



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 276 OF 2018

ROCKLINK LIMITED.....PLAINTIFF/APPLICANT

Vs

PAUL MBUGUA GITAU1ST DEFENDANT/RESPONDENT

JOSEPH KAHIGA GACHUI2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff filed the instant Notice of Motion dated 21/7/2020 expressed under Order 51 Rules 1 of the Civil Procedure Rules, Sections 1A, B and 3A of the Civil Procedure Act and Article 159 of the Constitution for orders that;

- a. The Applicant be granted leave to file a reply to defence and defence to counter claim.
- b. The Reply to defence and defence to counterclaim be deemed duly filed and served upon the Respondents.
- c. Costs of this Application be in the cause

2. The application is based on the grounds on the face of it and the Supporting Affidavit of Kabugu C. Muguku, Advocate. He avowed that the Lease lapsed on 4/3/2020 hence the withdrawal of the suit. That failure to file the reply to defence and defence to counterclaim within the prescribed timelines was inadvertent as Counsel intended to deal with all issues raised therein at the hearing of the suit. He averred that the Plaintiff has a robust defence against the counterclaim which draft is annexed as 'KCM1'. He urged the Court not to punish the applicant for mistakes of counsel but allow the application in the interest of justice and fairness.

3. On behalf of the Defendants, Paul Mbugua Gitau swore the Replying Affidavit on 3/9/2020 in opposition of the Application. He deponed that the Plaintiff's application is illegal and irregular since pleadings closed way back in June 2015. That there is no explanation as to why the Plaintiff failed to file its defence to the counterclaim for over 5 years now. He averred that the Plaintiff wholly withdrew its case and without any defence to counterclaim the Court is at liberty to enter Judgment for Kshs. 1,359,602 being rent arrears.

4. The application was canvassed by way of written submissions.

5. The firm of Kabugu & Co. Advocates filed submissions on behalf of Applicant dated 10/5/2021. He submitted that it is in the interest of justice for the Court to exercise its discretion in its favour and cited several decisions including **Patel v E.A Cargo Handling Services Ltd [1974] EA 75 & Sebei District Administration V Gasyali & others (1968)EA 300**.

6. Conversely the Respondents filed submissions dated 6/6/2021 through the firm of Kamiro R.N Advocates. They reiterated the averments in their Replying Affidavit and implored the Court to dismiss the application in its entirety.

Determination

7. The background of this application stems from the Plaintiff's suit against the Defendants dated 3/3/2015. It was the Plaintiff's case that it entered into a lease agreement with the Defendants on the 1/8/18 for the lease of the suit properties to wit; JUJA/JUJA EAST BLOCK 1/144 and JUJA/JUJA/EAST BLOCK1/145 (the suit lands) for a period of 6 years from the 1/7/2013. The purpose of the lease was for quarrying and excavation of building stones. The Plaintiff accused the Defendants of breach of contract and sought interalia orders of interim injunction and damages and interest.

8. In a quick rejoinder the Defendants filed their statement of defense on the 27/5/2015 and denied the Plaintiff's claims. In addition they filed a counterclaim and averred that the Plaintiff is in arrears of rent then in the sum of Kshs, 1,359,602/-. It sought orders that the lease between the parties was lawfully terminated by the Defendants pursuant to clause 3 (a) of the agreement; an order of eviction of the Plaintiffs

from the suit premises and a sum of Kshs. 1,359,602/- being the rent arrears due.

9. On the 14/7/2020 the Plaintiff withdrew its suit wherein the Defendants expressed no objection but affirmed to the Court its intention to prosecute their counterclaim. On an oral application to file a reply to defence and defence to the counterclaim, the Court directed the applicant to move the Court formally by way of an application. Hence this application.

10. The single question falling for determination in this application is whether the Court should extend time to allow the Plaintiff to file a defence to the Defendants' counterclaim.

11. According to the record, as soon as the Defendants intimated to the Court their intention to prosecute their counterclaim, the Plaintiff got startled with the realization that it had failed to file a defence to the Counterclaim within the prescribed time. The reasons advanced for this infraction is what has now become common place in legal practice which is that the mistake of counsel should be excused and consequences therewith not be visited to the party in default. The Defendants contend that the application is fatal beyond rescue because pleadings closed; inordinate delay in filing the application; the Plaintiff was bereft of a defence and is now concocting one. They urged the Court to dismiss the application with costs.

12. The Court's power to enlarge the time within which to file pleadings is a discretionary one and is derived from Section 95 of the Civil Procedure Act which provides as follows:

‘Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’

13. Additionally, Order 50 Rule 6 of the Civil Procedure Rules grants this Court discretionary jurisdiction to enlarge time in the following terms:

‘Where a limited time has been fixed for doing any act or taking any proceedings under these 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 same is not made until after the expiration 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.’

14. In exercising this discretionary jurisdiction, the Court considers various factors, among them: (i) whether there has been indolence or unexplained delay on part of the applicant; (ii) whether the applicant is guilty of abuse of the Court process; (iii) whether enlargement will prejudice the Defendant; (iv) whether denial of enlargement will occasion prejudice to the applicant in the circumstances of the case; (v) whether the enlargement is necessary for the effectual and complete adjudication of the dispute; and (vi) whether it is just and fair to enlarge time in the circumstances of the case.

15. The above principles were restated by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2013) eKLR** as follows:-

“(1) 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.

(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.

(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.

(6) Whether the application has been brought without undue delay; and

(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

16. The discretion of the Court must be exercised judicially considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice. Seeing that the Court's jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court. Furthermore, the degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying it an extension, against the prejudice to the respondent in granting the extension. See **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR**.

17. The statement of defence and counter claim was filed on 27/5/2015. The applicant was bound to file its response by 10th June 2015 in line with the fourteen days period provided under Order 2 Rule 13 of the Civil Procedure Rules which states;

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served,

fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with”.

In this case the service of defence and counterclaim has not been contested.

18. It is not in doubt that there has been a delay of over six years for the Applicant to have filed its defence. The explanation given by the applicant’s counsel that they intended to address all the issues at the hearing is not satisfactory because parties are bound by their pleadings and one is not expected to raise a defence that is not part of the record, least of all at the hearing. It is evident that the applicant suffers from inordinate delay in the manner in which it filed this application almost 6 years later. It almost appears as an afterthought.

19. That said the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.

20. Having said that it is clear that the Plaintiff failed to file defence to counterclaim in time and no satisfactory reason has been advanced. The question then will be whether in the circumstances of this case, justice can be served by denying the applicant the right to be heard. Being a constitutional tenet, I think not.

21. It is evident from the record that the hearing of the suit is yet to commence. As such allowing the application will afford the parties their day in Court so that the issues in controversy may be heard on merit.

22. The overarching consideration for the Court is to do justice to the parties and where the Court is satisfied that there is a defense on merit or defence that raises triable issues the Court should exercise its inherent jurisdiction to allow the defence to proceed on trial.

23. For the reason given above I am satisfied that this is an application which calls this Court to exercise its discretion in favour of the applicant.

24. The application is allowed as prayed with costs in favour of the Defendants/respondents.

25. **It is so ordered.**

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 7TH DAY OF OCTOBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Kabugu holding brief for Ms Thuku for the Plaintiff

Defendant 1 – absent

Defendant 2 – absent

Ms. Phyllis Mwangi – Court Assistant