



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 777 OF 2016

MICHAEL KIMANI (Suing on his

behalf and as Executor of the Estate

of Mweya Karonga).....PLAINTIFF

=VERSUS=

GEORGE KIMANI GITAU (Sued on his

behalf and in his capacity as the

Administrator of the Estate of Gitau Karonga.....DEFENDANT

RULING

What is before me is a Notice of Motion application dated 4th March, 2020 brought by the defendant under Order 36 Rule 7 of the Civil Procedure Rules seeking leave to file defence out of time. The application which is supported by the affidavit of the defendant’s advocate Obara Nicholas Andrew sworn on 4th March, 2020 was brought on the grounds that the defendant would be condemned unheard if the order sought is not granted. The defendant has contended further that proceeding with the suit without the defence by the defendant would amount to a miscarriage of justice. In his affidavit in support of the application the defendant’s advocate admitted that the defendant was served with summons to enter appearance and proceeded to enter appearance. The defendant’s advocate averred that the advocate who was previously handling the matter through inadvertence failed to file a statement of defence. The defendant’s said advocate averred that this omission was not discovered until when the matter was fixed for hearing. The defendant’s advocate averred that failure to file defence on time was not intentional and that the defendant all along wished to be heard in the matter. The defendant’s advocate averred that the defendant has a defence that raises trial issues and that the application has been brought in good faith and not with an intention to delay the hearing of the suit. The defendant’s advocate has contended that the plaintiff stands to suffer no prejudice if the leave sought is granted since the plaintiff who has already given evidence can be recalled to give further evidence in response to the defence by the defendant.

The application was opposed by the plaintiff through grounds of opposition dated 11th December, 2020 and a replying affidavit sworn by the plaintiff on the same date. In his grounds of opposition, the plaintiff has contended that the defendant has not given any sufficient reason on the basis of which the court can exercise its discretion in his favour. The plaintiff has averred further that the draft defence annexed to the defendant’s application discloses no triable issues that would justify the grant of the order sought. The plaintiff has contended further that the orders sought would prejudice the plaintiff and that the application lacks merit. In his affidavit in reply to the application, the plaintiff has reiterated that the defendant has not given sufficient reason for his failure to file defence within time. The plaintiff has averred that after he gave evidence and closed his case, the defendant was directed to file an application for leave to file defence out of time for hearing by the court on 7th July, 2020. The plaintiff has averred that the defendant failed to file the application as directed by the court and also failed to attend court on 7th July, 2020 when the application was to come up for hearing as a result of which the court closed the defendant’s case and ordered the parties to file submissions in respect of the main suit.

The plaintiff has averred that the defendant was only jolted into action when he was served with the plaintiff’s submissions. The plaintiff has averred that although the defendant has claimed to have filed the present application on 6th March, 2020, no evidence has been placed before the court in proof of such filing. The plaintiff has averred further that the draft defence annexed to the affidavit in support of the defendant’s application consists of mere denials which do not raise any triable issue.

The plaintiff has averred that a delay of over 4 years to file a defence is inexcusable and that the defendant who has slept on his rights does not deserve any mercy from the court. The plaintiff has averred that the defendant’s application is a tactic intended to delay the determination of the suit. The plaintiff has averred that since he has already given evidence and closed his case, he will be highly prejudiced if the defendant is allowed to file his defence at this stage. The plaintiff has averred that the application has been brought after inordinate delay and that the same is misconceived and amounts to an abuse of the process of the court.

The defendant filed submissions dated 26th February, 2021 while the plaintiff did not file submissions as had been directed by the court. The defendant has submitted that the delay in the filing of defence was occasioned by the fact that he had all along wished to have the dispute between him and the plaintiff resolved amicably since they are relatives. The defendant has submitted that the delay in the prosecution of the suit cannot be attributed to him but to the plaintiff who has been filing one application after the other. The defendant has submitted that he should be given an opportunity to have his day in court. The defendant has contended that the plaintiff's suit is *res judicata*. The defendant has reiterated that the plaintiff will not suffer any prejudice if the application is allowed. The defendant has submitted that he will suffer great injustice if the application is not allowed.

I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the defendant's advocates. The following is my view on the matter. It is not disputed that the court has jurisdiction under Order 7 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules to extend time within which to file a defence. The power conferred upon the court under Order 50 Rule 6 of the Civil Procedure Rules is discretionary. What I need to determine is whether the defendant has made out a case for the exercise of this court's discretion in his favour. It is not disputed that the defendant was served with summons to enter appearance and that he entered appearance in 2016 but failed to file a defence within the prescribed period. It is also not disputed that the present application was filed 4 years after the expiry of the time within which the defendant was to file his statement of defence. The defendant has given oversight on the part of the advocate who was handling the matter on his behalf as the excuse for his failure to file defence within time. The defendant has also blamed the numerous applications that were filed in the matter for the delay in the filing of the present application. The defendant has contended that the parties spent considerable time in the interlocutory applications and that it was until the suit was fixed for hearing that he realized that he had not filed a statement of defence.

On his part the plaintiff has contended that no reasonable excuse has been given by the defendant for his failure to file defence on time and that if the defendant is allowed to file a defence at this stage, he will be highly prejudiced since he has already given evidence and closed his case.

I am in agreement with the plaintiff that no reasonable excuse has been given by the defendant for his failure to file a statement of defence within the prescribed period. This alone does not however fetter this court's discretion under Order 50 Rule 6 of the Civil Procedure Rules. The dispute between the parties has been going on since 1990s. Although the court pronounced itself on the same on 24th May, 2007 in HCCC No. 2940 of 1992, some issues in dispute between the parties remain unresolved. It is necessary in the circumstances that the dispute between the parties be brought to a close. This can only be done if both parties are heard on the matter. The defendant entered appearance and participated in the interlocutory applications that were filed herein by the plaintiff. This is an indication that the defendant had an intention of defending the suit. I am of the view that justice would be better served if the defendant is given his day in court. I have considered the prejudice likely to be suffered by the plaintiff if the defendant is allowed to file his defence. It is not disputed that the plaintiff has already given evidence and closed his case and that his case as presented was on the basis that the suit was not defended. The plaintiff would not therefore be able to respond to the defence filed at this stage. It should be noted however that the plaintiff gave his evidence under special circumstances. Due to the plaintiff's illness, the plaintiff requested that this suit be heard on a priority basis so that his evidence can be taken. It was on that application that the suit was fixed for hearing and the evidence of the plaintiff taken despite the defendant's advocate having pointed out that the defendant had not filed a defence and required leave to do so. I am also in agreement with the defendant that the prejudice likely to be suffered by the plaintiff can be mitigated by the plaintiff applying to re-open his case to give further evidence in response to any new issue raised in the defendant's defence. I am not satisfied therefore that the plaintiff would suffer prejudice if the orders sought are granted which cannot be remedied.

Due to the foregoing, I find merit in the Notice Motion application dated 4th March, 2020. The application is allowed on the following terms:

1. The defendant is granted leave to file a statement of defence within seven (7) days from the date hereof.
2. The plaintiff shall be at liberty to file a reply to defence within fourteen (14) days from the date of service of the defence.
3. The plaintiff shall be at liberty to open his case and to recall the witness who has given evidence for further examination and cross-examination and to call additional witnesses if necessary.
4. The defendant shall pay thrown away costs assessed at Kshs.10,000/- forthwith and in any event within 30 days from the date hereof in default of which the plaintiff shall be at liberty to execute for the recovery thereof.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ojuok for the Plaintiff

Mr. Obara for the Defendant

Ms. Bestsy Chelangat - Court Assistant