



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO.37 OF 2013

MATUMBO COMPANY LTD.....PLAINTIFF/APPLICANT

VERSUS

MARY WAHU.....1ST DEFENDANT/RESPONDENT

VERONICA NYAMBURA.....2ND DEFENDANT/RESPONDENT

RULING

1. The notice of motion dated 19th March 2021 by the plaintiff is brought under sections 1A, 1B, 3A, 63 of the Civil Procedure Act, Order 50 Rule 6 and 51 of the Civil Procedure Rules and Article 50 (1) of the Constitution of Kenya. The application seeks the following orders:

i. Spent.

ii. That this Honourable court be pleased to grant the plaintiff and the defendant an early hearing date to settle this case on merit.

iii. That there be an extension/enlargement of time and such other /further orders this Honourable court may deem fit and just to grant in the circumstances of the issues between the parties.

iv. That the costs of this application abide the result thereof.

The application is supported by the following summarized grounds:

i. The defendant is frustrating the fixing of the hearing of this matter as such the plaintiff needs protection from the court by being given one directly instead of other forums.

ii. The suit property known as Matumbo House has been the case for 30 years and the plaintiff was granted an injunction by the Honourable Justice Waweru.

iii. The Honourable Justice Njuguna gave directions on how to proceed and she gave timelines for certain actions

iv. Despite the online challenges the plaintiff filed the pretrial questionnaire on time, thereafter the parties were given a date of 18th January 2021 for compliance which was later moved to 18th March 2021. On the said date the defendant's advocate said the matter had been dismissed and there was no need for directions. The confusion created by the advocate of the defendant was uncalled for since the plaintiff had complied and the 120 days had not expired.

v. Further, the defendant has not complied, in view of the circumstances it will be just to order the suit be given a hearing date in court to finally settle the issues of the parties herein.

2. The application is further supported by the affidavit of Mr. Joseph Makori Omboga counsel for the applicant. He avers that they complied with the court orders of paying the defendant's advocate throw away costs (JMO 2), filed its pretrial questionnaire and list of issues (JMO3) as well as asking for a mention date for compliance (JMO 4).

3. He contends that from the aforesaid it is clear that the plaintiff has taken all steps to prosecute the suit and it is the defendants who have not filed their documents. The plaintiff does not intend to delay this matter and is ready to be heard within the 120 days. He further avers that the defendants are the authors of this unfortunate situation and they would not be prejudiced if a hearing date is given as they have a corresponding duty to file their own documents.

4. In opposition to the application the defendant/respondent filed grounds of opposition dated 19th March 2021 on the following grounds:

- a) *That the ruling in issue left no room for extension of time, which is what the applicant sought for on the 19th March 2021.*
- b) *That the application as drawn and taken out is an attempt to Review the ruling in issue herein through the back door.*
- c) *That in any event the injunction alluded to by the plaintiff is non-existent and was vacated on 26th November 2013, when Onyancha J dismissed the plaintiff's application for the same.*
- d) *That the plaintiff is the author of its own misfortune, and cannot shift blame by insinuating that the defendants have on their part not complied with Order 11 of the Civil Procedure Act.*
- e) *That the record is very clear that on the 18th March 2021, the plaintiff sought for more time to be able to comply with Order 11.*
- f) *That the plaintiff's modus operandi is such that they are always out of time and their suit and application have hereinbefore been dismissed on this very grounds.*
- g) *That only an appeal and/or review can suffice against the very express ruling of 29th October 2020, and this application is but an abuse of process and is not for granting.*

5. Learned counsel for the plaintiff/applicant Mr. Makori in his submissions dated 31st May 2021 submitted that this application was necessitated after the respondent's advocate refused to take directions on grounds that the suit had been dismissed in the month of November 2020 which was not true.

6. He further submitted that the orders given by Justice Njuguna were to file their pre-trial documents within 21 days and prosecute its suit within 120 days from the date thereof. He contends that the respondent has never taken any steps to prepare for the hearing. He further submitted that as at the 18th of day of March 2021 when the garrulous objection was made the 120 days had lapsed.

7. On further calculation he says time stated running as from 20th November 2020 and had lapsed on 18th March 2021. He further submitted that the time does not run i.e the 21st of December to the 31st of January according to Order 50 Rule 4 which period is excluded from computation.

8. He urged the court to consider the fact that all notices were served on the respondent which shows good faith of a party who has nothing to hide. He submitted that the respondent's advocate misled the court on the issue of service and when the court was informed of the same the said advocate drafted a consent to reinstate the order to save face on the misrepresentation.

9. He prays that the orders be granted and the applicant be given a direct hearing date by the court in which case the respondent will not be prejudiced in any way.

Analysis and Determination

10. Upon considering the notice of motion, affidavit, annexures, the grounds of opposition and submissions by counsel, I find the main issue falling for determination to be whether there is merit in the notice of motion dated 19th March 2021.

11. The ruling dated 29th October 2020 by Justice Njuguna is very detailed and has captured a summary of what has been happening in this case. Directions were given by the court on the said 29th October 2020. The first was for the parties to file either pre-trial documents within 21 days and a date taken to confirm compliance.

12. Perusal of the record shows that the plaintiff/applicant did file its pre-trial conference documents dated 19th November 2020 and filed on the same date as per the receipt in the file. There is no evidence of the defendants having filed their documents as per the Order. A date to confirm compliance ought to have been given by the court in order to enforce the 21 days timeline. In absence of such an order then the plaintiff could only have taken a date to confirm compliance upon filing of the documents by the defendants. Failure to comply with that direction by the defendants placed the plaintiff/applicant in an awkward position. I disagree with the defendants when they submit that the suit stands dismissed because of failure to comply by the plaintiff/applicant. It is the defendants who have caused all this and they cannot shift the blame to the plaintiff/applicant.

13. The guiding principles in respect to extension of time are well set out in a number of authorities for example: **Edith Githungu Koine vs Stephen Njagi Thoithi [2014] eKLR** where the court stated:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and

whether the matter raises issues of public importance among others ...”

14. In the case of Nicholas **Kiptoo Arap Korir Salat vs Independent Electoral Boundaries Commission & 7 others Supreme Court Application No. 16 of 2014 [2015] eKLR** the Supreme Court gave the following guidelines in a matter of this nature:

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 a 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 respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay.*

15. I wish to refer to the cases of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR** and **Elinda Muras & 6 Others v Amos Wainaina [1978] KLR** which were cited in the case of **St. Patrick’s Hill School Ltd v Bank of Africa Kenya Limited [2018] eKLR** where the court in both instances held inter alia that the door of justice is not closed because a mistake has been made.

16. From the analysis above I am satisfied that for any date for hearing of this case to be taken the defendants **MUST** file their pre-trial conference documents. The plaintiff had shown willingness to proceed with the case by complying with Order (a) of the ruling of 29th October 2020.

17. I therefore find merit in the application and the concerns raised and allow the application in terms of prayer 2. However, before a hearing date is taken I issue the following directions:

- i) The defendants to file and serve their pre-trial conference documents within 7 days.
- ii) Both parties to file and serve their agreed issues within 14 days.
- iii) Mention on 26/7/2021 before this court for directions on fixing the matter for hearing.
- iv) Costs in cause.

Delivered online, signed and dated this 7th day of July, 2021.

H. I. ONG’UDI

JUDGE