



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 7 OF 2013

ALEXANDER MUNENE R. NGUU1ST PLAINTIFF

EPHANTUS NJIRU KITHOGONDO 2ND PLAINTIFF

DAUDI NJIRU KATHENDU 3RD PLAINTIFF

(Suing as Representatives of Eighty (80) Members of Runyenjes

Cattle Dip Self Help Group)

VERSUS

NJUE M'TETU.....1ST DEFENDANT

ELIAS NDWIGA NGARI 2ND DEFENDANT

MWANIKI MUGANE3RD DEFENDANT

CATHERINE MUTHONI NJIRU 4TH DEFENDANT

RULING

This is in respect to the application by the 1st, 2nd and 3rd defendants seeking leave to file their defence out of time. It is supported by the affidavit of their advocate DAVID NJERU NYAGA and based on the following grounds:-

1. ***That the 1st, 2nd and 3rd defendants filed their memorandum of appearance on 26th June 2012 and the defence was to be filed within 14 days of the above date***
2. ***Owing to factors beyond the control of the 1st, 2nd and 3rd defendants, the defence was not filed within the stipulated period***
3. ***The plaintiffs case will not be prejudice.***

In his supporting affidavit in support of the application MR. NYAGA has alluded to some of the reasons why the defence was not filed in time and these include:-

- a. ***That the 1st, 2nd and 3rd defendants were also canvassing another application under certificate of urgency dated 7th June 2012 and which was coming up on 4th July 2012 and so they were engaged in preparing affidavits and submissions***

b. ***That submissions were filed on 18th July 2012 and the ruling date set for 10th October and the file was not available in the registry.***

I have considered the application, the opposition thereto and the submissions by counsels. The main ground of opposition is that the 1st, 2nd and 3rd defendants have displayed a great degree of indolence and have given no reasons for failing to file their defence on time. The application is grounded under ***Order 51 rule 1 and Order 7 rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.***

It is not in dispute that counsel for the 1st, 2nd and 3rd defendants entered appearance in this suit on 25th June 2012 and so he had 14 days to file a defence as required under ***Order 7 rule 1 of Civil Procedure Rules.*** That provision uses the words “***SHALL ----- FILE HIS DEFENCE WITHIN FOURTEEN DAYS -----***” These was therefore a breach of a mandatory provision of the law.

That notwithstanding, the Court has powers under the inherent jurisdiction donated by ***Section 3A of the Civil Procedure Act*** to extend time in which an act is to be done. However, the party seeking the Court's indulgence must show some basis upon which such discretion may be exercised in his favour. Judicial discretion must be exercised on reason and not caprice. The reasons being advanced herein include that the 1st, 2nd and 3rd defendants were busy with their counsel preparing affidavits and submissions for an application which had been filed by the plaintiffs under a certificate of urgency. That cannot be a good reason to explain the failure to file defence in time. The plaintiffs application had been served on 7th June 2012 and was coming up on 4th July 2012. There can be no plausible explanation as to why a defence was not filed in time. The explanation that the file was unavailable in the registry to enable the 1st, 2nd and 3rd defendants file their defence is also not satisfactory. All that the 1st, 2nd and 3rd defendants needed to do was to present their defence to the registry and nothing would have prevented it from being filed as it had nothing to do with the application whose ruling was pending. In any case, there is no evidence that the defence, if any, was presented to the registry or Deputy Registrar and was rejected for the aforesaid reasons.

Counsel for the applicant has invoked the Constitutional provision guaranteeing a fair hearing as provided for under ***Article 50 of the Constitution.*** That provision of course deals mainly with criminal trials but even if I relate those provisions to this suit, they apply with equal force to the right of a plaintiff to have his case heard fairly and there can be no fair hearing if the defendant, as in this case, is being indolent and circumventing clear provisions of the law which oblige him to assist the Court to further the overriding objections of the ***Civil Procedure Act*** and the Rules which include the timely disposal of proceedings. The indolence of the 1st, 2nd and 3rd defendants is clearly captured further in the fact that on 2nd April 2013, this Court granted the plaintiffs leave to file an amended plaint and granted the 1st, 2nd and 3rd defendants leave to file their defence within 14 days of service. There is evidence on record that the said amended plaint was served upon the 1st, 2nd and 3rd defendant advocates on 18th April 2013. To-date no amended defence has been filed and one would have expected the 1st, 2nd and 3rd defendants to take advantage of that window and file a defence. Clearly, the 1st, 2nd and 3rd defendants are not deserving of this Court's discretion.

Ultimately therefore, I find no merit in the 1st, 2nd and 3rd defendants application dated 25th October 2012 and the same is hereby dismissed with costs.

B.N. OLAO

JUDGE

1ST OCTOBER, 2013

1/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

No appearance for Applicant

Mr. Mugo for Kamunyori for Respondent – present

Mr. Ngigi for Nyaga for 1st defendant - present

COURT: Ruling delivered this 1st day of October 2013 in open Court.

B.N. OLAO

JUDGE

1ST OCTOBER, 2013