



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 28 OF 2018

ELIUD KIBITOK KETER.....1ST PLAINTIFF

JOEL KIPRUTO KOSGEL.....2ND PLAINTIFF

NOAH KIPKIRONG ROTICH.....3RD PLAINTIFF

VERSUS

JOSEPH KIPKOSGEI BITO.....1ST DEFENDANT

JULIUS KIPKESSIO BIRIR.....2ND DEFENDANT

LONRHO AGRIBUSINESS (E.A) LIMITED.....3RD DEFENDANT

THE LAND REGISTRAR

UASIN GISHU COUNTY.....4TH DEFENDANT

GRACE CHEPSONGOK SEREM.....5TH DEFENDANT

EAST AFRICA TANNING AND EXTRACT

COMPANY (E.A.T.E.C).....6TH DEFENDANT

NANDI LEBERIO FARMS LIMITED.....7TH DEFENDANT

ATTORNEY GENERAL.....8TH DEFENDANT

RULING

This ruling is in respect of a Notice of Motion dated 30th November, 2020 by the 3rd defendant/applicant seeking for the following orders:

- a. Spent.
- b. That this Honourable court be pleased to stay proceedings herein pending hearing and determination of this application.
- c. That this Honourable court be pleased to set aside its order striking out the 3rd Defendants defence herein and allow the 3rd Defendant to Defend this suit by granting leave to file Defence out of time.
- d. That pursuant to grant of prayer no. 3 above, the honourable court be pleased to order that the defence earlier struck out is reinstated and deemed properly on record.
- e. That costs of this application be in the cause.

Counsel agreed to canvas the application vide written submissions which were duly filed. The 1st, 2nd, 4th, 5th, 6th and 8th Defendants' Advocates stated that they were not participating in the application.

3rd DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel swore an affidavit in support of the application and submitted that there was an oversight on his part leading to delays in filing the defence, witness statements and documents in support of the 3rd Defendant's Defence and that the same was not deliberate and/or intentional

Mr Kigen submitted that the 3rd Defendant/ Applicant stands to suffer irreparable loss should the Plaintiff/ Respondent proceed with this suit ex-parte and that the 3rd Defendant has a good Defence which raises triable issues.

Mr Kigen further submitted that the issue for determination is whether the order to strike out the 3rd defendant's defence was made against the established principles of Order 2 Rule 15 which provides that:

"15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- a. It discloses no reasonable cause of action or defence in law; or
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment entered accordingly, as the case may be.

Counsel acknowledged that the power to strike out pleadings is discretionary but the same should be exercised judiciously.

Mr. Kigen relied on the case of **D. T. Dobie & Co. (Kenya) Limited v Muchina & Another [1982] KLR 1** Madan J.A, (as he then was) stated as follows in the said case:-

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fuzzy informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way"... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the fuzzi facts of a case before it."

Counsel urged the court to allow the application as prayed and allow the filing of the 3rd defendant's defence and witness statements.

7TH DEFENDANT'S/RESPONDENT'S SUBMISSIONS

The 7th Defendant opposed the application and relied on the grounds of opposition filed. Counsel submitted that the application is incurably defective for violation of Order 4 Rule 1 (4) of the Civil Procedure Rules.

Mr Kibii pointed out that the affidavit in support of the application has not been sworn by an authorized officer of the 3rd defendant within the meaning of Order 4 Rule 1 (4) but by an advocate who depones on factual issues. That the application ought to have been brought by the 3rd defendant through its directors as the advocate lacks capacity to swear the same on behalf of the applicant.

Mr Kibii submitted that the application has been filed after the Ist plaintiff has testified and allowing the prayers sought shall automatically mean that the matter shall proceed denovo. Counsel therefore urged the court to dismiss the application

1st , 2ND AND 3RD PLAINTIFFS/RESPONDENTS SUBMISSIONS

Counsel for the plaintiff/respondents opposed the application, relied on the replying affidavit and associated himself with the submissions of the 7th defendant/respondent.

It was counsel's submission that the 3rd defendant failed to file their pleadings in court and when they realized that the matter was listed for hearing on 16th November 2018 they rushed and filed a memorandum of appearance and a statement of defence on 10th November 2018 without the leave of the court. That the 3rd Defendant/applicant should have filed an application for leave to file defence out of time and in that application annex a draft statement of defence.

Mr. Murgor submitted that this is an abuse of the court process and the court rightly exercised its jurisdiction under Rule 15 (d) to strike out the pleadings. Further that the affidavit in support of the application has been sworn by the advocate of record and not an authorized officer as required by law and procedure. In the pleadings that were struck out the 3rd defendant statement was authored by one DAVID K. KORIR.

Order 4 Rule 4 provides that:

"where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so"

In his statement paragraph 1 he says

"THAT I was the property Sales Manager of Lonrho Agribusiness (E.A) Limited the 3rd Defendant herein at the time of sale but currently on retainer to handle any pending issues and thus wish to states as follows, "Counsel submitted that from the foregoing he is not a director of the 3rd defendant hence a stranger to the suit.

Mr. Murgor further annexed copies of CR 12 to the replying affidavit and as per the records the directors are one HELLEN KIMOOI KIPLAGAT and HOSEA MUNDUI KIPLAGAT as at 5th February 2021 and no reason has been given as to why they cannot attend court or swear affidavits. Counsel therefore urged the court to dismiss the application with costs as it has been brought in bad faith to defeat justice.

ANALYSIS AND DETERMINATION

The plaintiff herein filed a Complaint dated 6th February, 2018 and served the 3rd defendant vide an affidavit of service sworn on 19th February, 2018.

The 3rd Defendant did not file any document in opposition of the Plaintiffs' claim until 10th November, 2020 when a Memorandum of Appearance, a Statement of Defence, a witness statement, a list of witnesses, a list and bundle of documents were filed on behalf of the 3rd Defendant.

When this matter came up for hearing of the Plaintiffs claim on 16th November 2020, the Court struck out the pleadings which had been filed without the leave of the court by the 3rd Defendant and directed that the hearing of the Plaintiffs' claim proceeds as scheduled.

Order 7 Rule 1 of the Civil Procedure Rules 2010, provides as follows:

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.

While Order 6, Rule 1 of the Civil Procedure Rules 2010, provides as follows:

Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.

The 3rd Defendant filed a memorandum of appearance and Statement of Defence after two years without leave of the court and no explanation was given as to why the same had not been filed.

Counsel also sat pretty and hoped that counsel on record and the court would not notice the anomaly. Civil Procedure is important for the orderly adjudication of cases. The timelines for filing pleadings should be adhered to unless there is a good explanation given for extension of time. Parties cannot just wait and file documents after 2 years without leave of the court. There is no trial by ambush, the other parties must have enough notice and a chance to respond to the claims filed.

However in the interest of justice and as was held in the case of **JOSHUA MULUNGU MUTIE & ANOTHER V COUNTY GOVERNMENT OF MACHAKOS [2018] eKLR** the Court called upon to make a determination of an Application where a party sought to set aside an order striking out pleadings that were filed out of time, the Court cited with approval the case of **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another Vs. Francis Bahati Diwani & 2 others (2014) eKLR** it held as follows:

"15. In my view, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rules does not expressly provide so, which has been filed out of time is an extreme measure which is resorted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court... I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules."

In the case of **BEATRICE WANJIRU KAMURI V JOHN KIBIRA MUIRURI [2016] eKLR** 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 (sic) 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... 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... 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."

The applicant has caused prejudice to the respondents as they will be forced to start the case de novo which is an expense. The issues raised by counsel for the respondents will be canvassed at the hearing of the main suit. The court has the discretion to order for costs or a fine. I order that the 3rd defendant pays costs of Kshs. 60,000/ to the 1st 2nd 3rd plaintiffs and the 7th defendant within the next 14 days failure of which the order lapses. The defendant to file the defence, witness statements, list of documents and documents within the same period.

DATED and DELIVERED at ELDORET this 19TH DAY OF AUGUST 2021

M. A. ODENY

JUDGE