



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 107 of 2004

MICHAEL MUTOTE MUTHUKUI.....PLAINTIFF/APPLICANT

VERSUS

RAPHEL MULI MATIVO.....DEFENDANT/RESPONDENT

RULING

The application dated 13th July, 2012 by the Plaintiff seeks extension of orders dated 30th April, 2012 giving the applicant 14 days within which to set the suit for hearing, stay of taxation of the Defendant's/Respondent's bill pending determination of the application.

The application is premised on grounds that the applicant was not notified of delivery of the ruling date or orders dated 30th April 2012. He is the rightful owner of the plot subject matter which the Respondent/Defendant intends to acquire unlawfully.

The application is supported by an affidavit sworn by the applicant whereby he deposes that the ruling in issue was not delivered on the 4th March, 2012 as scheduled. The ruling was later delivered on 30th April, 2012 without notice to his advocate. They learnt of the sequence of events on being served with a notice of taxation without any bill of costs. The court failed to notify the applicant of the order to set down the matter for hearing within 14 days. He was able to prove ownership of the property in issue.

The Respondent filed a statement of grounds of opposition in response in which he stated that the application had been overtaken by events and was incompetent and an abuse of the court process. He prayed for dismissal of the application as the suit had been dismissed on 30th April, 2012 hence it was non-existent.

The application was canvassed by way of written submissions. I have considered rival submissions filed alongside authorities cited.

First and foremost, I will address the issue raised by the respondent that the application was made under the wrong provision of the law.

A perusal of the application reveals that the Notice of Motion was brought pursuant to Order 10 rule 11 and Order 50 rule 1 of the Civil Procedure Rules.

Order 10 rule 11 of the Civil Procedure Rules provide as follows;-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

The above mentioned order is in respect of setting aside a judgment following non-appearance of defendant or failure to file a defence. The rule has nothing to do with a party failing to act pursuant to time extended by the court.

Order 50 rule 1 on the other hand is in regard to limitation of time for doing an event whereby a month is perceived to mean a calendar month.

Power to enlarge time derives from Order 50 rule 5 which provide as follows:-

***“The day in which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given shall not be reckoned in the computation of time allowed to plead, or take any other proceeding in the cause of matter.*”**

The application herein should have been made pursuant to the above mention rule.

The issue to be addressed is whether the application can be struck out just because it was sought following a wrong provision of the law.

In answering the question posed I am persuaded by the holding in **Utex Industries Ltd -versus- Attorney General Civil Appeal No. 52/1995.**

The application in the matter went before the Supreme Court whereby a party was seeking to enlarge time for failure to take a right step at the right time.

It was held as follows:-

“... I think ... it appears to be that a reflection of the saying that rules of procedure are handmaids to justice meaning that they should be applied with regard to the circumstances of each case”.

Looking at what transpired in this case, the Hon. Justice Ngugi heard the application dated 6th February, 2012 and reserved a ruling thereto to be delivered on the 3rd April, 2012. According to the court calendar, the date turned out to be during the vacation. Procedurally, the court ought to have issued both parties with a notice. Each party should have been notified to attend court for purposes of taking the ruling. The court record indicates that when the ruling was delivered on the 30th April 2012, only the Applicant's advocate was present.

The Respondent/Plaintiff who was to act within the next 14 days was not represented. There is absolutely nothing on record to indicate that the applicant was notified of the date for the ruling. It is averred that on 20th April, 2012 the applicant's advocate had sent his clerk to the court to enquire about the ruling but was advised to wait for a notice.

The notice their office got was on taxation dated 22nd June, 2012.

This application was also made pursuant to section 3A of the Civil Procedure Act which provides as follows:-

***“Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court.*”**

This means that the court must be concerned with doing justice.

Article 159(2) (d) of the Constitution also provides that Justice shall be administered without undue regard to procedural technicalities. Quoting of a wrong provision of law is a technicality. Order 50 rule 5 gives the court the discretion to enlarge time. All the court has to ensure is to see justice being done. Following my consideration, striking out the application in the instant case would be viewed as

hampering substantive justice.

The application herein therefore succeeds. Taxation of the defendant's bill of costs shall be stayed. Following the order made by the Hon. Justice Ngugi the Applicant/Plaintiff has 14 days within which to set down the case for hearing. In default, the suit will stand dismissed.

The omission herein having made by the court, there will be no order as to costs.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of MAY 2013.

L.N. MUTENDE
JUDGE