



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 336 OF 2014

JAMES WAMBUA KIMILA.....PLAINTIFF

-VERSUS-

SINOHYDRO CORPORATION LIMITED.....1ST DEFENDANT

JAMES NJUHO.....2ND DEFENDANT

RULING

1) On 24th September 2020, Lady Justice C. W. Githua, delivered a ruling in this matter in which she inter alia had her judgment arrested and this case reopened for the hearing of the 2nd defendant's case. The 2nd defendant was given 90 days from the date of the ruling to avail his witnesses. It would appear the 2nd defendant did not avail his witnesses neither did he conclude his case within the time given thus prompting the plaintiff to take out the motion dated 14th January 2021, the subject matter of this ruling.

2) In the aforesaid motion the plaintiff sought for the following orders:

a) THAT this application be certified urgent and be placed before Honourable Justice Cecila W. Githua for determination at the earliest instance.

b) THAT this honourable court be pleased to expeditiously issue judgment on the main suit herein.

c) THAT should the honourable court be pleased to award general damages in the main suit in favour of the plaintiff, interest on the same to accrue from 26th March 2020.

d) THAT costs of this application be provided for.

3) The motion is supported by the affidavit of Patrick Kimathi Muchena. When served, the 2nd defendant filed the replying affidavit sworn to oppose the application.

4) By the time of writing this ruling, Lady Justice Githua had already been transferred from Civil Divisions to Criminal Division hence the file could not be placed before her to determine the instant application.

5) I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the application. The plaintiff averred that Justice Githua was scheduled to deliver her ruling on 26th March 2020 but the 2nd defendant successfully moved the court to arrest the delivery of the judgment and also had the defence case re-opened for hearing on 24th September 2020.

6) The plaintiff further pointed out that the 2nd defendant failed to conclude the defence case within the 90 days he was given by the court. It is the plaintiff's submission that the 2nd defendant has also failed to avail witnesses as ordered within the given period.

7) It is for the above reasons that the plaintiff beseeched this court to expeditiously deliver its judgment. The 2nd defendant on the other hand has prayed to this court to indulge him further by extending time to hear his defence. He claimed that though he was given 90 days to

conclude his defence, he was unable to do so because his witness was not available and it took a considerable amount of time for him to visit his advocate to record a witness statement.

8) The 2nd defendant also stated that he managed to have his witness record and sign her witness statement on 15.12.2020. He further stated that due to failure of the judiciary e-filing system, he was unable to upload his documents. He pointed out that the e-filing systems was down most of the time during the period between December 2020 and January 2021 hence parties could make payments nor communicate through the system.

9) The 2nd defendant also averred that he has already paid and served upon the plaintiff the witness statement. The 2nd defendant beseeched this court to exercise its discretion by extending time for the hearing of his defence.

10) Having considered the arguments of both sides it is clear in my mind that this court is being asked to exercise its discretion to extend time to enable the 2nd defendant to present his defence. There is no dispute that this court (Githua J) re-opened the case and gave the 2nd defendant 90 days to file his witness statements and prosecute the defence case.

11) It is also not in dispute that the 2nd defendant did not file nor conclude his case within 90 days. The 2nd defendant has however explained in his replying affidavit the reasons why he did not comply with the court order. **First**, that it took time for him to secure his witness to execute a witness statement and that he was only able to do so on 15.12.2020.

12) Secondly, that it was difficult to access the court e-filing portal to file documents and pay for the same.

13) The reasons advanced by the 2nd defendant to explain his failure to comply with the court's directive appear to be plausible. The plaintiff did not controvert the aforesaid averments contained in the replying affidavit.

14) It is clear to me that the 2nd defendant did not contribute to the delay but was frustrated by challenges which came with new technology introduced by the Judiciary in the wake of Covid 19 pandemic outbreak.

15) It is important to note that the plaintiff is also entitled to have his case expeditiously determined. However, the court has to balance between the two competing rights. There is the right to have the judgment delivered vis-à-vis the right of being heard.

16) Having come to the conclusion that the 2nd defendant cannot be blamed for the failure to prosecute his defence, it is only fair to extend time to hear his defence.

17) It is apparent that the 2nd defendant's witness statement has been filed and served upon the plaintiff. What is remaining is for the 2nd defendant's evidence to be heard since delivery of judgment has been paused and the 2nd defendant's case re-opened for hearing.

18) In the end I will exercise my discretion to open access to justice by declining to grant the plaintiff's application and instead extend time to have the 2nd defendant's defence heard within 60 days. The plaintiff shall however be paid costs of the motion.

19) If the defendant does not conclude his defence within the period given, then the court shall proceed to deliver its paused judgment.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 13th day of May, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants