REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC.CASE NO.327 OF 2017

JOSHUA MULUNGU MUTIE .....1ST PLAINTIFF

EASTLANDS COMMERCIAL ENTERPRISES LTD.....2ND PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS .....DEFENDANT

RULING

1. In the Application dated 21st November, 2017, the Defendant is seeking for the following orders:

    a. The Defendant/Applicant be granted leave to file its Defence, List of Documents, List of Witnesses, and Witness Statement out of time.

    b. The Defence, List of Documents, List of Witnesses and Witness Statements annexed to this Application to be deemed as properly on record.

    c. The costs of this Application be in the cause.

2. The Application is premised on the grounds that although the Defendant's advocates prepared the draft Defence and accompanying documents to be signed by the relevant officer of the Defendant, the exercise was difficult because the Defendant has several departments in the relevant Ministry; that the Plaintiffs will not suffer prejudice if the Application is allowed and that the Defendant has a Defence which raises triable issues.

3. In response to the Application, the 1st Plaintiff deponed that the Defendant was properly served with Summons to Enter Appearance; that the Defendant is guilty of inordinate and unreasonable delay in entering appearance and filing a Defence and that no reasonable explanation has been given by the Defendant for not entering appearance and filing a Defence within the requisite time.

4. The 1st Plaintiff finally deponed that none of the Defendant's officer has seen it fit to depone an Affidavit to explain why the Defence was never filed in good time. According to the Plaintiffs, they shall be prejudiced if the Application is allowed because they have applied and paid for Judgment; that the Defence does not raise any triable issues and that the Application should be dismissed.

5. In his submissions, the Defendant's advocate submitted that the court has inherent jurisdiction to admit the Defendant's Defence to enable the issues in dispute to be determined on merit; that the Civil Procedure Rules obligates the court to do substantive justice and not to dwell on technicalities and that the Defence raises triable issues.

6. The Plaintiffs' advocate submitted that no explanation has been given by the Defendant's officers for the failure to act and have the Defence filed within time and that the Defence does not raise triable issues.

7. This suit was commenced by way of a Plaint dated 26th July, 2017 and filed on the same day. In the Plaint, the Plaintiffs are seeking to be declared the legal owners of Plot No. 1 Itunduimuni Market in Wamunyu location.

8. The Affidavit of Service shows that the Defendant was served with the Summons to Enter Appearance on 4th August, 2017, a fact the Defendant has not denied. When the Defendant did not enter appearance after being served with the Summons to Enter Appearance, the Plaintiffs applied for interlocutory Judgment on 3rd October, 2017. However, the said request was not allowed by the Deputy Registrar on the ground that it is not a liquidated claim.

9. Order 6 Rule 1 of the Civil Procedure Rules prescribes the rules for entering appearance, while Order 7 Rule 1 provides for the time

within which a Defence should be filed. Order 6 Rule 1 provides as follows:

> ***"Where a Defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons."***

10. It is trite that the Civil Procedure Rules do not provide for the entry of interlocutory Judgment in land matters. Indeed, this position was reinstated by Munyao J. in the case of ***Beatrice Wanjiru Kamuri vs. John Kibira Muiruri (2016) eKLR*** in which he held as follows:

> ***"7. It will be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory Judgment, and as I have mentioned earlier, that was the reason why no interlocutory Judgment was entered for the Plaintiff when she applied for the same..."***

11. On the issue of striking out pleadings which have been filed out of time, this court, in the case of ***Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another Vs. Francis Bahati Diwani& 2 others (2014) eKLR*** held as follows:

> ***"15. In my view, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rules does not expressly provide so, which has been filed out of time is an extreme measure which is resulted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court... I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules."***

12. The above decision of this court relied heavily on the decision of the Court of Appeal in the case of ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & Others (2013) eKLR*** where the court held as follows:

> ***"Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injunctive by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness."***

13. The Plaintiffs have deponed that because they have applied for interlocutory Judgment, they shall suffer prejudice if the current Application is allowed. As I have stated above, the Application for interlocutory Judgment was denied by the Deputy Registrar. The Plaintiffs were to set down the matter for hearing in the usual manner. Consequently no prejudice will be suffered by the Plaintiffs if the Defence is filed out of time.

14. In view of the Defendant's advocates' explanation that the filing of the Defence was delayed due to the administrative bureaucracies in the Defendant's office, and in the absence of evidence to show that the Plaintiffs will suffer prejudice with the filing of the Defence out of time, I shall exercise my discretion in favour of the Defendant, and strive to do substantive justice by allowing the Application dated 21st November, 2017.

15. Considering that there is no Judgment in this matter, the issue of whether the Defendant's draft Defence raises triable issues or not does not arise. It is the Defendant's constitutional and statutory right to defend the suit. The Plaintiffs can only raise the issue of whether the Defence raises triable issues or not after the Defence has been filed and served.

16. For those reasons, I allow the Application dated 21st November, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE