



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 79 of 2006

STEPHEN RAPHAEL GARAMAPLAINTIFF

VERSUS

ROBERT BAYA MRAMBA & 9 OTHERS.....DEFENDANTS

RULING

The Chamber Summons application dated 22-4-09 is made under order XLIX Rue 5 of the Civil Procedure Rules and section 3A Civil Procedure Act, seeking that 2-5 and 7-10 defendants/applicants, be granted leave to file their reply to the application dated 12-3-09 by enlargement of time – it is premised on grounds that:

- a) The defendant/applicants, were unable to put in their reply because time was too short.
- b) It is in the interest of justice that application be allowed, the proceedings are quasi- criminal in nature with serious penal consequences.
- c) The defendants have weighty issues to raise in their defence.

In the affidavit sworn by the applicant's counsel, it is deponed that an application was instituted for contempt proceedings against the present applicants vide a notice of motion dated 12-3-09. On 26-3-09, the court granted the respondents leave to file reply to the contempt application within 7 (seven) days. Applicant's counsel immediately wrote to the 4th applicant, having failed to reach him on phone – the letter marked OE-1 was delivered to him home in Watamu, by a runner one Nahshon Lichoti who found 4th applicant was away in Mombasa where he worked.

The 4th applicant who normally represents the other applicants did not communicate until 6-4-09, when he sent one Chrispus Gona (5th respondent) to their advocate's office. As a consequence, their counsel was unable to reply to their application as time had already expired.

The application is opposed, and in the replying affidavit, the respondent depones that the initial application dated 12-3-09 was served upon the respondent in good time but they failed to file a response, and the court granted their counsel extension of time to file their papers but they chose not to reply. Respondent laments that almost two months down the line; the defendants are seeking an extension of time to enable someone working in Mombasa to come and sign the papers and it is the respondent's contention that the defendants are not serious with the application and the court's dignity should be upheld by refusing to grant any more time for extension.

Mr. Angima in arguing the application explains that the time given was too short and it's the 4th applicant whom he normally uses to liaise with the others.

This is not a representative suit and as far as the record shows, the applicants/defendant are each sued in their own individual capacity. There is no authority filed nominating the 4th applicant to act on behalf of the other applicant – he is said to be the linkman – it is however not clear what difficulty the applicant's counsel has in getting in touch with the other applicants such that once he is unable to communicate with the 4th applicant, then there is a total eclipse in respect of all the other applicants.

Then incidentally 4th applicant finally sent Chrispus Gona – who from the records is the 5th defendant – it is not clear however as to when the 5th defendant received the information or what difficulties 4th applicant had so that he was not able to respond to his advocate's request within the period given by the court.

The applicants seem to treat the entire court process like some sort of irritating and unwelcome intrusion, that should be regarded casually – I say this because despite having been properly served, time extended, to date there isn't even a draft/proposed replying affidavit already prepared and filed as a sign of good faith, seeking to be ratified by the court – so did 5th defendant have any instruction to give to their counsel when he went to their offices?

And what is the mystery regarding the absence of all the other applicants – this remain completely unexplained. Mr. Angima submits that since the pending application is quash criminal and the applicants herein have expressed an interest in the matter, then there is legitimate reason for seeking indulgence. Of course the court recognized the seriousness of the matter and its consequences, that is why despite finding that service on the present applicants was proper, the court deemed that in the interest of justice, the present applicants be accorded time to file their responses. (It is the applicants whose conduct sends a message that they don't consider this to be a serious matter)

That was on 26-3-09 and it was not until 22-4-09, almost one month later that applicant's counsel found it proper to seek for more time. It is instructive that on 26-3-09 when counsel sought for extension of time, he did not suggest a time span, nor protest at the period given to him by the court. In fact by that date, the record is that he had consulted with his client but felt the instructions were not exhaustive – there was no alluding to difficulties in getting any of the defendants/applicants, then it was simply that there had been a breakdown in communication in the office of the advocate.

Mr. Lughanje for the respondent asked the court to take note that all defendant/applicants except for the 1st and 6th had been served with the application dated 12-3-09 and if they ere not in court on 26-3-09 (when leave for 7 days was given) then that was out of choice.

Mr. Angima tried to explain that part of the cause of the delay in filing this application was because the High Court was on vacation – as far as I know the vacation rules affect hearing of matters during vacation, not filing of matters – in fact if they had filed the application earlier, they would have been heard in late April when the vacation ended.

Is there anything on record, any explanation, to justify allowing the applicants two bites at the cherry?

The length of delay is about a month from the date when extension of time was given, and almost two months from the date the application was served on the defendants. The reason for the delay is not definitely stated, there are half hearted feeble attempts to explain the cause of the delay – a requirement for satisfactory explanation is confirmed by the views expressed by several court of appeal decisions regarding delay – that there must be some explanation offered for it before an extension of time can be considered. In the present scenario, the explanation given is unsatisfactory and completely unpersuasive. The upshot is that there is no merit in the application – I see no ground on which to give applicants another chance and the application is dismissed with costs to respondent.

Delivered and dated this 7th day of **July 2009** at Malindi.

H. A. OMONDI

JUDGE