it would have all the facts required for determination of the matter, and that the plaintiff would have an opportunity to respond to the documents perchance they are admitted.

The Response

3. The plaintiff filed his replying affidavit on **24/8/2020**. He deposes that the application is fatally defective for the reason that similar orders had been sought in a previous application which was struck out on the basis that the defence and other documents that were referred to in the application had not been annexed to the application as exhibits; that therefore it was quite evident that the defendant intended to have the defence and counterclaim already filed to be regularized, and by that reason the instant application is therefore res judicata and this court is *functus officio* and has no jurisdiction to entertain the instant application, having dealt the issues in the former; that service of summons was effected on **18/12/2015** and the advocates for the defendant entered appearance on its behalf on **29/2/2015** but filed no other document in compliance; that the defendant waited for almost **4 years** to seek the court's leave; that the excuse that the advocate Kenei had left the firm is lame since he left in the year **2018**, long after the suit was filed and summons served; that it is clear from the circumstances of the case that the defendant had the material information at all times and failed to file defence and documents and reliance of an advocates' departure from its advocates' firm is not a good ground; that the defendant's advocates failed to turn up when the matter was fixed for hearing on **24/9/2019** despite invitation; that subsequently the defendant's advocates received a hearing notice for the confirmed hearing date without demur; that the defence and the application are made simply for the purpose of having the suit drag on and that this court should not exercise its

discretion in the defendant's favour.

4. The defendant filed its written submissions on **25/5/2021**. The plaintiff filed none.

Determination

5. I have considered this application, the response and the filed submissions.

6. The main issue for determination in this matter is whether this court should exercise its discretion to admit the defendant's defence and documents out of time. A similar application had been made earlier and it is also incumbent on this court to determine if the instant application is *res judicata*.

7. I must dispose of the *res judicata* issue at once for it is a preliminary issue.

8. The application dated was struck out on 10/2/2020

9. Subsequently this application was filed on 12/3/2020. The former application sought the following orders:

(1) That this court be pleased to grant the defendant/applicant leave to file defence and counterclaim as well as witness statements and documents in support of the defence and cross-claim out of time.

(2) That the draft statement of defence and counterclaim filed herewith be deemed as properly filed and served upon payment of the requisite fees.

(3) That the costs of this application be in the cause.

10. The court found the application of the defendant quite presumptuous - it even asking that the documents already filed be deemed as properly filed *upon payment of the requisite fees*. Further no copies of the said documents were attached to the application and hence the court was unable to relate the described documents with the documents mentioned in the application.

11. The main issue is whether the application can be deemed to have been heard on the merits such that the doctrine of *res judicata* may be deemed to apply to the instant application. It is clear that the court would have considered the defence and other documents had they been attached to the former application but they were not and that dealt the application the fatal blow upon which it was struck out.

12. Striking out is not the same as dismissal. Striking out implies that a technicality was involved which could not allow this court to go further to delve into the merits of the application. In that former application the technicality was that the court had no documents to refer to to determine if the defendant had a good defence raising triable issues; it all had to do with the slapdash approach that the advocates for the defendants have adopted since the inception of this suit. And that is the basis of the plaintiff's claim that the defendant is only intent on delaying the hearing and determination of the suit much to the detriment of the estate of the late G. D. Dass.

13. However, I am unable to accede to the plaintiff's submission that the application is *res judicata* for the mere non exhibition of the documents intended to be sought to be admitted in this case, and the lack of leave to file the documents already on the record, meant that the court could not examine them and that the application was therefore not heard on the merits. Indeed as a sign that the application was dealt with on a preliminary procedural issue, this court stated as follows:

“13. I find it necessary to deal with the last issue raised by the plaintiff before delving into the merits of all the other issues because it may in my view dispose of the entire application.”

14. The defendant has regularized its position though not without occasioning considerable prejudice to the plaintiff as to more delay, and exhibited the documents in the instant application and it is this court's view that the same should be heard on the merits.

15. After the former application was struck out on **10/2/2020** it did not take the defendant long before it filed the instant application on **12/3/2020**, but the same could not be finalised quickly because of the effects of the current pandemic on the court schedules.

16. On the **23/10/2020**, this court of its own motion and in line with proper case management aimed at easing backlog caused the matter to be fixed for hearing for a second time, and scheduled the hearing to **3/6/2021**. However it appears that this date was erroneously taken without notice of the instant application pending in the record.

17. I have examined the reasons for the delay advanced by the defendant and found them quite wanting and incapable of availing them any relief in the instant application. First, summons were served in **2015** and the matter has been fixed for hearing at least once before the former application was filed.

18. The departure of Mr. Kenei in **2018** from the firm of Gumbo and Associates advocates while the suit was filed in **2015** has nothing to do with justification for the delay that occurred before his departure and worsens the picture for the defendant. What the defendant's counsel admits although not in very certain terms is that they were seized of this suit and they did nothing about it for a lengthy period of time. It is true that much delay has been occasioned by the inaction by the defendant and its counsel.

19. However, should the defendant be shut out from presenting its defence in this matter?

20. I am alive to the provisions of **Article 50** of the constitution. The provisions of **Article 50** of the **Constitution** recognize the right of any person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body and in this court's view any dispute includes an appeal. **Article 159(2) (d)** of the **Constitution** provides that, to paraphrase, the courts shall not allow substantive justice to be sacrificed at the altar of technicalities.

21. Whatever the amount of delay which in this court's view can be compensated for by way of costs the defendant has finally arose from its long slumber in a bid to be heard and this court is, in view of the constitutional provisions aforementioned, not inclined to shut it out. Furthermore this court has examined the defence and counterclaim attached to the application and it thinks that they raise some triable issues arising from alleged default on the part of the plaintiff's father. It is for that reason that this court finds that the application dated **12/3/2020** ought to be allowed.

22. Consequently I grant the application dated **12/3/2020** in terms of **Prayer No. (3)** only. The costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF JUNE, 2021

MWANGI NJOROGE

JUDGE, ELC, KITALE.