



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 379 OF 2007

DICK DANIEL OKALO.....1ST PLAINTIFF/APPLICANT

CAROLYNE ACHIENG ODHIAMBO.....2ND PLAINTIFF/APPLICANT

-VERSUS-

EAST AFRICAN MAGAZINE LIMITED....1ST DEFENDANT/RESPONDENT

JOHN OYWA.....2ND DEFENDANT/RESPONDENT

NATION MEDIA GROUP LIMITED.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiffs/applicants have brought the Notice of Motion dated 18th March, 2019 supported by the grounds established on the face thereof and the facts deponed to in the affidavit of the 1st applicant herein. The applicants are seeking for the following orders:

i. Spent.

ii. THAT the order made on 28th October, 2018 that this suit be prosecuted within 120 days be varied and/or set aside and this Honourable Court be pleased to enlarge time for prosecution of this suit unconditionally or on such terms as this Honourable Court may deem fit.

iii. Overtaken by events.

iv. THAT the costs of the application be in the cause.

2. In his affidavit, the 1st applicant deponed that on the 29th of October, 2018 this Honourable Court issued orders to the effect that the applicants do ensure prosecution of their suit within 120 days from that day, failure to which their suit would stand dismissed.

3. The 1st applicant explained that the applicants appointed a firm of advocates who then fixed the suit for hearing on 19th February, 2019 but that on the said date, the court stood down the 2nd applicant's evidence and directed the parties to file their respective witness statements and supplementary list of documents, if any. The 1st applicant added that the court fixed the matter for mention on 28th February, 2019.

4. It was also the 1st applicant's assertion that when the matter came up for mention as scheduled, the court was not sitting and hence parties were directed to take fresh dates from the registry.

5. Further to the above, the 1st applicant stated that the applicants' advocate managed to have the matter fixed for mention on 11th March, 2019 and on which date compliance with the directions made on 19th February, 2019 was confirmed and the suit fixed for hearing on 28th May, 2019. However, according to the 1st applicant, the 120 days for prosecution would have lapsed on 22nd March, 2019 and hence the need for enlargement of time.

6. The Motion is opposed by way of the replying affidavit sworn by *Ronald Wakhisi Makokha*, advocate for the respondents, on 14th May, 2019. Therein, he averred inter alia, that following the orders of this court that the applicants prosecute their suit within 120 days from 29th of October, 2018, the applicants ought to have first set down the matter for pre-trial directions but did not; instead, they obtained a hearing date.

That it is for this reason that the 2nd applicant was stood down on 19th February, 2019 by this court and the parties directed to comply with pre-trial directions.

7. The deponent confirmed that this court was not sitting on 28th February, 2019 and that the matter was scheduled for mention on 11th March, 2019; adding that on the said date, this court noted that the 120 days ordered for the prosecution of the suit had since lapsed, thus the same was never set down for hearing on 28th May, 2019 as stated in the 1st applicant's affidavit.

8. The deponent went ahead to state that the applicants were previously given ample time to prosecute their suit but they did not utilize it and without sufficient reason, carefully adding that the respondents stand to be prejudiced should the application be allowed.

9. In reply thereto, the 1st applicant put in a further affidavit sworn on 18th June, 2019 stating that the suit commenced before the coming into force of the Civil Procedure Rules, 2010 and that as soon as the parties were directed to file their relevant pre-trial documents, the applicants complied. The 1st applicant further maintained that the suit was later fixed for hearing on 28th May, 2019 and that upon realization that the scheduled hearing date fell outside of the 120 days, the applicants' advocate made an oral application for enlargement of time but was directed to file a formal application.

10. The 1st applicant through his affidavit equally maintained that the present application was filed well before the expiry of the 120 days, the same having been set to expire on 22nd March, 2019.

11. The Motion was disposed of by way of oral arguments which were made before this court on 15th July, 2019. *Mr. Ngugi* advocate for the applicants reiterated the contents of the respective affidavits filed on behalf of the applicants, save to argue that the 120 days ordered by this court excluded the dates between 21st December, 2018 and 31st January, 2019 in computation of time.

12. The advocate further contended that the reason his clients could not prosecute their suit within the set timelines was due to circumstances beyond their control and that any delay arising therefrom is excusable and not inordinate. He was also careful to submit that since this court's directions given on 29th October, 2018 the suit has been active and that the respondents do not stand to suffer any prejudice in the event that time is extended, given that they do not intend to call any witnesses.

13. The counsel urged this court to consider the interest of justice that will be served in allowing the suit to be prosecuted as opposed to dismissing it, citing the various authorities constituting the applicants' filed list of authorities.

14. In his opposing arguments, *Mr. Wakhisi* counsel for the respondents while equally relying on the facts deposed to in his replying affidavit, maintained that the applicants are not deserving of the orders sought owing to their non-compliance with the court order giving strict timelines for the prosecution of the suit. The advocate went ahead to submit that where a party is experiencing difficulties in complying with an order of the court, then he or she ought to inform the court of the same.

15. *Mr. Wakhisi* further contended that the applicants have not met the requirements for extension of time neither have they given sufficient reason as to why they should be granted such extension. He argued that compliance with pre-trial directions applies to all civil cases, even those filed prior to the coming into force of the Civil Procedure Act and Rules 2010.

16. The counsel went further to submit that this is an old matter in which his clients stand to be condemned to pay costs to the applicants in a case which has dragged on for over 10 years, urging this court to consider the authorities being relied upon.

17. In his rejoinder, *Mr. Ngugi* argued simply that the applicants have explained the efforts taken towards prosecuting their suit within the set timelines.

18. I have considered the grounds presented in the Motion as well as the facts stated in the affidavits both in support of and in opposition thereto. I have similarly taken into account the rival oral arguments and authorities relied upon.

19. This is by and large an application seeking the enlargement/extension of time. That being the case, I turn to **Order 50, Rule 5** of the **Civil Procedure Rules** through which provision this court is granted the power to enlarge the time for doing any act pursuant as follows:

“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.”

20. From the foregoing, it can be said that a court of law may entertain an application seeking enlargement of time even where such application has been brought after expiration of the time

21. In the present instance, I am able to confirm from the record that on 29th October, 2018 the respondents' application seeking to have the applicants' suit dismissed was scheduled to come up for hearing but that the same was withdrawn by the respondents' counsel. Consequently, this court ordered the applicants to prosecute the suit within 120 days failing which the same would stand dismissed.

22. Thereafter, according to the court file, the applicants appointed the current firm of advocates to represent them and a Notice of Appointment was filed on 27th November, 2018. Going by the court file, it would appear the said advocates wrote to the Deputy Registrar, requesting for an early hearing date in view of the court order of 29th October, 2018. Subsequently, the suit was set down for hearing on 19th

February, 2019.

23. The record confirms that when the parties appeared before this court on 19th February, 2019, it was noted that neither of the parties had filed their witness statements. As a result, this court ordered that they comply accordingly, and directed that the case be mentioned on 28th February, 2019. On the said date, it would appear the court was not sitting and the parties were issued with a fresh date, being the 11th of March, 2019.

24. Going by the record, when the parties attended court on the said 11th March, 2019 the applicants confirmed having complied with pre-trial directions whereas the respondents indicated that they would not be calling any witnesses and hence did not need to file any statements. This court, having noted the above, directed that the matter be heard on 28th May, 2019. Soon thereafter, the applicants brought the application now before this court.

25. That being the case, I am now called upon to consider whether the explanation and reasons given by the applicants are sufficient to warrant a granting of the order for extension being sought.

26. I wish to first state that extension of time is in no way a right owed to any party; rather, it is applied by the court as a matter of discretion and on a case-to-case basis. Such was the position taken in the Supreme Court case of *County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR* cited by the respondents where the issue for determination was whether to extend time for filing a petition of appeal. I have similarly considered the Court of Appeal case of *Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 others [2018] eKLR* cited by the applicants where extension of time was sought for filing a record of appeal.

27. In the former case, the court with reference to *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* also considered the reasons for the delay as well as the prejudice that would be suffered by the respondents in that case if an extension is granted.

28. In addressing the reasons given in the present case, I take the following view. It is not disputed that it will always remain the duty of a plaintiff to take steps to prosecute his or her case; the buck stops with the plaintiff. On the one hand, I am appreciative of the respondents' arguments that once court orders are made, they ought to be complied with to the letter. On the other hand, going by the sequence of events set out hereinabove, I am convinced that the applicants took reasonable steps towards prosecuting their case following the order of 29th October, 2018 even though for one reason or another, they had earlier on not complied with pre-trial directions and this proved to be a setback in the progress in their case.

29. Further to the above, the applicants indicated that they had filed their current application before the lapse of the 120 days. They made reference to *Order 50, Rule 4* of the *Civil Procedure Rules* which I will cite hereunder:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act...”

30. Going by the above, it is apparent that the application was indeed filed prior to the lapse of the 120 days which goes to show that the applicants did approach this court with a view to extending the time for prosecuting their case. Even if such time had lapsed, *Order 50, Rule 5 (supra)* would still grant this court the discretionary power to enlarge the time. Be that as it may, I am satisfied that the applicants have given a reasonable explanation for their inability to prosecute their case within the 120 days and have shown that they took certain active steps in attempting to do so.

31. On the subject of prejudice, I have taken into account the respondents' submission that they stand to be prejudiced if the order for extension is granted as sought, explaining that they will be condemned to pay costs and yet the suit has delayed. To my mind, I would agree with the respondents that this is quite an old case and it is unfortunate that it is yet to proceed for hearing.

32. It is noteworthy that the claim is of a defamatory nature and if anything, it is the applicants who would be at a disadvantage if the same is dismissed given that they are the ones responsible for bringing the same before court. In the circumstances, I am thus not convinced that the respondents have shown the prejudice which will be occasioned if the application is allowed.

33. The upshot is that the Motion is hereby allowed and the applicants are granted a last opportunity to prosecute their suit within 60 days from today, failing which the same shall stand dismissed. The applicant is condemned to pay costs of Ksh.10,000 to the respondent. The same to be paid within 14 days from today.

Dated, Signed and Delivered at Nairobi this 3rd day of October, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs/Applicants

..... for the Defendants/Respondents