



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 35 OF 2009

PAOLO SPIGA

GIANFRANCO MARIA SANTUCCI.....PLAINTIFFS

VERSUS

DR. JOHN MUGALASINGA KHAMINWA.....DEFENDANT

RULING

1. I have before me for determination an amended Notice of Motion application dated and filed herein on 24th May 2016. By the said application, Dr. John Mugalasinga Khaminwa, the Plaintiff in the Counterclaim prays for Orders:-

- 1. That this Honourable Court do vary the orders issued by the Honourable Justice Hellen Omondi on 20th and 26th July 2011 in respect to the service of the Counterclaim**
- 2. That this Honourable Court do extend time to the Applicant to effect service of the Counter-Claim against the 2nd, 3rd and 5th Defendants in the Counter-Claim**
- 3. That the costs of this application be provided for.**

2. The application which is supported by the Applicant's affidavit is premised on the grounds that:-

- a. There is a defence on record showing that some of the Defendants were served with the Counter-Claim;**
- b. The said Ruling on 20th July 2011 would unfairly penalize the Applicant when the fault it is obvious lies not with the Applicant;**
- c. It is in the interest of justice that the said ruling in respect of the Counter-Claim be varied;**
- d. That the Applicant has made strenuous efforts to comply with the order of this Court;**
- e. That the Applicant stands to suffer a great loss and damage if the orders sought are not granted for it is through no fault of his own that the service has not been complied with;**
- f. That the Applicant has a valid case as stated in his Counter-Claim; and**
- g. That no prejudice will befall any of the Defendants if time were extended to enable the Applicant to effect service.**

3. In a Replying Affidavit sworn and filed herein on 9th January 2018 by their Advocate Tukero Ole Kina, the Respondents assert that no leave was sought and none was given for the amendments sought in the application. The Respondents further aver that the evidence of the alleged service of the Counter-Claim on the 1st and 4th Defendants to the Counterclaim was never filed and or brought to the attention of the trial Judge before the application was argued and the ruling complained about was delivered.

4. It is further the Respondents case that the time taken by the Applicant to seek the variation of the orders of the Court is inordinately long. That the Applicant is guilty of laches and should not seek to divert blame to anyone.

5. I have considered the application and the response thereto. I have equally considered the Submissions of Dr. Khaminwa, Senior Counsel acting for himself and Mr. Ole Kina, Learned Counsel for the Respondents.

6. The suit was filed by the two Plaintiffs/Respondents on 8th April 2009. The Defendant/Applicant then entered appearance and filed a Defence and Counter-Claim. The Counter-Claim included three personalities who were non-citizens and who were not served for a while. By a Chamber Summons Application dated 5th February 2010, the Plaintiff /Respondents moved the Court to strike out the Defence and Counter-Claim on a number of grounds including the fact that no leave was sought to include non-Kenyan Defendants ordinarily resident in Italy in the Defence and Counter-Claim.

7. That application was canvassed before the Honourable Justice Hellen Omondi before whom the Defendant/Applicant submitted that he had been that far unsuccessful in serving the Defendants in the Counter-Claim as they resided in Italy and had not returned to the jurisdiction of the Court.

8. In a Ruling delivered on 20th July 2011, the Learned Judge directed that the Defendant complies with the provisions of Order V Rule 21-28 regarding service within the next thirty (30) days in default of which the Counter-Claim would stand struck out without further reference to this Court.

9. By this application initially dated 19th August 2011 as amended on 24th May 2016, the Defendant seeks a variation of those Orders and for an extension of time to effect services of the Counter-Claim against the 2nd, 3rd and 5th Defendants therein.

10. I think it is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. *In Nicholas Kiptoo Korir Arap Salat –vs- Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR*, the Supreme Court delineated the underlying principles that a Court should consider in the exercise of its discretion to enlarge time in the following terms:-

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;

3. Whether the Court should exercise its discretion to extend time, is a consideration to be made on a case to case basis.

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.

5. Whether there will be any prejudice suffered by the Respondent if the extension is granted.

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petition, public interest should be a consideration for extending time.

11. In the matter before me, the Applicants main ground appears to be that he had made some attempt at service and that the Ruling made on 20th July 2011 would unfairly penalize the Applicant when the fault is not of his own.

12. As can be gleaned from the orders of the Learned Judge issued on 20th July 2011, the Applicant herein was required to comply with the provisions of the then Order V Rules 21-28 of the Civil Procedure Rules within 30 days in default of which the Counter-Claim would stand struck out. No such compliance was made and accordingly the Counter-Claim herein stood struck out on or about 20th August 2011.

13. That must be the reason the Applicant initially rushed to Court on 19th August 2011 and filed this application. As it were the said application would not be prosecuted for another 8 years. A perusal of the Applicant's Supporting Affidavit does not give any reason and/or explanation why the same was not done. It is apparent from the attachment thereto that the last attempt to serve the Counter-Claim was in or about August 2011.

14. As it were, it is evident that the Applicant does not even know where the would-be defendants in the Counter-Claim currently reside after the Italian Ministry of Foreign Affairs failed to locate them in Italy as per the Letter from the Ministry of Foreign Affairs dated 26th October 2011(Annexure DJMK 5). To grant the orders sought herein would therefore be tantamount to the Court acting in vain as the Applicant evidently has no idea where the would-be Defendants are.

15. I think every litigant in our Courts has a right to an efficient and expeditious disposal of cases. Article 159(2) (b) of the Constitution exhorts Courts in exercising their Judicial authority to be guided by the principle that justice shall not be delayed. As was submitted by Counsel for the Plaintiffs/Respondents every attempt to fix this case for hearing since 2011 has failed due to the existence of this application.

16. In the circumstances herein and on the material placed before me, I am not persuaded that the delay in seeking the extension of time has been adequately explained. Neither am I persuaded that allowing this application at this stage would serve any useful purpose.

17. The upshot is that I find no merit in the Amended Motion dated and filed herein on 24th May 2016. The same is dismissed.

18. The costs shall be in the cause.

Dated, signed and delivered at Malindi this 9th day of April, 2019.

J.O. OLOLA

JUDGE