



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 5 OF 2016**

**AMIT AGGARWAL**

**(Suing as administrator of the Estate of**

**GURCHARAN DASS AGGARWAL.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**RULING**

1. The application dated **17/9/2019** and filed in court on **18/9/2019** has been brought by the defendant. It seeks the following orders:

**(1) That this court be pleased to grant the defendant/applicant leave to file defence and counterclaim as well as witness statements and documents in support of the defence and cross-claim out of time.**

**(2) That the draft statement of defence and counterclaim filed herewith be deemed as properly filed and served upon payment of the requisite fees.**

**(3) That the costs of this application be in the cause.**

2. The applicant has brought the application pursuant to **Order 7, Order 50 Rule 6, Order 51 of the Civil Procedure Rules 2010, Section 1A and 3A of the Civil Procedure Act, Article 50, 159 of the Constitution of Kenya.**

3. The grounds upon which the application is premised are that the defendant did not file its defence in time due to inadvertence; that the matter has now been set down for hearing on **24/9/2019** before the defendant could file its defence; that should the matter proceed to hearing without the defendant's pleadings being admitted, then the defendant will have been condemned unheard contrary to rules of natural justice; that it is in the interest of justice that the defendant is granted leave to file its defence and counterclaim as it will allow the court an opportunity to have all facts in place to allow for just determination of the matter; that the plaintiff will still have an opportunity to reply to the defence and the counterclaim; that the plaintiff does not stand to suffer any harm if the prayers sought herein are granted and that is only proper that the issues raised by the plaintiff are heard and determined on their merit so as to ascertain the rights of each party.

4. The application is supported by an affidavit of the defendant's counsel dated **17/9/2019**.

5. The plaintiff filed replying affidavit on **24/9/2019**. His response is that the application is intended to derail the conclusion of the case; that the defendant acknowledged the existence of this case as early as **29/12/2015** and should have filed defence within 14 days as per **Order 7 rule 1**; that the defendant has all along been represented by counsel and no explanation has been tendered as to why the defendant/applicant failed to file a defence during the course of four years and no convincing reason has been given for the delay yet the defendant appears to have had the materials necessary for their defence all along; that after being served with the hearing notice the defendant delayed for a further five months before filing the instant application and is guilty of laches and underserving of this court's discretion in its favour.

6. The application was disposed of by way of written submissions. The defendant filed its submissions on **14/10/2019**. The plaintiff filed his on **17/10/2019**. I have considered the application, the response and the submissions.

**Determination**

7. The main issue for determination in the instant application is whether this court should grant leave for the applicant to file defence, counterclaim and witness statements in this matter at this stage.

8. An examination of the record shows that this suit was filed way back on **14/12/2015**. It is correct that Gumbo and Associates Advocates who still act for the defendant filed a memorandum of appearance on **29/12/2015** and filed a replying affidavit on behalf of their client on **17/2/2016** in respect of the motion dated **14/12/2015**. That affidavit is a very detailed document and it annexes numerous documents as exhibits. It is quite surprising that even though all that material was in the respondent's possession they failed to file a defence. Further on **23/3/2016** the respondent filed extensive submissions annexing various authorities. On the **8/2/2016** a consent was filed by the parties settling the application dated **15/1/2016**. Other applications have been dealt with thereafter including the notice of motion dated **21/11/2016** to which the same firm of Gumbo and Associates filed another extensive replying affidavit on behalf of their client on **31/3/2017**.

9. In the light of the foregoing has the defendant shown sufficient cause as to why this court should exercise its discretion in its favour? In the defendant's submissions filed on **14/10/2019** the defendant invokes **Order 50 rule 5** that time may be enlarged even when the defendant failed to comply with **Order 7 rule 1**. Further, he cites the Court of Appeal case of Nicholas **Kiptoo arap Korir Salat -vs- Independent Electoral and Boundaries Commission & Others [2012] eKLR**. While invoking **Article 159 (2) (d)** of the Constitution the defendant exhorts this court to administer without undue regard to technicalities. Citing the Management Committee of **Makondo Primary School & Another -vs- Uganda National Examination Board HC Misc. Appl. No. 18 of 2010** as quoted in **Republic -vs- Commission on Administrative Justice Ex-parte Stephen Gathuita Mwangi [2017] eKLR**. The respondent submits that it is cardinal principle of law that a party shall not be condemned unheard. Further citing **Joshua Mulungu Mutie & another -vs- County government of Machakos [2018] eKLR**; the respondent submits that it has good defence which merits cannot be addressed at this stage but only after the defence has been filed. The exit from the firm Gumbo & Associate of Mr. Henry Kenei Advocate allegedly without proper handover was cited.

10. The applicant also submits that the court should find the delay in filing of the instant application was not inordinate given that Mr. Kenei's failure to hand over properly affords a proper explanation thereof. The applicant also cites the case of **Joseph Ouma Oditi -vs- Jane Kisaka Mung'ao [2018] eKLR** in which the decision in **Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another [2014] eKLR** was quoted.

11. In an attempt to turn the tables on the plaintiff whose affidavit has mounted serious resistance the applicant submits that this matter was last in court on **29/5/2017** and that therefore the plaintiff has not been zealous in prosecuting his claim against the defendant. While observing that this court did not strike out the suit *suo motu* for that reason the applicant prays that "*such discretion be equally extended to the defendant herein*". Citing **Wachira Karani -vs- Bildad Wachira [2016] eKLR** the applicant submits that the mistakes of counsel should not be visited upon a litigant. Finally, referring to the case of **Cecilia Karuru Ngaiyu -vs- Barclays Bank of Kenya & Another [2016] eKLR** the applicant submits that if the prayers in the application are granted, then the costs should also be granted and delayed pending the determination of the main cause.

12. I have also examined the submissions of the plaintiff filed on **17/10/2019**. Relying on **Charles Karanja Kiiru -vs- Charles Githinji Muigwa [2017] eKLR**, the plaintiff reiterates that the undisputed service of summons upon the defendant and the filing of documents in this case amounted to acknowledgment of its existence. He submits that all the material necessary was within possession of the defendant and no proper explanation has been given to warrant granting the orders sought. He faults the excuse of departure of Mr. Kenei stating that the said advocate left the firm of Gumbo & Associates in 2018 three years after the suit was filed. He also blames the defendant for waiting for the fixing of a hearing date only to file the instant application which in his view is meant to scuttle the hearing that was to take place on **24/9/2019**. Citing **Benjamin Kipkulei -vs- Shadrack Kamamia & 7 Others [2019] eKLR** the plaintiff submits that the indolence of the applicant disentitles it from the prayers sought. He maintains that though the application seeks that the defence and counterclaim be deemed as properly filed no draft defence or statement of defence or counterclaim is attached to the application. Citing **Nicholas Arap Korir Salat -vs- Independent Electoral and Boundary Commission & 7 Others [2014] eKLR**, it is submitted that the defendant's action of filing the defence and counterclaim without leave of court and then presenting an application to legitimize such unauthorized filing is an abuse of the court process and those documents should be expunged for being filed without leave.

13. I find it necessary to deal with the last issue raised by the plaintiff before delving into the merits of all the other issues because it may in my view, it will dispose of the entire application. I have gone through the passage relied on by the plaintiff in the case of **Nicholas Kiptoo Arap Korir (supra)**, the main concern is whether the draft defence and counterclaim and other documents in respect of which the applicant desires that leave be granted to file are exhibited in the instant application. The affidavit of **Linus Cheruiyot** sworn on **17/9/2019** does not exhibit any statement of defence and counterclaim. However at **paragraph 13** the deponent states as follows:

**"13. That I have subsequently sought instructions from my client and prepared a defence and counterclaim and proceeded to file it herein."**

14. Which defence is being referred to? The most effective way of proof of a fact by affidavit is the annexure thereto of the document referred to. Without such annexed copies any reader of an affidavit will be at a loss as to which document is mentioned by the deponent. If that is the case then which documents should the court consider in determining whether the proposed defence of the defendant has any merit? In my view the deponent's default sends this court to a needless search through the record for any filed documents. Nevertheless this court has noted on the **18/9/2019** some documents entitled statement of defence and counterclaim was lodged in this court record. If that is the defence of the defendant filed pursuant to the Civil Procedure Rules then it is hopelessly out of time and also filed without leave of court.

15. In my view a document filed without leave of court is irregularly in the record and should be expunged at the instance of a party or at the court's own motion. In this case it cannot be assumed that the bundle of documents filed on **18/9/2019** is the same one referred to in **paragraph 13** of the affidavit supporting the instant motion, that bundle in any event contains documents other than the defence and counterclaim. These are not mentioned in the affidavit supporting the motion.

16. Whatever other merits may exist in respect of the instant application I find that it is fatally defective for failure to exhibit the defence and counterclaim and witness statements and documents sought to be relied. For that reason the application dated **17/9/2019** is struck out with costs to the respondent.

It is so ordered.

**Dated, signed and delivered at Kitale on this 10<sup>th</sup> day of February, 2020.**

**MWANGI NJOROGI**

**JUDGE**

**10/2/2020**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiarie holding brief for Nasilou for defendant

N/A for plaintiff

**COURT**

Ruling read in open court.

**MWANGI NJOROGI**

**JUDGE**

**10/2/2020**