



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC. CASE NO. 323 OF 2013

JOB WAWERU KARIUKI PLAINTIFF

VERSUS

ANN WAMBUI KARIOKI1ST DEFENDANT

WINNIE WANJIRU KARIOKI2ND DEFENDANT

RULING

The Plaintiff/Applicant filed his application dated 6/3/13 under Certificate of Urgency wherein he sought a temporary injunction against the Defendants/Respondents pending hearing and determination of the application and of the Suit.

The said application was heard by the Judge in Chambers on 8/3/13 when the same was certified as urgent and interim orders in terms of prayer No. 2 were granted. The Applicant was also ordered to serve the Respondent for *Interpartes* hearing on 13/3/13.

On the said of 13/3/13, the Applicant confirmed having served the 2nd Respondents the previous day and stated he had not served the 1st Respondent who lives in the United States of America. On their part, the Respondents requested for time to file their reply. The Applicant also sought leave to reply to their response. These requests were granted by the court and a mention date of 16/4/13 was given.

On 16/4/13, it was revealed that Counsel for the 2nd Respondent was also acting for the 1st Respondent thereby resolving the issue of service upon the 1st Respondent. Counsel for the Applicant confirmed having been served with a Replying Affidavit by the Respondents and requested for the original Sale Agreement referred to before he could file his further affidavit. Counsel for the Respondents did not object to this request. The court ordered the 1st Respondent to avail the original Sale Agreement by way of further affidavit and the Applicant to file a further affidavit in response thereto. The court also directed for the matter to be mentioned further on 9/5/13.

On 9/5/13, it emerged that the 1st Respondent did not produce the original Sale Agreement as directed. She only produced a copy. Counsel for the Applicant sought for more time to file his further affidavit. Counsel for the Respondents sought a hearing date for the application. The court granted both requests and the application was fixed for hearing on 18/6/13.

On the 18/6/13, when the application came up for hearing Counsel for the Respondents raised an

objection to the hearing of the same based on the provisions of Order 40 Rule 4 (4) which provides as follows:-

“All applications under this order shall be heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time.”

Counsel for the Respondent contended that the application having been filed on 7/3/13 was now out of time as sixty days from that date had already elapsed. He stated that the provision above was couched in mandatory terms, that Counsel had not applied to the court to extend the time and none had been granted. He requested the court to rule on this point. On his part, Counsel for the Applicant contended that most of the delay in hearing his client's application arose while accommodating them in their requests for further time to file their reply. He also stated that due regard to Section 1A and 1B of the Civil Procedure Act should be had and that the matter should be determined on the basis of substantive justice rather than technical matters. He further argued that for a party to rely on that rule, he must demonstrate the failure of the Applicant to prosecute the application within the stated time period. In reply thereto, Counsel for the Respondents stated that the delay occasioned by them was due to the fact that his client resides in United States of America and therefore it took time to courier documents back and forth.

Looking at the chronology of proceedings in this matter right from the date of filing this suit and accompanying application, it is quite clear that every effort was made to expedite the hearing of the application which was filed under certificate of urgency. Also, the chronology of events indicates that the delay in the hearing of this application was occasioned by the need to settle preliminary matters such as service upon the 1st Respondent and the need to see the original Sale Agreement. No one party is solely to blame for this. As far as I can tell, from the proceedings herein, both the Applicant and the Respondents accommodated each other quite well on those preliminary issues. It is on this basis that the hearing of the application was set to take off on 18/6/13 if it was not for the Preliminary objection raised by counsel for the Respondents.

The Preliminary Objection was based on Order 40 Rule 4 (4) which I have cited above. The point he raised is a valid point and indeed, if we were to strictly adhere to that provision, then the Applicants' application would be held to be time barred.

However, this is not the conclusion that I will arrive at. My reasons are as follows:

1. The provision is ousted by the more superior provision of Article 159(2) (d) which provides that justice shall be administered without undue regard to procedural technicalities.
2. The delay in hearing the application can partly be attributed to the Respondents when the Applicant and the Court indulged them with extensions of time to file their reply.
3. In raising their preliminary objection, the Respondents did not point out any failure by the Applicant to prosecute this application within the prescribed time lines.
4. Further, the Respondents did not demonstrate what prejudice they had suffered or were likely to suffer arising out of the hearing of this application out of the prescribe timelines.

It is noteworthy that Order 40 Rule 4 (4) allows for an extension of time by the Court for the hearing of an application such as this one outside of the time limit of sixty days since filing. Where the court has good reason to extend time, it may extend time. Nowhere in that provision is it stated that the affected party must first apply for extension of time for the court to extend time. Indeed, the provision allows the court to extend time *suo moto*. I find that the instant case offers good reasons to extend time for the hearing of the pending application on merit. I direct that parties agree on a suitable hearing date.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI

ON THE 5TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE