



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 189 OF 2006

1. ABDULHALIM MOHAMMED SHALLO

2. SHEIKH ABDULKADIR M. SHALLO.....PLAINTIFFS

VERSUS

PANDYA MEMORIAL SOCIETY T/A

PANDYA MEMORIAL HOSPITAL.....DEFENDANT

RULING

Before me is an application by Notice of Motion dated 25th March 2009 and made under sections 3A and 95 of the Civil Procedure Act, Order V Rules 17 and 32 of the Civil Procedure Rules. The applicant, who is the defendant, applies for the following orders:-

- 1. That the time for serving summons, amended defence and counter claim be enlarged to a period expiring 45 days after the determination of this application;**
- 2. That leave be granted to the applicant to effect substituted service of the Summons to Enter Appearance and Amended Written Statement of Defence and Counter-Claim dated 29th April 2008 upon the Additional Defendant.**

The application, which is supported by an affidavit sworn by Syed Kassim Shah an advocate instructed by MS A. B. Patel & Patel Advocates for the applicant, is based on the grounds that the court, on 24th April 2008, allowed the applicant to amend and serve its amended defence and counter-claim upon the plaintiffs and the additional defendant within seven (7) days from the aforesaid date, but despite concerted efforts to serve the additional defendant within the appointed time, he has not been served because his whereabouts are unknown to the applicant and that no prejudice will be occasioned to the plaintiffs if the said period is enlarged. The said affidavit in support elaborates those grounds.

The application is opposed and there is a replying affidavit sworn by the 1st plaintiff for himself and on the authority of the 2nd plaintiff. The gist of the opposition to the application is that the same has been lodged rather late in the day and is a ploy to delay the plaintiffs' application for judgment pending hearing in this court. The plaintiffs therefore contend that the application is an abuse of the process of the court and should be dismissed with costs.

At the hearing, counsel for the applicant submitted that the delay in filing the application had been explained and arose when an earlier application for a similar relief was withdrawn paving way for lodging this application. In counsel's view, the plaintiffs will not suffer any prejudice if the application is allowed since the orders sought will not prejudice the pending application for judgment.

Responding to the oral submissions of counsel for the applicant, the 1st plaintiff who led his brother, the 2nd plaintiff, in opposing the application emphasized that the applicant was guilty of inordinate delay and that the application is in any event *res judicata*, an after thought, vexatious, frivolous and an abuse of the process of the court.

I have considered the application, the affidavits filed and the submissions made to me. Having done so, I take the following view of the matter. The jurisdiction to enlarge time is donated by Order XLIX Rule 5 of the Civil Procedure Rules which reads as follows:-

“5. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

The order, as can clearly be seen, gives the court power to enlarge time which may have been limited by the rules or an order of the court. The discretion to do so is wide, the main concern of the court being to do justice to the parties. In the matter at hand the order which limited the time within which the service of the defence and counter claim was to be made was in the following terms:-

“ 1.

2.

3. That if the court fees have not yet been paid, then such fees be paid and the amended defence and counter claim be served upon the plaintiffs and the additional defendant within seven (7) days from today.”

The applicant swears that, it tried to comply with the said order but could not because the whereabouts of the additional defendant were unknown. In that regard the applicant has exhibited two affidavits of non-service. The first one is by a process server called Isaac Muriuki Kinuya sworn on 17th June 2008 and the second one is sworn by Syed Kassim Shah, counsel for the applicant on 25th November 2008. The two affidavits depone to the difficulty in effecting service of process upon the additional defendant. In the premises, I am satisfied that service cannot be effected upon the said additional defendant in the normal manner.

With regard to the objection that the applicant is guilty of inordinate delay in approaching the court, I have seen the applicant's earlier application for substituted service. It is dated 25th November 2008 and was lodged on 27th November 2008. The delay involved was of seven (7) months. That delay would appear to be long but is it prolonged and inordinate? Before I determine the issue, the initial order of Njagi J., may be looked at. The Learned Judge found as follows:

“ I am satisfied that the application for leave to amend is brought in all good faith in order to bring

to the fore the true identities of the parties to the dispute which in turn will enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.”

So, the intended additional defendant is a necessary party to these proceedings without which, the court may not “*effectually and completely adjudicate upon and settle all questions involved in the suit.*” In view of the importance of the additional defendant to these proceedings, I am not inclined to consider the period of delay of seven (7) months to lodge the application as inordinate or prolonged. In **Trust Bank Limited – v – Amolo Company Limited C.A. No. 215 of 2000 (UR)**, the Court of Appeal observed as follows:-

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their merit” and further that “errors should not necessarily deter a litigant from pursuit of his right.”

(See also **Essenji and Another – v – Solanki [1968] EA 224**).

With regard to the objection that this application is *Res Judicata* because of the withdrawn application, I am afraid the objection was not well taken because the previous application was not determined on merits and the plea of *Res Judicata* is not available as a defence to the plaintiffs.

In the end, I will exercise my discretion in favour of the applicant and hereby allow its application dated 25th March 2009 in terms of prayers 1 and 2 thereof. The return date in the Summons to Enter Appearance should be 21 days from the date of advertisement in the Daily Nation. The plaintiffs shall have the costs of the application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Jumbale holding brief for Situma for the Applicant and the Plaintiffs in person.

F. AZANGALALA

JUDGE

1ST OCTOBER 2009