



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT

E.L.C NO.48 OF 2015

COMFORT GARDEN LTD.....PLAINTIFF

VERSUS

GLADHOME (1977) LTD.....1ST DEFENDANT

TYSONS LTD.....2ND DEFENDANT

R U L I N G

1. By a ruling delivered by this court on **27th January, 2015** the plaintiff was allowed to re-amend his plaint and file the same within 7 days. In the alternative the annexed amended plaint to the application dated **18th April, 2013** was to be deemed as duly filed upon payment of the requisite fees.

2. The plaintiff took the second option and paid for the annexed Amended amended plaint on **4th February 2015**, nine days after the delivery of the ruling meaning he was two days late as per the court order issued on **25th January, 2015**.

3. As a result of the late filing of the Amended amended plaint, the defendant filed the application dated **11th February, 2015** seeking orders;

(i) That the plaintiff suit filed on 24th April 2012, and further amended plaint filed on 19th July 2012 be dismissed with costs for non-compliance of the order of this Honourable Court given on 27th January, 2015.

(ii) That costs be granted to the defendant of the suit.

4. The application is premised on the grounds on the face of the application and is supported by the affidavit of **Harmesh Kumar Mahan** sworn on the **11th February, 2015**. He depones that this Honourable Court ruled on 27th January, 2015 that the plaintiff re-amend his plaint and file the same within the next seven (7) days or in the alternative the annexed amended plaint to be deemed as duly filed upon payment of filing fees and the same to be served upon counsel for the defendant Harmesh Kumar Mahan; that the plaintiff did not comply with the orders of the court by filing their amended plaint by **2nd February, 2015** when their time expired.

5. In opposing the application, the defendant filed two affidavits. A replying affidavit sworn by **Rukwaro Gitahi** sworn on **23rd February, 2015** and another by a process server, **Dominic Mutunga**. In his affidavit, Rukwaro depones that he visited his advocates offices on **29th January, 2015** and signed the verifying affidavit to the Amended Amended plaint. He was informed by his advocate that their

court clerk, one Dominic Mutunga had travelled from Nairobi to Nyeri on **30th January, 2015** and **3rd February, 2015** with the intention of filing the further amended plaint but was unable to access the court file.

6. He was further informed that the clerk managed to make payment for the further amended plaint on **4th February, 2015** but the said payment was allowed in absence of the court file. The Amended amended plaint was served upon the defendant's counsel on **18th February, 2015** which they acknowledged and in exchange served them with the current application.

7. The deponent contends that any delay in filing the further amended plaint was occasioned by the court by changing the file number from **Nyeri HCCC No.93 of 2012** to **ELC 48 of 2015** thus the reason why the file could not be traced. He urges the court to dismiss the application as the same lacks merit.

8. In further support of the plaintiff's case, **Dominic Mutunga** a process server in his affidavit dated **19th February, 2015** depones that on **29th February, 2015** he received from the firm of **Wainaina Karimi Advocates** an Amended Amended plaint and verifying affidavit in triplicate with instructions to file the same in Nyeri High Court registry and then serve the copies upon the firm of Bali-sharma and Bali-sharma Advocates Nyeri.

9. That on **30th January, 2015** he presented his documents for filing at the Nyeri High Court registry but the file could not be traced. He returned again to the registry on **3rd February, 2015** but was informed that the file had yet to be traced. The following day he went back to the registry and the officer in charge allowed him to pay for the documents in the absence of the file.

10. After filing, he served the Amended Amended plaint on **18th February, 2015** upon the firm of Bali-Sharma and Bali-Sharma Advocates and in exchange was served with the current application and that is when he noticed that the file number had changed from Nyeri HCCC No.93 of 2012 to ELC No.48 of 2015. He went back to the Nyeri High Court registry and ensured that his documents were placed in the file.

11. I have considered the application, affidavits and authorities filed by counsel for the defendant. From the outset, I must state that I do not see what prejudice the defendant will suffer that cannot be compensated by an award of damages if the filed Amended Amended plaint is allowed to form part of the court record bearing in mind that the filing of that amended plaint was ordered by the court.

12. The explanation given by the plaintiffs counsel on why the further amended plaint was filed late is reasonable. A court of law is enjoined to be magnanimous in allowing amendments so as to allow parties ventilate the real issues in controversy. By shutting out the further amended plaint, the court may not fully and conclusively deal with the issues arising therefrom.

13. In the event, I find no merit in the application and the same is dismissed. However, I find that no explanation has been given by the plaintiff as to why the further amended plaint was served upon the defendant's counsel 14 days after filing of the same. For this reason I award the plaintiff costs for the application.

Orders accordingly.

Dated, signed and delivered at Nyeri this 9th day of March, 2015

L N WAITHAKA

JUDGE

In the presence of:

Mr. Theuri holding brief for Mr. Wainaina for plaintiff/respondent

Mr. Mugambi holding brief for Mr. Mahan for the applicant/defendant

Lydia – Court Assistant