



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 143 OF 2012**

**ELBI HOMES LIMITED.....PLAINTIFF**

**VERSUS**

**LENZI LAURA**

**ROBERTO LENZI**

**CRYSTAL BAY WATAMU LIMITED.....DEFENDANTS**

**RULING**

1. By this Notice of Motion application dated 5<sup>th</sup> February 2019, the 2<sup>nd</sup> Defendant prays for an order that leave be granted to them to file an additional list and bundle of documents.

2. The application which is supported by an Affidavit sworn by the Defendant's Advocates on record Martin D. Tebino is based on the grounds inter alia:

***i. That the Defendants have recently come into possession of critical documents that were not in their possession when the Statements of Defence were initially filed;***

***ii. That the said documents include survey maps indicating the exact location of both the Plaintiff's property in FR No. 194/151 and the Defendants properties in FR No. 133/146 respectively;***

***iii. That the additional documents also include management contracts between the Defendants and Pierre Loporte Ltd who are the registered proprietors of Plots 409, 411 and 413 and their individual titles;***

***iv. That the said documents will assist this Court to appreciate the intricate issues herein and especially the Defendants arguments; and***

***v. That no prejudice will be occasioned to the Plaintiff as it is yet to close its case but the Defendants stand to be greatly prejudiced unless the application is allowed.***

3. The application is opposed. By Grounds of Opposition filed dated 1<sup>st</sup> April 2019 and a Replying Affidavit sworn on their behalf by their Advocate on record Kiarie Kariuki and filed herein on 4<sup>th</sup> July 2019, the Plaintiff asserts that it is quite clear from the documents annexed to the Defendants' Affidavit that the documents they intend to produce have been in existence long before this case was filed in 2012. The Plaintiff therefore asserts that the allegation that the Defendant have only recently come into possession of the documents is false.

4. The Plaintiff further asserts that its director has already given evidence and they stand to be prejudiced by the introduction of new documents which he had not had the benefit of looking at by the time his evidence was taken.

5. The Plaintiff, therefore asserts that the 2<sup>nd</sup> Defendants' application is devoid of merit and that the same ought to be dismissed with costs.

6. The 2<sup>nd</sup> Defendant herein has urged this Court to grant them leave to file an additional list of bundle of documents. A Court's discretion for purposes of extension of time is wide and unfettered. Like any other judicial discretion however, it must be exercised judiciously and upon reason rather than arbitrarily, capriciously or upon mere whim or sentiment.

7. The underlying principles that a Court should consider in the exercise of such discretion were delineated by the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat –vs- Independent Electoral & Boundaries Commission & 7 others (2014) eKLR* as follows:

- 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 extensions is granted;**
- 6. Whether application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

8. The matter before me was instituted by the Plaintiff on 30<sup>th</sup> August 2012. The 1<sup>st</sup> Defendant filed a Statement of Defence on 10<sup>th</sup> September 2012 while the 2<sup>nd</sup> Defendant filed his own on 3<sup>rd</sup> October 2012. Following an amendment of the Plaintiff on 27<sup>th</sup> October 2017 to include the 3<sup>rd</sup> Defendant in these proceedings, the 2<sup>nd</sup> Defendant filed an Amended Statement of Defence on 6<sup>th</sup> December 2017.

9. In terms of furnishing evidence to be relied upon by parties at the trial, Order 7 Rule 5 of the Civil Procedure Rules provides as follows:

**“The defence and Counterclaim filed under rule 1 and 2 shall be accompanied by: -**

- a. An affidavit under Order 4 Rule 1(2) where there is a Counterclaim;**
- b. A List of Witnesses to be called at the trial;**
- c. Written Statement signed by the witnesses except expert witness; and**
- d. Copies of documents to be relied on at the trial.**

**Provided that the statement under sub-rule (c) may with leave of the Court be furnished at least fifteen days prior to the trial conference under order 11.”**

10. Accordingly, in order to ensure a quick and expeditious trial, discovery, along interrogatories and inspection of documents is meant to be done at the pre-trial stage. It is not disputed that this matter went for pre-trial and that parties filed the documents they intended to rely upon and that the suit was thereafter fixed for hearing.

11. After the trial commenced and one of the Plaintiff’s witnesses had testified, the 2<sup>nd</sup> Defendant proceeded to file the present application before me stating that they had recently come into possession of critical documents and that they should be granted leave to file and rely upon the same.

12. As was stated by the Supreme Court in the *Nicholas Kiptoo Korir Arap Salat Case (Supra)*:

**“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court.”**

13. I have looked at the affidavit of Martin D. Tebino Advocate in support of the application. The Defendant does not even make an attempt to explain from where or when they got the documents and hence why the same could not be filed within the time stipulated in law. I could not in the circumstances even consider the reason for the delay as it would appear to me that the Applicant treated the extension of time as a right.

14. Given that the Plaintiff’s director had already testified herein without being given an opportunity to consider and respond to the documents, I am persuaded that the Plaintiff stands to suffer prejudice if any additional documents were to be introduced at this late stage.

15. In the premises, I did not find any merit in the Motion dated 5<sup>th</sup> February 2019. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**