



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 865 OF 2016

SURJIT SINGH HUNJAN.....PLAINTIFF

- VERSUS -

NAHEED A KHAN.....DEFENDANT

RULING

1. On 16/12/2019, parties to this suit recorded a consent pursuant to which the plaintiff was granted leave to file and serve a defence to counter-claim before 31/1/2020. It does emerge that the plaintiff did not file the defence to counterclaim within the prescribed time. Subsequently, the plaintiff filed a notice of motion dated 3/2/2020 seeking leave of the court to file defence to counter-claim out of time. That application is the subject of this ruling.

2. The application was supported by an affidavit sworn on 3/2/2020 by Michelle Moraa Sagini, counsel for the plaintiff. She deposed that upon recording the consent on 16/12/2019, their Court Clerk omitted to diarize the matter. Consequently, they never remembered to comply with the timelines set out in the consent. She exhibited a copy of the defence to counter-claim and urged the court to allow the application.

3. The defendant opposed the application through an affidavit sworn on 29/5/2020. He gave a chronology of the history of these proceedings and deposed that the plaintiff had in the past been given timelines within which to file his reply to defence and defence to counter-claim but had failed to comply. He added that the plaintiff had failed to file his defence to counter-claim for a period of over 4 years. He contended that the plaintiff's conduct was deliberate, frustrating and geared to delay justice.

4. The application was canvassed through written submissions which I have duly considered.

5. The single question falling for determination in this application is whether the plaintiff has satisfied the criteria upon which our courts exercised jurisdiction to extend the time within which to file pleadings.

6. The court's power to enlarge the time within which to file pleadings is a discretionary one and is derived from Section 95 of the Civil Procedure Act which provides as follows:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

7. Similarly, Order 50 rule 6 of the Civil Procedure Rules grants this court discretionary jurisdiction to enlarge time in the following terms:

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:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

8. In exercising this discretionary jurisdiction, the court considers various factors, among them: (i) whether there has been indolence or unexplained delay on part of the applicant; (ii) whether the applicant is guilty of abuse of the court process; (iii) whether enlargement will prejudice the defendant; (iv) whether denial of enlargement will occasion prejudice to the applicant in the circumstances of the case; (v) whether the enlargement is necessary for the effectual and complete adjudication of the dispute; and (vi) whether it is just and fair to enlarge time in the circumstances of the case.

9. In the present application, time for filing and service of defence to counter-claim was fixed by consent of the parties on 16/12/2019. The time lapsed on 31/1/2020 without compliance by the plaintiff. The plaintiff subsequently brought the present application on 4/2/2020. This was a period of three days from the date of expiry of the prescribed time.

10. While opposing the application, counsel for the defendant contended that on 4/11/2016, Gitumbi J granted the plaintiff 14 days within which to file response to defence and defence to counterclaim but the plaintiff failed to do so. From the record, that is not true. The correct position is that on 4/11/2016 Gitumbi J granted the plaintiff leave to file and serve a further affidavit and written submissions.

11. The dispute in this suit relates to ownership of Apartment No 7 erected on Land Reference Number 209/30390, situated in Kileleshwa, Nairobi. It would be in the best interest of justice to conclusively adjudicate the dispute and determine it on merits.

12. Taking the above criteria and circumstances into account, I think there is a proper basis for exercise of discretion to enlarge the time within which the plaintiff shall file his further pleadings. The defendant will be indemnified through a modest award of costs of the application.

13. Consequently, the plaintiff's notice of motion dated 3/2/2020 is disposed in the following terms:

a. The plaintiff is hereby granted an extension of 15 days within which to file reply to defence and defence to counter-claim

b. The plaintiff shall pay the defendant throwaway costs of Kshs 10,000 (Ten Thousand) within 30 days from today.

c. In default of (b) above, the extension order herein shall stand vacated and any consequential pleadings filed by the plaintiff shall stand struck out.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Court Clerk - June Nafula

Note

This Ruling was supposed to be delivered on 22/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE