



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.513 OF 2016**

**JOSEPH NDUNGU NJOROGGE.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**GEOFFREY GITERU GITAU.....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**THE LAND REGISTRAR,**

**KIAMBU LAND REGISTRY.....2<sup>ND</sup> DEFENDANT**

**THE SECRETARY, KIAMBU LAND**

**CONTROL BOARD.....3<sup>RD</sup> DEFENDANT**

**GITHUNGURI DAIRY & COMMUNITY**

**SACCO LIMITED.....4<sup>TH</sup> DEFENDANT**

**G.K GATERE**

**T/A G.K GATERE &CO ADVOCATES.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

The matter for determination is the *Notice of Motion* application dated **29<sup>th</sup> November 2017**, brought by the 1<sup>st</sup> & 5<sup>th</sup> Defendants/

Applicants herein under **Article 159(2) (a) (d)** of the **Constitution** and **Order 50 Rules 2** and **6** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010, Section 1B, 3** and **3A** of the **Civil Procedure Code, Cap 21 Laws of Kenya** and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers:-

- 1. The Honourable Court do extend time within which the 1<sup>st</sup> and 5<sup>th</sup> Defendants to file and serve their defenses, witness statements and list of documents.**
- 2. That upon leave being granted in prayer 2 above, defence and witness statements filed out of time be deemed duly filed and served.**
- 3. The costs of the Application be provided for.**

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of **Andrew Njogu Gachoka**. These grounds are:-

- a) That the Court directed parties to file their defences and witness statements and list of documents on 15<sup>th</sup> September 2017 within 30 days.**
- b) That Applicants undertook to do the same but on the last date of filing, the clerk was unable to reach the court premises on time and found the registries locked.**

c) *The next day the Advocate filed the said documents but it was already late hence prompting the Application.*

d) *The Applicants have a plausible defence and the delay is not inordinate.*

In his **Supporting Affidavit** the Applicant's Advocate reiterated the grounds of the Application and further averred that in computing the 30 days regard should be given had to the public holidays and the weekends. He further averred that the Court is bestowed with powers to grant extension of time as long as it's done without inordinate delay for purposes of interest of justice. He further averred that the Applicants will be greatly prejudiced if the Application is not allowed.

The Application is opposed and the Respondent filed a **Replying Affidavit** dated **25<sup>th</sup> February 2018**. He averred that the Application is an afterthought and the Applicants and their Advocates have ignored the Orders and directions of the court. He further averred that the Application does not articulate reasons for the inordinate delay and that the Defence introduced in the pleadings is a simple denial and lacks merit. He alleged that the delay in filing the defence and introducing it cannot be excused and the 30 days granted to the Applicants were reasonable and therefore the defence should be expunged from the courts records. He therefore urged the court to dismiss the Application.

The Applicants filed a further **Replying Affidavit** dated **29<sup>th</sup> November 2017**, and averred that he has a legitimate claim and urged the Court to be guided by the oxygen principle and allow the filing of the defence and allow the matter to go for full hearing.

The Application was canvassed by way of written submissions and the Applicants through the **Law Firm of Gachoka & Co. Advocates** filed their submissions on the **29<sup>th</sup> March 2018**. The Applicants relied on various decided cases and submitted that the court would ordinarily be deemed to allow an application to file the defence out of time to avoid the harsh consequences that would befall a litigant. They further submitted that **Order 50 Rule 5** of the **Civil Procedure Rules** allow the court to cause for an extension of time as the case may require. They relied on the

case of **Microsoft Corporations...Vs...Mitsumi Computer Garage & Another (High Court Nairobi Civil Case No.810 of 2001**, in which the Court stated:-

***"The rules of procedure are not an end to themselves and are only a means to an end."***

They further relied on the case of **County Executive of Kisumu...Vs... County Government of Kisumu & Others (2017) eKLR**, where the Supreme Court reiterated the principles laid down in **Nicholas Kiptoo Arap Korir Salat...Vs...IEBC & Others** and the Court held that:

***"That in application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court."***

It was therefore submitted that the defence having been filed hours late, the same is not tantamount to any injustice and further the Respondent is not bound to suffer any injustice. The Court was therefore urged to allow the Application.

The Respondent through the **Law Firm of S. Ndege & Co. Advocates** filed their submissions on **17<sup>th</sup> May 2018**. It was submitted that **Article 159(2)** should not be read selectively as the same provides that justice shall not be delayed. It was further submitted that the court while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities and on this the court ought to invoke procedural technicalities for the interest of justice more so when the party

is guilty of inordinate delay. On this they relied on the case of **Wayua James & Another...Vs...Daniel Kip Karona Tarus & Another (2014) eKLR**, where the Court held:-

***"the order sought is discretionary and convincing submissions must be made to satisfy the court that the Applicant is deserving of this courts exercise of its discretion.***

***"this court finds that there are triable issues but some have been proved by admission. The Applicants were indolent and this court finds that they are not deserving of this courts exercise of its discretion."***

It was therefore submitted that the Applicants have failed to satisfy that they will suffer prejudice if the orders sought are not granted and therefore the court was urged to dismiss the Application.

The Court has now carefully considered the pleadings in general and the annexures thereto. The Court has further considered the instant **Notice of Motion** application which is brought under **Article 159 (2) (a)(b)(d)** of the **Constitution**, **Order 50 Rule 2** and **6** of the **Civil Procedure Rules** and **Sections 1A, 1B & 3A** of the **Civil Procedure Act**.

The Applicant has sought for extension of time within which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should file and serve their defences and that if Leave is granted, the filed defence and witness statements be deemed as duly filed.

The Plaintiff/Respondent opposed the said application on allegation that there was undue delay on the part of the Applicants herein to file their

respective defences.

From the court record, it is evident that the matter came for **Pre-trial Directions** on **15<sup>th</sup> September 2017** wherein, the Applicant was granted leave to file his defence and other documents. If we are to take calendar days, the **30 days** were to expire on **15<sup>th</sup> October 2017**. From the court records, the Applicants filed their **Statement of Defence on 19<sup>th</sup> October 2017**. That was about 3 to 4 days after the expiry of 30 days granted by the court.

The Plaintiff then filed a **Notice of Motion** application dated **31<sup>st</sup> October 2017**, and sought for various prayers among them an Order that the Applicant's defence be struck off for having been filed outside the stipulated time which is offensive to the Civil Procedure Rules.

However, on **15<sup>th</sup> February 2018**, the Plaintiff applied to court to abandon his application dated **31<sup>st</sup> October 2017** and chose to prepare the main suit for hearing. With the withdraw of the said application, then in essence, it meant even the prayer for striking out the defence for having been filed outside the stipulated period was also abandoned.

However, maybe due to abundance of caution, the 1<sup>st</sup> and 5<sup>th</sup> Defendants/Applicants chose to proceed with the instant application.

**Order 50 Rule 2** gives provisions of which dates shall not be computed for the purpose of counting time. It is evident that Sundays are excluded from such computation. Since the directions for filing the Defence were given on **15<sup>th</sup> September 2017**, then if Sundays are excluded, it is evident that by **19<sup>th</sup> October 2017** when the Statement of Defence for the Applicants was filed, 30 days were not yet over and the

Defence was therefore not filed out of time.

Even if the Defence was filed out of time, the delay was by about 3 to 4 days. It is trite that courts have held that where there is delay whether of one day or one year, there must be some kind of explanation for the cause of delay. See the case of **M/S Behan & Okero...Vs...Pan African Insurance Co. Kisumu High Court, Misc.No.229 of 2003**, where the Court held that:-

**“Once there is delay whether it is one day or one year, there must be some kind of explanation and the cause of delay cannot cause constitute or automatic refusal but the cause of delay must be legitimate and must be explained to the satisfaction of the court”.**

The Applicants have contended that they filed their defences on time but the Court Clerk for their advocate arrived late for the filing of the Defence and when the Registry opened next, time had lapsed. The laxity on the part of the Clerk for the Applicant's advocate should not be visited on the Applicants herein. The Applicants have offered a legitimate explanation for the delay.

The Court has considered their Defences and the said Defence have raised triable issues. The Court is vested with unfettered discretion to extend time and such discretion must be exercised judicially and the nature of the Defence has to be considered to determine whether it raises triable issues and a party with a *bonafide* defence should be assisted to canvass at the trial. See the case of **Sametract...Vs...Maqs Motor Ltd, Kisumu HCCC No.45 of 1996**.

As the Court observed earlier, the Defence filed by the Applicants herein raises triable issues and parties should be allowed to canvass their cases at the trial.

The Application is also anchored under **Article 159(2)(a)(b) & (d)** which provides that when the court is exercising its Judicial authority, it should be guided by the principles that justice shall be done to all and shall be administered without undue regard to procedural technicalities.

Having now carefully considered the rival written submissions, and the relevant provisions of law, the Court finds that the Applicants have given reasonable explanation for the delay. The application was brought without undue delay and that the Plaintiff/Respondent herein will not suffer any irreparable damage if the application is allowed.

For the above reasons, the Court finds the 1<sup>st</sup> & 5<sup>th</sup> Defendants'/ Applicants' **Notice of Motion** application dated **29<sup>th</sup> November 2017** is **merited and the same is allowed entirely in terms of prayers No.2 and 3 with costs being in the cause.**

It is so ordered.

**Dated, Signed and Delivered at Thika this 17<sup>th</sup> day of May 2019.**

**L. GACHERU**

**JUDGE**

**17/5/2019**

In the presence of

Mr. Aringa holding brief for Mr. Ndege for Plaintiff/Respondent

Mr. Njoba holding brief for Mr. Gachoka for 1<sup>st</sup> & 5<sup>th</sup> Defendants/

Applicants

No appearance for 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> Defendant

No appearance for 4<sup>th</sup> Defendant

Diana - Court Assistant

**Court** – Ruling read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**17/5/2019**