



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISC.CIVIL APPLICATION NO. 264 OF 2015

IN THE MATTER OF THE COMPANIES ACT (CAP. 486) LAWS OF KENYA

AND

IN THE MATTER OF RECTIFICATION OF THE COMPANY

REGISTER OF CATHAM PROPERTIES LIMITED

BETWEEN

GUO DONG.....APPLICANT

VERSUS

MULTI WIN TRADING (E.A) COMPANY LTD.....1ST RESPONDENT

HAI CHEN.....2ND RESPONDENT

CHENG-DU UNITRUST WITH MUTLIWIN

INVESTMENT & MANAGEMENT CO. LIMITED....3RD RESPONDENT

PENG ZANG.....4TH RESPONDENT

ONGALO TOBIAS MUGA T/A

ONGALO & COMPANU ADVOCATES.....5TH RESPONDENT

CHRISTINE ANYANGO MUGA.....6TH RESPONDENT

CATHAM PROPERTIES LIMITED.....7TH RESPONDENT

RULING

1. The Application before Court is the Notice of Motion of 11th July 2016 in which Guo Dong (the Applicant) seeks the following Orders:-

1. THAT this Honorable Court be pleased to enlarge the time within which to file a reply to Defence and Defence to Counterclaim herein.
2. THAT consequently, the said Statement or Reply to Defence and Defence to the Counterclaim filed herein be deemed to have been properly filed.
3. THAT the Honourable Court be pleased to grant any further orders that may be just and fair in the circumstances.

2. The Defence and Counterclaim which the Applicant seeks leave to respond to were filed on 9th March, 2016. Those pleadings would themselves have been filed in reaction to the Directions made by Kariuki J. on 17th February 2016 on the Disposal of this matter as follows:-

1. **The matter will be heard via viva voce evidence.**
2. **The originating notice of motions in both cases shall be heard together as complaints with same and affidavits being treated as pleadings.**
3. **The parties at liberty to add more documents within 14 days and serve and call any relevant witnesses to support their case.**
4. **The Registrar of the companies to be served to participate in the proceedings.**
5. **Costs in the cause.**

3. As the Plaintiff had failed to file a Defence to the Counterclaim, the Defendants moved Court for a mention on 2nd June, 2016 for purposes of taking a date for Formal Proof. The Court Record of 2nd June, 2016 shows that on that day Counsel for the Plaintiff did not attend Court and Counsel for the Defendants took a date of 7th July 2016.

4. The Government of Kenya declared 7th July 2016 a Public Holiday to mark Iddulfitri and obviously the hearing would not proceed. Formal Proof was rescheduled to 12th July 2016 at 2.30pm but that did not happen as there was an interruption by the current Application.

6. The Affidavits sworn on 11th July 2016 and 17th August 2016 by Counsel James Ochieng Oduol offers an explanation as to the delay in filing the Reply to Defence and Defence to Counterclaim. He depones that the Defence and Counterclaim were served on his firm on 9th March 2016 but owing to an inadvertent error on the part of his offices registry, it was brought to the attention of Counsel handling the matter long after the period which a Reply was required to be filed had lapsed. He further depones that he took personal conduct of the mater and filed the current Application as soon as the lapse was brought to his attention.

6. Counsel takes full responsibility for the lapse in his office.

7. The Application was opposed and a Replying Affidavit of Li Wenjie sworn on 17th July 2016 filed in response. He is the Assistant General Manager of Catham Properties Ltd(the 7th Defendant). He alleges that the Motion before Court fits into a pattern used by the Plaintiff to frustrate the commercial activities of the 7th Defendant.

8. He points out that todate the Plaintiff has not complied with the Court orders of 12th February 2016 and makes no effort to offer any explanation for non-compliance. He further depones that the Plaintiff has not applied for extension of time within which to comply with the said orders.

9. Mr. Li Wenjie points out that Counsel Ochieng Oduol does not indicate when the error occurred in his

office and when he discovered it. He further asserts that Counsel for the Plaintiff ought to have been aware of the lapse as early as 6th June 2016 when a Notice for the Formal Proof was served upon his firm and would therefore be guilty of inaction for a month.

10. Mr. Li Wenjie also depones that in his intended Pleadings the Plaintiff has admitted his use of State Institutions to put pressure to bear on the officers of the 7th Defendant and that the Plaintiff has a habit of making serious allegations of impropriety against State Agencies Director of the 7th Defendant and its Advocates.

11. The Defendants proposition is that if this Court were inclined to enlarge time then it should do so on condition that the Plaintiff deposits in Court, within 7 days USD 31,000, releases Motor Vehicle Registration KBY 889X to the 1st Defendant and that trial takes place within 21 days.

12. While the Plaintiff attributes the lateness in filing the reply to Defence and Defence to Counterclaim to an excusable inadvertence or mistake on the part of his Counsels office, the Defendants think that this is part of a stratagem of the Plaintiff of ensuring that the suit does not proceed to its detriment. The Defendants ask this Court to look at the Application with disfavor because of the Plaintiffs conduct prior to the bringing of the action and during the proceedings (**Shah Vs. Mbogo** 1968 EA 93).

13. As a starting point this Court has to examine whether the Motion was filed timeously. It is true as pointed out by the Defendants that the Plaintiffs Counsel does not state when the lapse occurred in his office or in the very least when he became aware of the lapse. This Court would also accept the argument that the Plaintiff's Counsel ought to have been aware of the failure to file the intended pleadings as early as 6th June 2016 when it was served with a Notice for Formal Proof. Counsel would therefore be guilty of inaction for one month.

14. The onus was on the Plaintiff's Counsel to demonstrate that it acted diligently and quickly upon discovering that it had not responded to the Pleadings served on them on 9th March 2016. By failing to state with some, exactitude, when the lapse was learnt, Counsel did not avail to the Court important information upon which it would determine whether Counsel acted with necessary promptness. That said, it can be inferred that the lapse came to the attention of Counsel sometime between 9th March 2016 when the Pleadings were served and 11th July 2016 when the Motion was presented. There is a difference of four months. Even in the circumstances of the case this is a relatively short span of time and this Court is unable to say that there was undue delay in presenting the Application.

15. Let me turn to the antecedents upto 12th February 2016 when the Court gave Directions as to the hearing. The record shows that the Plaintiff's action was confronted by a Preliminary Objection by Defendants which the Court dealt with in a Ruling of 2nd December 2015. Nothing suggests that, upto that time, the Plaintiff had obstructed the progress of the matter.

16. After the Ruling, Counsel for the parties, on 2nd February 2016, addressed Court on Directions to be made for disposal hereof and those Directions were made on 17th February 2016. Again upto there, the matter was making some steady progress towards hearing.

17. Is the Plaintiff guilty of employing obstructive tactics after the giving of Directions? To answer that question one needs to set out and understand the nature of Directions given by Court. They are:-

1. The matter will be heard via viva voce evidence.

2. The originating notice of motions in both cases shall be heard together as complaints with same and affidavits being treated as pleadings.

3. The parties at liberty to add more documents within 14 days and serve and call any relevant witnesses to support their case.

4. The Registrar of the companies to be served to participate in the proceedings.

5. Costs in the cause.

18. The Defendants assail the Plaintiff for failing to comply with the above Directions, failing to explain why the Plaintiff has not complied and lastly failing to seek extension of time to comply.

19. Other than setting the matter down for hearing, Directions (1) and (2) may not have required the Plaintiffs to take any positive steps. In respect to Direction (3) this Court has not been told that, prior to the filing of the Counterclaim, the Plaintiffs needed to file more documents. Non-compliance of this Direction is not apparent to me.

20. As to service of the Registrar of Companies, the position of the Plaintiff is that the obligation was on either of the parties. The argument being that if the Plaintiff has failed to comply then so have the Defendants. The Direction is silent as to who should serve the Registrar and the time frame for service. Yet it seems to the Court that prior to the filing of the Counterclaim, the Party to serve the Registrar would be the Plaintiff as it was seeking Rectification of the Register to the 1st and 7th Defendants. But, I must wonder whether after the presentation of Counterclaim, the Defendants too are not interested in the participation of the Registrar. See the following Prayers in the Counterclaim:-

i. A declaration that at the time the Plaintiff subscribes for 850 shares allotted in the 7th Defendant, he did so as a nominee or trustee obliged to transfer them to the beneficial owner upon termination of the trust.

ii. A declaration that in September, 2014, the Plaintiff lawfully transferred to the beneficial owner, the 1st Defendant herein, the 850 shares formerly registered in his name.

iii. A declaration that the duly executed transfer of shares by the Plaintiff lodged with the Registrar of Companies reflects the common intention of the Plaintiff and the 1st Defendant that the shares which the Plaintiff held upon trust for the 1st Defendant be transferred to it.

iv. In alternative to iii. Above an order that the Plaintiff executes new transfers of shares in fulfillment of the terms of the declaration of the trust deed which the Plaintiff signed on 28th February, 2014.

v. An Order that the Plaintiff refunds US \$310,000 to the 1st Defendant.

vi. An Order that the Plaintiff hands over forthwith to the 1st Defendant its motor vehicle, Registration No. KBY 888X.

vii. General Damages for user of KBY 888X from 26th January 2015 to the time of delivery.

viii. Costs of this suit.

ix. Interest on US \$ 310,000 and costs of the suit from 11th June, 2015 until payment in full.

21. But if it is to be accepted that it was the Plaintiff to serve the Registrar then the Court cannot find substantial non-compliance as the main suit has not been set down for hearing.

22. In my estimation the Defendant has not established that the Plaintiff flagrantly disregarded the Directions of 17th February 2016 or at all or in a manner that it would disentitle it to a favourable exercise of my discretion.

23. In doing so, the Court observes that the Defence and Counterclaim themselves may have been served

outside the time of the Courts' order. If pleadings are taken to be included as part of the Documents that needed to be filed and served within 14 days then the Defence and Counterclaim were served 7 days late. A true testimony that, in their fallibility, Human Beings will from time to time fail to keep timelines and make mistakes!

24. In exercise of its discretion, this Court will excuse the lapse by the Plaintiff's Counsel as the Court record proceedings do not show that the Plaintiff is guilty of a deliberate or systemic plot to delay or obstruct the progress of this matter.

25. This Court has also looked at both the Counterclaim and the intended Reply and Defence to Counterclaim. Many of the issues raised in these Pleadings are intertwined or related with the main action and it would be fair that each of the parties herein are given a fair opportunity to plead its/his action in full and to ventilate their case on merit.

26. Parties will be quick to notice the Court has made its Decision without giving regard to allegations and Counter allegations in respect to the conduct of the parties herein outside the Court. These allegations and counter allegations are unhelpful for now because they are untested and remain mere allegations and counter allegations.

27. The Application of 11th July 2016 is allowed but with costs to the Defendant. The statement of Reply to Defence and Defence to the Counterclaim shall be deemed as properly filed and served upon payment of the requisite Court Fees which shall be made within 7 days hereof.

Dated, Signed and Delivered in Court at Nairobi this 17th day of February,2017.

F. TUIYOTT

JUDGE

PRESENT;

Kamau Kuria for Plaintiff

Ocheing for Defendant/Applicant

Alex - Court Clerk