



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 346 OF 2015

BENJAMIN KIPKULEI.....PLAINTIFF

VERSUS

SHADRACK KAMAAMIA.....1ST DEFENDANT

ALFRED KAMAAMIA.....2ND DEFENDANT

SIMON KILELE.....3RD DEFENDANT

MORINGASO KAMOIRO.....4TH DEFENDANT

SANAET KAMOIRO.....5TH DEFENDANT

JOSEPH NAIMODO.....6TH DEFENDANT

NGAPOE LETURA.....7TH DEFENDANT

PAPIYO PAREIYO.....8TH DEFENDANT

RULING

1. By Notice of Motion dated 13th February 2018, the defendants seek an orders “that time be enlarged within which the defendant can file a defence and the defence filed herein dated 14th February, 2018 be deemed properly filed and served” and “that the court does order a rehearing of the suit herein as defended suit on such terms that may be imposed by this honourable court”.

2. The application is supported by an affidavit sworn by the 1st defendant. He deposed that the defendants were served with Summons to Enter Appearance in December 2015 and that their advocates on record inadvertently failed to file defence within the stipulated time. He annexed a copy of the draft defence and urged the court to allow the application as otherwise the defendants would be condemned unheard.

3. The plaintiff opposed the application through his replying affidavit sworn on 28th June 2018. He deposed that having entered appearance on 22nd December 2015, the defendants ought to have filed defence by 15th January 2016 and that on 9th November 2016 the court gave the defendants 30 days to file defence. That no explanation has been offered for the delay. That the present application is similar to another dated 24th July 2017 in respect of which a ruling had been delivered on 12th October 2017 which ruling addressed the issues now raised.

4. The application was heard through written submissions. The applicants filed submissions on 5th July 2018 while the respondent filed submissions on 13th July 2018. I have considered the application, the affidavits filed, the submissions as well as the authorities cited. The application essentially seeks enlargement of time to file a defence and consequent upon such enlargement, a rehearing of the suit.

5. The court’s power to enlarge time is guided by **Order 50 rule 6** of the **Civil Procedure Rules** which provides:

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

6. The factors to be considered when dealing with an application for enlargement of time were restated by the Court of Appeal in **Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR** as follows:

20. Whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, J.J.A in Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR, thus

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

7. The record herein shows that the defendants filed Memorandum of Appearance on 23rd December 2015. By dint of the provisions of **Order 7 rule 1** of the **Civil Procedure Rules**, the defendants ought to have filed their defence within fourteen days from 23rd December 2015. Thereafter, they ought to have served the defence on the plaintiff’s advocates within fourteen days from the date of filing it. Taking into account the period when time does not run owing to the provisions of **Order 50 rule 4** of the **Civil Procedure Rules**, they ought to have filed the defence by 28th January 2016. As at 13th February 2018 when the present application was filed, there had been a delay of over 2 years. That is certainly an inordinate delay. So far, no defence has been filed and what is annexed to the present application is a draft defence.

8. In view of the issues raised in the present application, it is important to paint a backdrop of the circumstances of the matter this far. Pursuant to Notice of Motion dated 24th July 2017, the defendants sought orders inter alia that the proceedings of 13th June 2017 and all other proceedings and consequential orders thereto be set aside and that the plaintiff be recalled for cross-examination and further that the District Land Surveyor be ordered to comply with the orders issued by the court on 19th January 2016 and 11th May 2016 and determine the boundaries of parcels no. L.R. 20591/79 and L.R. No. 20591/119 and L.R. No. 79256. I considered the application and dismissed it in a ruling delivered on 12th October 2017. For clarity, I find necessary to quote the ruling in extenso:

... The record shows that on 19th January 2016 Hon. Justice Munyao Sila ordered the District Surveyor, Nakuru to proceed to the ground and carry out a survey to determine whether land L.R No. 79256 is comprised within or forms part of or is independent of LR No. 20591 or LR No. 410/1, 410/2, 7265 and 7281. The survey exercise was to be completed within thirty (30) days.

10. When the matter next come up on 9th March 2016, the survey had not been done. The Surveyor was given a further 45 days. Yet again on 11th May 2016, the court gave a further 45 days to enable the survey to be done. The matter came up again on 9th November 2016 and the survey had not been done. The surveyor was given more time and the defendant were given 30 days to file their defence.

11. The matter next came up on 8th March 2017, a date which was given on 9th November 2016 in the presence of counsel for the defendants. Counsel for defendants did not appear on 8th March 2017. The court noted that the defendants had been given 30 days from 9th November 2016 to file their defence but had not yet done so. The court therefore ordered that the main suit be heard on 11th May 2017.

12. Come 11th May 2017 counsel for the defendants did not attend court. The 1st defendant was however present and sought an adjournment on the ground that the defendants and their advocate were not aware of the hearing date. The application was opposed by counsel for the plaintiff who pointed out that the defendants had not yet complied with Order 11 of the Civil Procedure Rules. In its ruling the court stated in part as follows:

I note from the affidavit of service that the defendants’ advocate was served with a hearing notice on 6th April 2017. I also note that Munyao J. gave today’s date having taken into account the defendants’ failure to file a defence despite being given a limited period to do so. In the circumstances, I order that the hearing proceeds today.

13. The file was accordingly placed aside for hearing. The hearing commenced later that day at 12.15pm. PW1 gave his evidence in chief and at the conclusion thereof, Mr. Musembi informed the court that he was now present in court and holding brief for Mr. Kamwaro for the defendants. He applied for an adjournment on the ground that Mr. Kamwaro had called him at noon and informed him that Mr. Kamwaro had wrongly diarized the date. He sought an adjournment for purposes of cross examining PW1 and for further hearing. Though counsel for the plaintiff opposed the application, the court while noting the inconsistencies in the reasons advanced for adjournment, granted an adjournment in the interest of justice. The mater was then adjourned to 13th June 2017, a date that was mutually convenient to parties, for cross examination of PW1 and further hearing.

14. On 13th June 2017, Ms. Moenga holding brief for Mr. Kamwaro for the defendants, sought an adjournment on the ground that Mr. Kamwaro was not ready to proceed since he had matters at the Children’s Court in Narok during the then ongoing service week at the said court. The application was opposed among others on the grounds that the service week was in the subordinate court and in any case Mr. Kamwaro had not stated which particular matter he was handling in the service week. Upon considering the matter, the court saw no merit in the application for adjournment and dismissed it. Hearing was ordered to proceed. Upon delivery of the ruling on the application for adjournment, Ms. Moenga left the court such that there was no one present to cross examine PW1. The plaintiff not calling any further witness, the plaintiff’s case was closed. Upon application by plaintiff’s counsel, the defence case was also closed and parties were ordered to file and exchange written submissions. The

matter was then set for mention on 19th September 2017 to take date of judgment. Subsequently, the application currently before court was placed before the court under certificate of urgency on 26th July 2017.

9. It is thus apparent that the hearing of the suit was concluded and the matter is pending delivery of judgment. It is also clear that the delay herein of 2 years aside, the defendants were all along aware that they had not filed defence. I have gone through the affidavit in support of the application and I have not seen any explanation for the inordinate delay of 2 years.

10. Another detail worth noting is that when the present application which was filed under Certificate of Urgency was placed before the court on 25th May 2018, the court gave explicit directions and timelines regarding service of the application, filing and exchange of responses and written submissions. The matter was then scheduled for mention on 20th June 2018 to take date of ruling in respect of the application. The defendants' counsel was ordered to extract and serve the directions upon counsel for the plaintiff. Come 20th June 2018, counsel for the defendants did not attend court and counsel on record for the plaintiff protested that he had neither been served with the application nor the directions.

11. Although it has been argued in the defendants' submissions that the failure to file defence within time was due to mistake of counsel, no such mistake has been identified or explained in the application or supporting affidavit. In such circumstances, the submissions on the supposed mistake are an afterthought.

12. All the parties appearing before a court in a civil case have a duty to assist the court to attain the overriding objective of civil litigation which is the just, expeditious, proportionate and affordable resolution of disputes before the court. The plaintiff herein has dutifully followed the rules and has progressed his case this far. The matter is on the verge of conclusion. On the other hand, the defendants have failed to comply with the rules as regards timely filing and service of statement of defence. Even when they were given a limited time by the court to do so, they didn't comply. Instead of filing the defence, they kept the plaintiff and the court busy with applications. If I was to accede to the defendants' request, there would be grave injustice to the plaintiff.

13. The applicants seek an order that there be a re-hearing of the suit. That issue was heard and determined in the ruling delivered on 12th October 2017. It is thus res judicata and I cannot reopen it.

14. For all the foregoing reasons, I find no merit in the Notice of Motion dated 13th February 2018. It is dismissed with costs to the plaintiff.

15. Delay in delivery of this ruling, which was occasioned by the fact that I proceeded on medical leave, is regretted.

Dated, signed and delivered in open court at Nakuru this 30th day of April 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the defendants/applicants

Mr J M Kariuki holding brief for Mr Karanja Mbugua for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomo