



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 447 OF 2017

JOSEPH MUENDO MUNYAO.....PLAINTIFF/RESPONDENT

VERSUS

ELIUD NDETO KASYIMA.....1ST DEFENDANT/APPLICANT

NICHOLAS MWIKUYU MATHEKA.....2ND DEFENDANT/APPLICANT

RULING

1. In the Application dated 29th January, 2018, the Defendants are seeking for the following orders:

a. The Defendants/Applicants be granted leave to file the Defence annexed to this Application out of time.

b. The annexed Defence, List of Witnesses, Witness Statements and List of documents be deemed to be duly filed upon payment of the requisite filing fees; and

c. The costs of and incidental to this Application be in the cause.

2. The Application is premised on the grounds that the Defendants have a meritorious Defence that raises triable issues; that the granting of the orders sought will not occasion any prejudice to the Plaintiff that cannot be compensated by an award of damages and that the Constitution requires the court to determine disputes without undue regard to procedural technicalities.

3. In his Affidavit, the 2nd Defendant deposed that he is a member and secretary of the Uplifting Family Foundation, the purchaser of a parcel of land known as Wamunyu/Kyawango/383 (*the suit land*); that they purchased the suit land from Munyao Mbengei, the Plaintiff's father and that the Foundation has developed the plot.

4. According to the 2nd Defendant, it took three weeks for the members of the Foundation to convene a meeting of all members to agree on the appointment of an advocate and thus the delay in filing a Statement of Defence.

5. In the Grounds of Opposition, the Plaintiff averred that the Defendants have never entered appearance in the matter, which is a mandatory procedural requirement that precedes the filing of a Defence; that the suit land is currently registered in the name of the Plaintiff and that in any event, the Defendants are time barred because the suit land was registered in 1982.

6. The Plaintiff averred that the widows of the late Joshua Mwasaa Mwova did not have capacity to sell the suit land to the Defendants because the Grant was not confirmed until 21st July, 2015 and that the suit land did not belong to the Plaintiff's father as alleged but belonged to his mother, Ngunya Munyao.

7. The Defendants' advocate submitted that this court has discretion to admit the Defendants' Defence out of time for the determination of the issues on merit. The Defendants' advocate finally submitted that the Defence raises triable issues and that those issues can only be determined after trial.

8. This suit was commenced by way of a Complaint dated 11th November, 2017 on 13th November, 2017. The Defendants did not however enter appearance until 23rd January, 2018 when their advocate filed a Notice of Appointment of Advocates. The Defendants are now seeking the leave of the court to file their Defence out of time.

9. The 2nd Defendant has deponed that the Memorandum of Appearance and Defence could not be filed within the requisite time because the Uplifting Family Foundation took over three weeks to assemble its members to appoint an advocate to represent it in these proceedings. The Defendants have further argued that the Defence raises triable issues which should be determined at trial and that the filing of the Defence out of time does not prejudice the Plaintiff.

10. Although the Defendants were under a legal obligation to file their Memorandum of Appearance within fifteen (15) days from the date of service of the Summons, and thereafter file a Defence within fourteen (14) days, Order 50 Rule 6 of the Civil Procedure Rules gives this court the discretion to enlarge time upon such terms (*if any*) as the justice of the case may require, for the filing of the Defence.

11. The Defendants have given reasons as to why they did not enter appearance and file their Defence within the requisite time. Indeed, the Plaintiff has not shown the prejudice that he will suffer that cannot be compensated by way of damages if the Defence is filed out of time. As was held by the Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others [2013] eKLR*, deviation from and lapses in form and procedures which do not go to the jurisdiction of the court should not have an invalidating effect (*also See Welcome Properties vs. Karuga (2001) KLR 402*).

12. In the circumstances, I shall allow the Defendants to file their Defence out of time. The Application dated 29th January, 2018 is therefore allowed as follows:

a. The Defendants to file their Defence together with the List of Witness Statements and documents within fourteen (14) days of this Ruling.

b. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE