

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. NO. 278 OF 2011

RAKESH KUMAR ANAND.....APPLICANT

VERSUS

DIPAK KUMAR ANAND.....RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 9th July 2012 in which the Applicant seeks for orders that time within which the Applicant may fix the Originating Summons dated 10th June 2011 for hearing be enlarged. He also seeks for the costs of this application.

The application is premised on the grounds appearing on the face of the application together with the Supporting Affidavit of Rakesh Kumar Anand sworn on 9th July 2012 in which he stated that he instructed the firm of M/s Njeru Nyaga to institute these proceedings and to conduct them on his behalf and that the said lawyers informed him that on 7th December 2011, this court directed that the matter be fixed for hearing within 30 days of the said directions. He further stated that the said lawyers did not subsequently inform him of a hearing date and that his enquiries were met with the response that the court file could not be traced. He further stated that on 14th May 2012, he instructed the law firm of Wandabwa Advocates to take over the conduct of this suit on his behalf who proceeded to fix the Originating Summons for hearing on 6th June 2012 where upon the court registry staff declined to do so citing the court's order for the same to be fixed for hearing within 30 days from 7th December 2011. He further swore that his former advocates had indeed tried to fix the suit for hearing but they inadvertently quoted the incorrect case number which could have been the reason why the court file could not be traced in order to fix the matter for hearing in good time.

The Application is contested. The Respondent filed his Grounds of Opposition dated 20th February 2013 in which he stated that there had been inordinate delay in taking the necessary steps to fix the Originating Summons for hearing which is not only inexcusable but has also prejudiced the Respondent. He further stated that the Respondent had already taken default proceedings to have the Originating Summons struck out and that the Originating Summons is itself incompetent.

Both the Applicant and the Respondent filed their written submissions which have been read and taken into consideration by this court.

In determining whether or not to grant the application, I wish to rely on the guiding principles laid out in the case of *Ivita v Kyumbu* (1984) KLR where it was stated that the test to be applied by the courts is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.

Firstly, is the delay prolonged? This particular suit was filed on 13th June 2011. The court ordered that the

suit be fixed for hearing within 30 days from 7th December 2011. Hence, the suit was supposed to be fixed for hearing latest on or about 23rd January 2012. It was not. This particular application seeking to extend time to fix the suit for hearing was filed on 9th July 2012, a period of 6 months later. In my experience in handling cases of this nature, I would not categorize a delay of 6 months as being prolonged delay. I so hold.

Secondly is to determine whether the delay was or was not excusable. The applicant has pointed to the court the reason for the delay in fixing the suit for hearing within the prescribed period as being the inadvertence on the part of his lawyer in indicating the correct case number on his letter inviting of the fixing of the suit for hearing wherein he cited case number 287 instead of 278. The applicant explained that this is most likely the reason why the court registry staff could not trace the correct court file and reported that the file was missing resulting in the matter not being fixed for hearing as directed by the court. To my mind, this excuse seems quite plausible and I am persuaded that this is the reason why the applicant was not able to fix the suit down for hearing within the time specified by this court. I hold that this excuse is acceptable to this court.

Accordingly, I find that the delay by the Applicant in fixing this suit for hearing was not prolonged and was excusable. I therefore allow the application and direct the applicant to fix this suit for hearing within a period of 3 months from today's date.

SIGNED AND DELIVERED IN NAIROBI THE 1ST DAY OF NOVEMBER 2013

MARY M. GITUMBI

JUDGE