



**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L PET NO. 13 OF 2013**

*Formerly PET NO. 2 OF 2011*

**MARIA SOTI EDUCATIONAL TRUST .....PETITIONER**

**VS**

**THE REGISTRAR OF TITLE .....1ST RESPONDENT**

**THE ATTORNEY GENERAL .....2ND RESPONDENT**

**AND**

**KENYA FOREST SERVICE.....1ST INTERESTED PARTY**

**KENYA ANTI-CORRUPTION COMMISSION .....2ND INTERESTED PARTY**

**MARIA KESUMO KEMBOI)**

**BIWOTT TARUS)**

**EVERLYN MWANZO).....3RD INTERESTED PARTIES**

***(Application to be allowed to respond to a constitutional petition out of time; principles to be applied; Attorney General as respondent alleging that it took a while to obtain instructions; application to extend time coming three years after suit was filed; whether adequate reasons given to be allowed to file response out of time; no excuse for not filing a response within three years of suit; however application allowed on basis that the State deserved to be heard on merits)***

**RULING**

1. Two applications one dated 18 February 2014 and the other dated 19 February 2014 were argued before me on 1 April 2014. The application dated 18 February 2014 has been filed by the Kenya Forest Service the 1st interested party to this suit. The second, dated 19 February 2014 has been filed by the respondents to this suit. Both applications seek extension of time to be allowed to file replying affidavits/responses to the present suit. Before I delve into the two applications, I think it is best that I give a little background to this suit.

2. This suit was instituted on 8 February 2011 by way of a Constitutional Petition. The petitioner is a trust registered under the provisions of the Trustee (Perpetual Succession) Act, CAP 164, Laws of Kenya. The

suit was instituted against the Registrar of Titles as the first respondent and the Attorney General as the second respondent. The claim of the petitioner is that it is the registered proprietor of the land comprised in the title I.R. No. 67900-LR No. 19054 which title was issued on 7 December 1995. It is its case that the respondents revoked the said title in contravention of the petitioner's constitutional rights to hold property. The revocation was vide a Gazette Notice published on 26 November 2010.

3. There were a series of applications some of which introduced several interested parties to this suit. Through these applications Kenya Forest Service was introduced as the 1st interested party, the Kenya Anti-Corruption Commission as the 2nd interested party, and a group of three persons as the 3rd interested parties.

4. On 6 November 2013, I directed that the suit would be formally heard on 19 February 2014. I directed parties to file their written submissions and be ready to make any oral submission on that day. Up to that time, no response had been filed by either the respondents or Kenya Forest Service (KFS). No objection was raised when I issued directions on the hearing of the matter. On 11 February 2014, I gave a ruling on an application by other persons who had sought to be introduced into the matter as interested parties and affirmed that the matter will proceed for hearing on 19 February 2014. On 19 February 2014 when the matter was listed for hearing, the petitioners had filed their written submissions and were ready to proceed with the hearing of the matter. It is on that day that the respondents filed their application whereas it emerged that the KFS had filed its application the previous day.

5. The two applications are similar and I will consolidate this ruling to cover both applications.

6. In the application dated 19 February 2014 filed by the respondents, the respondents have asked that I set aside the directions that I gave on 6 November 2013 on the hearing of the matter, and have sought extension of time to be allowed to file their response and written submissions out of time. The grounds upon which the application is founded are as follows :-

*(i) That the Office of the Attorney General has now received instructions belatedly from the client Ministries.*

*(ii) That counsel in conduct of the matter was on annual leave from 16 January 2014 to 16 February 2014 and was unaware of the last court order made on 11 February 2014 until late last week.*

*(iii) That it was not and has never been the intention of the Attorney General nor the duly authorized subordinate to delay the expeditious disposal of the matter.*

*(iv) That the Attorney General as defender of the public interest merits a hearing.*

*(v) That there have been numerous interlocutory applications for joinder by the parties which obscured or clouded the main matter.*

*(vi) The pleadings had by 11/2/2014 not been closed by virtue of the pending ruling.*

7. The application is supported by the affidavit of Wanjiku Mbiyu a Senior Deputy Chief Litigation Counsel in the Office of the Attorney General. She has inter alia deponed that no response to the suit has been filed due to lack of instructions from the Ministry of Forestry and Wildlife, the Ministry of Environment and Natural Resources and the Ministry of Lands, despite letters having been written to these Ministries. She has deponed that on 6 November 2013, she delegated the file to Miss Brigid Maina, her colleague, with instructions to seek leave to file a response out of time and that thereafter she went on leave. She has averred that the position of the Government is that the suit land was a gazetted forest which was illegally allocated to the petitioner.

8. *The application by KFS is premised inter alia on the reasons that :*

*(a) KFS had instructed M/s Kalya & Company Advocates who had not filed a response to the petition*

*despite being granted leave to file the same.*

*(b) That in the interests of justice, KFS should be given a chance to be heard.*

*(c) That it would be unjust to punish KFS for a mistake of its counsel.*

*(d) That the orders sought have grave and far-reaching consequences and should not be granted without hearing KFS.*

*(e) That the petitioners will not suffer any prejudice.*

The supporting affidavit is sworn by Prof. Nixon Sifuna, learned counsel appearing for KFS. He has deponed that he was instructed to take over the matter from the firm of M/s Kalya & Company Advocates on 18 February 2014, and upon taking over the matter, he discovered that no response to the petition had been filed by KFS. He has deponed that it will be in the interest of justice that they be heard as the suit land touches on a gazetted forest.

9. The Ethics and Anti-Corruption Commission, who are the 2nd interested party have not opposed the two applications. The applications have however been opposed by the petitioners and the 3rd interested parties. The petitioners filed grounds of opposition whereas the 3rd interested parties filed a replying affidavit sworn by Maria Kesumo Kemboi.

10. In their grounds of opposition, the petitioners have inter alia averred that for three years, the applicants have failed to file any response and that when the directions were issued for the hearing of the matter, no objection was raised, and that indeed, the respondents and the 1st interested party agreeable to the directions. It is stated that the directions were taken by consent of the parties and that no application to set aside the consent has been made. It is also stated that the petitioners have already filed their submissions. The third interested parties on the other hand have averred that there is no justification to allow the application which has come close to 4 years after the petition. It is also deponed that if government officials chose to ignore the advice of the Attorney General it is only themselves to blame. It is further stated that the firm of M/s Kalya & Company Advocates is a competent firm and may have had good reasons why they did not file a response. It is further averred that the applicants cannot hide on the alleged instructions said to have been given to Ms. Brigid Maina.

11. At the hearing of the application, Ms. Mbiyu for the respondents to the petition and Prof. Sifuna for KFS urged their respective applications. Mr. Karanja Mbugua for the respondents and Ms. Ledishah Kipsei for the 3rd interested parties opposed the applications. As I stated earlier, the EACC was not opposed to the two applications and Mrs. C. Natome for the EACC urged me to allow the applications.

12. I have considered the applications, the rival responses, and the submissions of counsel, and I take the following view of the matter.

13. Essentially, what the applicants want is to be allowed to file their responses to the petition out of time. It is agreed that they are indeed out of time. The principles upon which a court may allow a party to file its pleadings out of time are now well established. The oft quoted decision is that of **Shah v Mbogo (1967) EA 116** which was a decision on an application to set aside a judgment obtained ex-parte and for leave to defend. The court held that the power to allow such application is discretionary and added as follows at p123 :-

*"This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."*

14. In **Chemwolo v Kubende (1986) KLR 492** the Court of Appeal stated at p497 that when faced with an application of this nature, it is primarily important to ascertain whether there are merits which ought to be

tried. Apaloo J, in the same case at p 502, was of the following opinion :-

*" I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."*

15. In ***Mwangi v Kenya Airways Ltd (2003) KLR 486***, the Court of Appeal was faced with an application for extension of time to file an appeal out of time. The court held that the discretion of the judge handling such application is unfettered, although he could consider matters such as the length of the delay, the reason for the delay, the chances of the appeal (or case) succeeding, and fourthly, the degree of prejudice that may be caused to the respondent.

16. I will be guided by the three decisions above.

17. The length of the delay when a party seeks to file a response out of time is material. In our case, the time lapse is considerable as the applicants are about 3 years late. This is an inordinately long time for which if no good explanation is offered, I may be inclined to deny the application.

18. KFS have averred that they gave instructions to M/s Kalya & Company Advocates to file a response but they did not do so. I am more sympathetic to this reason, given that mistakes of counsel ought not to be visited upon a client.

19. The explanation offered by the State is however not too impressive. Their reason is that there was a delay in obtaining instructions. On my part I am not too convinced that such delay was excusable. I do not see how the office of the Attorney General which is the principal advisor to the Government can fail to get instructions for three years out of a department of the same Government. If an individual, who is outside Government can obtain instructions from a Government Department in a short time, the Attorney General should in fact obtain instructions much quicker. I must say that I am not particularly contented by the tardy and dilatory manner, that seems to have become the norm, in which the office of the Attorney General handles its matters. Such ineffectiveness needs to come to an end especially given that the office of the Attorney General is the defender of public interest. It is time that the office of the Attorney General and all its personnel raise the bar on their performance in attending to litigation within time. I personally do not see any excuse that may have held back the office of the Attorney General from seeking instruction for 3 years. If any seriousness had been put to obtain instructions, for sure, it would not have taken 3 years to get instructions. The excuses given by Ms. Mbiyu that she was on leave have also not impressed me and I am not touched by them. It cannot be claimed that in the absence of Ms. Mbiyu, or any other personnel for that matter, nothing can move in the office of the Attorney General.

20. That said, I think there are serious issues that have been raised in this petition which merit an opportunity being given to the State and to KFS to respond to them. The State and KFS have raised the issue that the suit land was a gazetted forest which was improperly allocated to the petitioner. I think given the weight of issues, the State and KFS deserve a hearing.

21. I do not see what major prejudice will be caused to the petitioners which cannot be compensated by an award of costs. The petition has not yet been heard, and even though the petitioners have filed submissions, they can modify them or supplement them in light of any response that may be filed by the State or KFS. I think the prejudice to the petitioner is less than the prejudice the State and KFS would suffer if I am to shut them out of this suit.

22. For the reasons above, I allow the applications dated 18 February 2014 and 19 February 2014. I direct that both the State and KFS do file their responses to this petition within the next 30 days. The State and KFS will also shoulder the costs of their respective applications.

23. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Miss M.M. Gakuo holding brief for M/s Shapley Barret & Co Advocates for the petitioners.***

***Mr. P. Kuria of the state Law office present for the respondents.***

***Prof Nixon Sifuna present for 1st interested party.***

***Mrs Christine Natome for 2nd interested party.***

***Ms Ledishah J. Kipseei present for 3rd interested party.***