



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 23 OF 2018

NGUMBAU INVESTMENTS LIMITED

t/a COURTYARD HOTEL.....PLAINTIFF/RESPONDENT

VERSUS

KITELE INVESTMENTS LIMITED.....1ST DEFENDANT/APPLICANT

ADMINISTRATORS OF THE ESTATE OF THE

LATE LABAN MAINGI KITELE.....2ND DEFENDANT/APPLICANT

AND

KINDEST AUCTIONEERSINTERESTED PARTY

RULING

1. In the Notice of Motion dated 19th April, 2019, the Defendants have sought for the following reliefs:

- a) That the Applicants be granted leave to file a Defence and Counter-claim out of time and any order that may be issued pursuant thereto.***
- b) That the costs of the Application be granted.***
- c) That the Honourable Court do issue any other relief as it deems fit and proper.***

2. The Application is premised on the Affidavit of the Administrator of the Estate of the 2nd Defendant who deponed that the Defendants were served with Summons to Enter Appearance and the Plaint on 23rd November, 2018; that the Defendants appointed an Advocate who filed a Notice of Appointment on 19th February, 2018 and filed the Replying Affidavit to the Application dated 5th February, 2020 and that the court thereafter rendered its Ruling on 12th October 2018.

3. It was deponed that immediately thereafter, the Applicants through a new firm of Advocates Bashir, Noor & Company Advocates (*advocates currently on record*) filed a Notice of Appeal dated 24th October, 2018 and that the same was never prosecuted.

4. The 2nd Defendant deponed that then counsel on record on their own volition elected to respond solely to the Application and neglected to respond to the main suit; that the mistake of counsel should not be visited on the innocent Defendants and that the Defence raises triable issues. The Application was not opposed.

5. In his submissions, the Defendants' advocate submitted that Article 50 of the Constitution provides for the right to fair hearing which includes the right to be heard. Counsel relied on the case of *Joshua Mulungu Mutie & another vs. County Government of Machakos [2018] eKLR* in which the court stated as follows:

“Considering that there is no Judgment in this matter, the issue of whether the Defendant’s draft Defence raises triable issues or not does not arise. It is the Defendant’s constitutional and statutory right to defend the suit.”

6. Counsel submitted that this court has time and again selfishly guarded the right to fair hearing and given parties in disputes before this

court the right to be heard; that the Applicant has vigorously shown that it is ready and willing to defend this suit and have the matter decided on merit and that Article 40 of the Constitution provides for the right to property.

7. Counsel submitted that the Plaintiff's/Respondent's claim is that owing to renovations done, the court should give it proprietary interest hence making them co-owners, which in essence deprives the Applicant the right to its property and that owing to the gravity of the claim, it is in the interest of justice that the Defendants be allowed to defend the suit.

8. Counsel submitted that this court has consistently approached land and proprietary rights matters with abundance of caution and interpreted the law in safe guarding the propriety rights and the right to be heard. Counsel relied on the case of *Joshua Mulungu Mutie (supra)* where this court stated as follows:

"It is trite that the Civil Procedure Rules do not provide for the entry of interlocutory Judgment in land matters."

9. Counsel submitted that the draft Defence raises triable issues; that the Court of Appeal in *Job Kilach vs. Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR* observed that:

"... What then is a defence that raises no bona fide triable issue" A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

10. According to the Defendants' counsel, the Defendants not only intends to defend the suit but they also have a claim against the Plaintiff for rent arrears and *mesne profits* and that in the interest of avoiding multiplicity of suits and saving precious judicial time, the court should grant the Applicant an opportunity to canvass its case.

11. The Plaintiff's advocate submitted that despite being aware of the suit, the Applicants failed to file their Defence; that on 20th December, 2018, the Respondent filed a request for Judgment under Order 10 Rule 4(1)(2) of the Civil Procedure Rules, 2010 and that the Application was placed before the court on 15th January, 2019 and the court directed that the matter be fixed for pre-trial directions.

12. Counsel submitted that they proceeded to fix the matter for pre-trial directions and served the pre-trial date upon the Applicants; that it was at this point that the current Advocates on record conveniently filed a Notice of Change of Advocates and the present Application citing indolence on the former Advocates and that the Applicants have always been aware of the suit and every development thereof.

13. The Plaintiff's advocate submitted that the Advocates currently on record for the Defendants have also been aware of the suit since 12th October, 2018 and that had they acted diligently, they would have filed their Defence.

14. This suit was commenced by way of a Plaint dated 5th February, 2018. On the same day the Plaint was filed, the Plaintiff also filed an Application under a Certificate of Urgency for injunction. The said Application was opposed by the Defendants though their former advocate by filing a Replying Affidavit, with the Ruling being delivered on 12th October, 2018.

15. In the current Application, the Defendants are seeking for leave to file the Defence out of time. Indeed, the perusal of the record shows that the Defendants have always been represented by an advocate. That being so, and having instructed the former advocate timeously, the failure by the advocate to file the Defence within the requisite time was a *bona fide* mistake by the said advocate.

16. Although Order 7 Rule 1 of the Civil Procedure Rules provides that a Defence should be filed within fourteen (14) days of service of the summons, Order 50 Rule 6 allows the court to enlarge time as the justice of the case may require.

17. The Plaintiff has not informed the court which prejudice he will suffer in the event the Defendants are allowed to file their Defence. Considering that the Plaintiff has not been heard, and in view of the fact that the Defendants have a right to be heard, which right will be infringed upon unless they are allowed to file their Defence out of time, I shall allow the Defendants' Application dated 19th April, 2019 as follows:

- a) The Defendants be and are hereby granted leave to file their Defence and Counter-claim out of time.***
- b) The said Defence and Counter-claim to be filed and served within fourteen (14) days of the date of this Ruling.***
- c) Each party to bear his own costs.***

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6TH DAY OF NOVEMBER, 2020.

O. A. ANGOTE

JUDGE