



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL CASE NO 3 OF 2016

GAMADID TRADING CO LTD.....PLAINTIFF

VERSUS

GARISSA COUNTY GOVERNMENT.....1ST DEFENDANT

NATHIF JAMA ADAN.....2ND DEFENDANT

ABDULLAHI HUSSEIN.....3RD DEFENDANT

THE CONTROLLER O F BUDGET..... 4TH DEFENDANT

RULING

On 15th November, 2016 I fixed a ruling date for an application by the plaintiff dated 28th October 2016 which asked for several injunctive orders regarding an alleged amount of Kshs.22,804,840 said to be a debt accrued and payable to the plaintiff. That ruling date which was 14th December, 2016 was fixed in the absence of counsel for the defendants.

On the 9th of Dec 2016, before the ruling was delivered, counsel for the defendants filed the Notice of Motion which is for decision today, seeking several exparte and interparties orders which are as follows:-

1. That this honourable court be pleased to certify the application as urgent and do dispense with service of the same upon the plaintiff/respondents and proceed to hear the application exparte in the first instance.
2. That pending interparties hearing of this application, this honourable court be pleased to stay the delivery of ruling slated for Tuesday 13th December, 2016.
3. That pending interparty hearing of this application, this honourable court be pleased to stay the exparte proceedings of 15th November 2016.
4. That pending interparty hearing of this application, this honourable court be pleased to grant unconditionally leave to the applicants to file response to the instant suit.
5. That pending interparties hearing of this application, this honourable court be pleased to grant unconditionally leave with applicants to file response to the instant suit
6. That pending interparties herein of this application, this honourable court be pleased to grant

leave and the extension of time for the applicants to file his response to the Notice of Motion application dated 28th October, 2016.

7. That in the final determination of this application, this honourable court be pleased to stay the delivery of ruling slated for 13th December 2016.

8. In the final determination of this application, this honourable court be pleased to stay the exparte proceedings of 15th November 2016.

9. That in the final determination of this application, this honourable court be pleased to grant unconditionally leave to the applicants herein to file its response to the instant suit.

10. That in the final determination of this application, this honourable court be pleased to grant unconditionally leave for the applicants herein to file its response to the instant suit.

11. That this honourable court be pleased to grant leave and allow the applicant herein file its response to the instant suit.

12. That the costs of this application be provided for.

The application has grounds on the Notice of Motion. It was filed with an affidavit sworn by Mohamud H. Mursal described as the County Secretary of Garissa County on 8th December, 2016.

This application was brought to the attention of the court on 14th December 2016 before the court delivered the ruling. I certified the same as urgent and adjourned the intended delivery of the ruling and fixed the application for interparties hearing.

On response to the application, on 21st April 2017, the plaintiff filed an affidavit in reply sworn by Aden Haji Gamadid in opposition to the application. The plaintiff's counsel filed written submissions on 21st April, 2017 while the applicant/defendants counsel filed written submissions on 21st June 2017. I have considered both submissions.

This is basically, in my view, an application requesting that a litigant or a party be allowed to participate in proceedings where he has failed to come to court in time, but has come before a decision is made in the matter.

In bringing the application, the defendants have relied on Order 51 Rule 1 of the Civil Procedure Rules relating applications brought through Motion, as well as Order 8 Rule 1 of the Civil Procedure Rules on amendment of pleadings. They also rely on Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap21). All these sections relate to the powers of the court to ensure that substantive justice is done but do not relate directly to stoppage of delivery of judgment or ruling in order to allow a party to defend himself/herself.

Many arguments have been put in the submissions by party's counsel. However, in my view this is a procedural issue as the defendants are merely asking for an opportunity to be allowed to participate in the proceedings as they claim that their advocate was instructed late. The pending ruling was also not delivered on 14th December 2016 because of this intervening application.

I find that this court having not delivered the ruling in the application of 28th October 2016 and having perused the substance of all the pleadings herein filed, I will be doing injustice if it does not allow the defendants to participate in the proceedings. This position in my view is supported by the provisions of Article 50 of the Constitution of Kenya 2010. Shutting out a litigant from defending themselves when the matter has not been determined, would only give rise to an appeal which will be more costly and time consuming for the parties and the courts. I will thus allow the application.

I note that several ex parte orders were sought in the application. These were prayers 1- 6. They have been spent. Prayer 7, 8 and 9 are granted. However responses will be filed within 7 days from today. With regard to prayer 10 the defendants are also granted leave to file their response to the suit within 7 days from today. Prayer 11 is granted subject to the conditions of prayer 9 and 10.

The plaintiff has obviously suffered inconvenience by the delay caused by this application. Though the defendants have been successful in the application, in the interest of justice, I will award attendance costs to the advocates for the plaintiffs for all attendances in court on the application dated 28th October 2016 and the present application, including the attendance today.

In conclusion, I allow the defendant's application dated 8th December, 2016 and grant prayers 7, 8, 9, 10, and 11 as stated above. I however grant attendance costs to the plaintiff's counsel for all the attendances on the Notice of Motion dated 28th October, 2016 and the present application up to and including the attendance of today's ruling date, I will now proceed to give directions to progress this long standing matter.

Dated and delivered at Garissa on 19th day of July, 2017

George Dulu

Judge