



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 300 OF 2006
ROSE WARUINU MUTHEMBA.....PLAINTIFF/APPLICANT
VERSUS
JANE NJERI MUTHEMBA.....1ST DEFENDANT/RESPONDENT
DAVID MUNGAI MUTHEMBA.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The application before the court is a Notice of Motion dated and filed in court on 17th June 2014. The application seeks the following orders:-

- 1. That the time within which to file grounds of opposition and replying affidavit on behalf of the 2nd Defendant be enlarged.***
- 2. That this Honourable Court be pleased to grant leave to the 2nd Defendant/Applicant to file the Replying Affidavit and annexures out of time.***
- 3. That the Grounds of Opposition filed on 3rd June 2014 and replying affidavit filed on 9th June 2014 be deemed as properly on record.***
- 4. That the costs of this application be in the cause.***

2. The application is premised on the grounds set out therein and is supported by affidavit of **David Mungai Muthamba** dated **17th June 2014**.

3. The background to the application is that the Plaintiff/Respondent filed her application for amendment of the Plaint on 11th April 2014 and served the same upon the 2nd Defendant/Applicant on 16th April 2014. The Respondents were by law required to file and serve their response within three clear days of hearing. But due to what is alleged to be lack of instructions, there was a delay and the 2nd Defendant/Respondent filed their response out of time and without seeking the leave of the court. When the Plaintiff's application came for hearing on 10th June 2014 Mr. Nagpal for the Plaintiff/Applicant objected to the application being opposed, as the response was filed out of time, and relying on order 51 Rule 14 and Order 50 Rule 2 Mr. Nagpal asked the court to reject the documents filed out of time.

4. Mrs. Wambugu for the 2nd Defendant/Respondent admitted that she filed the document late in time

but gave reasons for the same. I was asked to rule on the matter and I directed the M/s Wambugu to file the current application for consideration.

5. The application is opposed by affidavit of Rose Waruinu Muthamba (the Plaintiff) dated 14th July 2014.

6. With the leave of the court parties filed written submissions to the application. The Applicant filed his submissions on 7th August 2011 and reply submissions on 4th September 2014 while the Respondent did the same on 29th August 2014.

7. I have carefully considered both the application and the opposing submissions. I do not intend to write a long Ruling. This court has the power to extend time in appropriate circumstances under the provisions of Order 50 Rule 6 of the Civil Procedure Rules 2010. This court also has the inherent jurisdiction to extend time in appropriate circumstances in the interest of justice.

8. This brings me to three seemingly important factors which I must consider in the exercise of my discretion. The first one is that the Applicant has admitted they filed the documents out of time, and have given good reasons for the same which this court can positively consider. However of more importance is the fact that the amendment sought in the Respondent's application dated 11th April 2014 are massive. If granted it amounts to a completely new suit. As I stated in my Ruling dated 10 June 2014, the said amendments are far reaching that the wider interest of justice would dictate where there is the intention to oppose the same the party opposing should not be mainly barred by technicalities. The amendment seeks to introduce 36 new paragraphs to the Plaint. There are proposed 21 paragraphs to be cancelled. There are proposed new 13 prayers to the Plaint. There are proposed 4 prayers to be cancelled. The proposed amendment increased the value of the suit property by over Kshs.27,000,000/-. It is an amendment which a court should allow any intending party to oppose without relying on due technicalities.

9. The second reason for allowing the application for leave to oppose the said amendment is that (and I could be wrong in this assumption) the parties appear to me to be blood relatives, and part of the suit property could be a disputed family property. Family emotions can run deep. In order to calm those emotions, it is important that a court appears to be sensitive to them, and that matters concerning disputant family relatives are as far as possible determined on their merits rather than on technicalities.

10. Arising from the foregoing, the orders that best commend themselves to me are as follows:-

a. The 2nd Defendant's Notice of Motion dated 17th June 2014 is allowed with costs to the Plaintiff/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Othieno for Plaintiff/Applicant

Mohamed Holding brief for Wambugu for Defendant/Respondent

Atelo – Court Clerk