



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. NO. 538 OF 2014**

**RICHARD NGATIA WAWERU.....PLAINTIFF**

**VERSUS**

**ARLVIND VOHORA.....DEFENDANT**

**RULING**

Coming up before me for determination is the Chamber Summons dated 17<sup>th</sup> November 2014 in which the Defendant/Applicant seeks leave to issue a Third Party Notice against Alex Lumumba also known as Alex Namwayi and for time for making this Application be extended.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Defendant, Arvind Vohora, sworn on 17<sup>th</sup> November 2014 in which he averred that the Plaintiff and he are neighbors at Mitini Estate. He further stated that in May 2013, there were massive thunderstorm episodes within Nairobi and during one of them, an acacia tree in his compound fell and partly landed onto the Plaintiff's fence. He stated that he spoke to the Plaintiff soon after that incident and the Plaintiff requested him to have the other threes in his compound felled to avert a similar incident in the future. He averred that he spoke to a gentleman by the name of Alex Lumumba also known as Alex Namwayi who had done tree cutting on the property of one of his neighbors. He confirmed having obtained a permit from Nairobi City County on 14<sup>th</sup> May 2013 before he could undertake the tree cutting. He further averred that on 21<sup>st</sup> May 2013, Mr. Alex Lumumba sent some people to cut the trees using among other equipment, chainsaws and ropes. He stated that on the same day, he heard a big crash in his back yard and upon going outside the house to look, he saw that a tree had fallen onto the roof of a gazebo on the Plaintiff's property. He stated that he was informed by Mr. Alex Lumumba that the falling of the tree onto the Plaintiff's property was as a result of a strong wind that blew at the time the tree was being felled. He stated that he believes that the tree fell onto the Plaintiff's property due to the negligence of Mr. Alex Lumumba and/or his servants or agents in that they:

- b. Allowed the tree to fall onto the Plaintiff's property;
- b. Proceeded to fell the tree knowing that a strong wind which was blowing could change the course of the falling tree from the desired landing location;
- c. Failed to secure the tree by using a rope or any other device so as to avoid the redirection of the falling tree by the wind.

He further averred that pleadings closed on 8<sup>th</sup> November 2013 and this Application ought to have been made earlier but stated that the delay in bringing this Application was occasioned by the fact that there were several other processes going on in the matter such as transferring the case from Civil Division to the Environment and Land Court and also for pre-trial conference. He added that there will be no prejudice if this Application is allowed.

The Application is contested. The Plaintiff/Respondent filed his Grounds of Opposition dated 30<sup>th</sup> April 2015 stating that he opposed the Application on the following grounds:

1. The Application has no merit.
2. The Application is intended to delay the expeditious prosecution of the Plaintiff's claim.
3. The Application is filed out of time and no valid justification has been rendered thereof.
4. The Application is speculative and does not raise any clear ground of the issue of a Third Party Notice as proposed.
5. The Application is otherwise an abuse of court process.

The Plaintiff/Respondent filed his written submissions in which he emphasized that this Application is an afterthought intended to delay the expeditious disposal of this suit.

The main issue I am required to determine is whether to extend the time for filing this Application. Order 1 Rule 15 of the Civil Procedure Rules, 2010 provides for the court's jurisdiction and procedure to join a Third Party to a suit. The law provides that:

**Rule 15(1) "Where a defendant claims as against any other person not already a party to the suit (hereinafter called the Third Party):**

***(a) That he is entitled to contribution or indemnity;***

***(b) That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff;***

***(c).....***

***He shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter a Third Party Notice) to that effect and such leave shall be applied for by summons in chambers ex parte supported by an affidavit."***

The Defendant/Applicant admitted that pleadings closed on 8<sup>th</sup> November 2013 and that he should have made the application for leave to issue a third party notice earlier. He does not specify by when but as per the legal provision set out above, he should have filed his application within 14 days after 8<sup>th</sup> November 2013. He however filed this Application on 20<sup>th</sup> November 2014 which was one year later. The grant of leave to issue a Third Party Notice out of time is a discretionary power on the part of the court. Accordingly, the court is thereby enjoined to consider the validity of any reason given for the delay and consider the same against the period of delay and make a determination on whether such a reason is justifiable in the circumstances. At paragraph 13 of the Supporting Affidavit to this Application, the Defendant/Applicant gives his reason for delay in filing this Application to be:

**13. The delay in bringing this application was occasioned by the fact that there were several other processes going on in the matter such as transferring the case from the Civil Division to the Land & Environment Court and also for pre-trial conference.**

Does this reason in any way justify a one year delay in filing this Application? On that point, I agree with the position taken by Justice L. Onguto in **Morano Limited versus Sinohydro Corporation Ltd (2014) eKLR** where he made the following finding:

***“Extension of time for the performance of an act or process under the Civil Procedure Rules is purely a discretionary matter. In exercise of such discretionary jurisdiction, the court must act judiciously. The Court must closely scrutinize all relevant factors and ignore irrelevant ones. Thus a party must plainly explain the reasons for its failure to comply with the rules. The court will consider too the length of the delay and if any prejudice will be occasioned to the opposite party. The delay in making an application to take out third party proceedings in this matter spanned over 2 years. That is certainly inordinate if one considers the fact that the rules only donate to the defendant a fourteen day window to make the application for Third Party Proceedings. However, was and is the delay excusable? No reason appears to have been advanced ... I would not agree, the defendant was always aware of the Third Party. In all the instances reference was made to the intended third party by name. The delay in my view in the circumstances was both inordinate and inexcusable.”***

In this case, though the delay was not 2 years but 1 year, the reason advanced by the Defendant/Applicant is inadequate. The transfer of this suit from the Civil Division to this court could not possibly have in any manner caused the delay to file this Application. The Defendant/Applicant should have filed this Application before the Civil Division. They did not. Further, pre-trial procedures could not in any way have stood in the way of the Defendant/Applicant from seeking leave to take out Third Party Proceedings. I am instead convinced that there was no justifiable excuse not to seek leave to issue a Third Party Notice within the prescribed timeline.

In addition to this, there is the fact that this suit has been certified ready for hearing and the only matter standing in the way of the main trial is this Application. In my view, joining a third party at this stage is prejudicial to the expeditious disposal of the present suit. I agree with Justice Onguto in his enunciation in **Morano Limited versus Sinohydro Corporation Ltd (2014) eKLR** (supra) where he stated as follows:

***“I am conscious of the overriding objective enshrined under Sections 1A & 1B of the Civil Procedure Act as supported by Article 159 of the Constitution. Under the Double – O principle, undue regard ought not to be placed on technicalities whilst dispensing justice and when applying or interpreting the procedure rules. The main aim should always be to dispense justice and resolve disputes in a just, fair and proportionate manner. However, that objective applies to both parties in equal measure and force. Failure to comply with the various rules of procedure should never be lightly overlooked as the same rules were themselves designed to achieve the overriding objective. The rules assist in dealing with cases efficiently and expeditiously. In the instant case, allowing the application will only stagnate the case. The parties have agreed on the issues for trial and the case has indeed been set down for trial. Allowing the intended joinder of a Third Party to the proceedings will imperil the proceedings as the parties will have to start all over again. The plaintiff will be unnecessarily prejudiced. The defendant on the other hand will not be prejudiced. The defendant can always bring fresh proceedings against the intended Third Party at an appropriate time .... I decline to extend time for filing an application to take out third Party proceedings and the application is dismissed.”***

This finding falls on all fours in regard to the Application. Accordingly, this Application is hereby dismissed with costs to the Plaintiff/Respondent.

**DELIVERED, SIGNED AND DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY 2016.**

**MARY M. GITUMBI**

**JUDGE**

