



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

CIVIL SUIT NO 30 OF 2016

JANEFFER CHEBII KIMETTO (Suing as the

personal representative of the estate of

Jonah Kipkoske arap Chumo.....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS CHEBWAGAN

YOUTH POLYTECHNIC.....DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the Respondents' application dated 25th July, 2017. The said application which is brought pursuant to order 45 Rule 1 and 2 of the Civil Procedure Rules seeks the following prayers:

i. Spent

ii. That this honourable court be pleased to review and/or set aside its orders of 12th July 2017 committing the applicants herein to serve 3 months in civil jail.

iii. Spent

iv. That the applicants be granted leave to file a defence out of time

v. That further necessary directions be given

vi. That the costs of this application be provided for.

2. The application is predicated upon the grounds stated in the Notice of Motion and the supporting affidavit of Pastor Kenneth Rotich.

3. Among the grounds cited by the applicants are the fact that the applicants were neither served with Summons to enter Appearance nor the order issued by the court. It is also alleged that some of the applicants have since retired from the Board of Governors of Chebwagan Youth Polytechnic and that the construction is project of the County Government of Kericho over which the applicants have no supervisory role. It is deponed that the plaintiff has no proprietary interest in the suit property as she was compensated for it and her former advocate had given the go ahead to the defendant to operate as she had no further claim in respect of the suit property.

4. The application is opposed by the Plaintiff/ Respondent through her affidavit sworn on the 20th February, 2018 in which she gives a chronology of events since the suit was filed. She maintains that the applicants were served with the order of injunction dated 2nd August, 2017.

5. The parties agreed to canvass the application by way of written submissions and counsels for both parties filed their respective submissions.

Issues for Determination

6. I have considered the pleadings, applications, rival affidavits as well as counsels' submissions and the following issues emerge for determination:

- i. Whether the applicant has met the threshold for review of the orders issued on 12th July 2017.
- ii. Whether the defendant should be granted leave to file its defence out of time.
- iii. Who should bear the costs of this application.

Analysis and Determination

7. With regard to the first issue, the conditions for review are set out in Order 45 (1) of the Civil Procedure Rules as follows:

“Any person considering himself aggrieved

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed and who from the discovery of a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.

8. The applicants rely on the ground that there is discovery of a new and important matter which, after the exercise of due diligence was not within their knowledge or could not be produced by them at the time when the order was made. In this regard it has been submitted that the applicants were not served with Summons to enter Appearance or the order and therefore did not know of its existence.

9. Even though there is an affidavit of service indicating that Reverend Kenneth Rotich was served in his capacity as the Chairman of the Board of Governors of Chebwagan Youth Polytechnic, it has now emerged that the said Rev. Kenneth Rotich is no longer the Chairman of the defendant Polytechnic as he resigned from the Board way back in 2010 and he does not make decisions on behalf of the defendant. It is also clear from the affidavit of service that the order was served upon Geoffrey Kemei the Secretary of the defendant and not each of the Board members. In the circumstances I find and hold that service was not properly effected on the applicants.

10. The applicants are also seeking leave to file their defence out of time. The court has a wide discretion to extend time as long as such power is exercised judiciously. In the case of **Aviation Cargo Support Limited V St. Mark Freight Services Limited (2014) eKLR** the Court of Appeal in determining an application for leave to file and serve a record of appeal out of time stated as follows:

“The order whether or not to grant extension of time to file and serve the 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 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 these facts. When this happens, the reasons why this occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to court to seek extension of time or leave to file out of time.”

11. The principle to be gleaned from the above authority is that the court has the discretion to extend time as long as the discretion is exercised judiciously.

12. It is also trite law that where service was not effected the court has no discretion but to set aside the judgment or order. See the case of **Kamji Naran V Velji Ramji 1954 EACA 20**.

13. For the foregoing reasons I grant the application in terms of prayers 2 and 4 and direct as follows:

- a. That the order committing Pastor Kenneth Rotich, Geoffrey Koros, Andrew Bii, Zipporah Soi and Geoffrey Kemei to civil jail be set aside.
- b. The defendant be and is hereby granted leave to file its defence out of time. The said defence shall be filed within 14 days from the date hereof.
- c. The cost of the application shall be in the cause.

Dated, signed and delivered at Kericho this 16th day of March, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Kemboi for Mr. Kipkoech for the Defendant.
2. Miss Cherotich for the Plaintiff.