



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION OF 29 OF 2019

WATAMU MEN FRIDAYS LTD.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

REMO LENZI.....2ND DEFENDANT

SEVEN ISLANDS WATAMU LTD.....3RD DEFENDANT

RULING

1. By an Originating Summons dated and filed herein on 13th August, 2019, Watamu Men Fridays Ltd (the Plaintiff/Applicant) prays for orders as follows:

- 1. That this Honourable Court be pleased to grant the applicant herein leave to file a suit out of time.**
- 2. That the annexed draft Plaint be deemed to be duly filed within time upon payment of court filing fees.**
- 3. That the costs of this application be provided for.**

2. The application is supported by an affidavit sworn by one Samson Masaba Munikah who describes himself as one of the shareholders of the Plaintiff Company. It is premised on a number of grounds, *inter alia*, that:

- a) The Applicant stands to incur massive loss and tremendous detriment due to non-prosecution of the case;**
- b) That by virtue of a grant registered on 26th August, 1993, the Commissioner of Lands granted one Elijah Kimalel Koskei a lease of all that parcel of land known as Plot No. 696 Watamu. Subsequently in consideration of a sum of Kshs.3,700,000/- the said Elijah Kimalel Koskei transferred all his rights, title and interests in the said piece of land to the Plaintiff/Applicant on 27th September,1994;**
- c) In September 2002, the Plaintiff through one of its directors came to know that certain persons had illegally and fraudulently become freehold owners of a property described as**

Kilifi/Jimba/1125 which title was subsequently transferred to one Abbas Lali Ahmed on 28th January 2003. On or about the 17th March, 2003, the said Abbas Lali Ahmed transferred the parcel of land to the 3rd Defendant herein;

d) That the boundaries of the purported title No. Kilifi/Jimba/1125 covers an area of 6.2 Ha which measurements traverses, subsumes and otherwise totally extinguishes the Plaintiff's Plot No. 696 Watamu. The 2nd and 3rd Defendants have since fenced and developed a big hotel on the parcel known as Kilifi/Jimba/1125;

e) Upon learning of the encroachment, the Plaintiff together with one Karim Anne Challis filed Mombasa High Court Misc. Application No. 108 of 2004 seeking for leave to apply for an order of mandamus against the 1st Defendant through the Chief Land Registrar, the Director of Surveys and the Commissioner of Lands;

f) Though leave was granted on 24th February, 2004, the substantive motion has failed to proceed for a long period of time owing to numerous other applications and cases touching on the same parcel of land. In a Ruling delivered on 8th July, 2011 in one of the cases, it was directed that all Judicial Review applications touching on the parcel of land shall remain in abeyance pending determination of the civil suits filed in relation thereto. That status quo still persists;

g) The Plaintiff/Applicant is now desirous of pursuing its rights and interests in Plot No. 696 Watamu in a normal suit in light of a recent decision rendered by the Court of Appeal in a related matter in which the Plaintiff had an interest.

3. I have carefully considered the application and the elaborate Affidavit in support thereof. As the Court of Appeal stated in **Aviation Cargo Support Ltd –vs- St. Mark Freight Services Ltd, Civil Application No. 98 of 2013:**

“The order whether or not to grant extension of time or leave to file and serve a record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merits. For the court to exercise its discretion in favour of an Applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the Applicant must give a plausible explanation to the satisfaction of the court why it occurred and what steps the Applicant took to ensure that it came to court as soon as was practicable.

In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The courts are not blind to the facts and when this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance to seek extension of time or leave to file out of time.”

4. In this regard, I have noted the reasons for the delay in filing the suit and the explanation given by the Applicant in its Affidavit in support. I note that shortly after the Applicant learnt of the existence of the other title, it moved to court and filed Mombasa High Court Miscellaneous Application No. 108 of 2004 where it obtained leave to apply for an order of mandamus against the decision of the Chief Land Registrar to issue the impugned title to the intended Defendants.

5. I have also noted that the substantive motion that was filed subsequent to the leave remains pending for one reason or the other undetermined and that the Applicant is now desirous of pursuing its rights and interests in a normal suit. I am satisfied that the long delay has been caused by circumstances that were largely beyond the Applicant's control.

6. In the circumstances I find merit in the Originating Summons dated 13th August, 2019. The Applicant is accordingly granted leave to file the intended suit within 14 days from today.

7. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE