



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC SUIT NO. 416 OF 2009**

**MORAHO LIMITED.....PLAINTIFF**

**-VERSUS-**

**SINOHYDRO CORPORATION LTD.....DEFENDANT**

**RULING**

1. It has for a long time been possible to join additional parties to proceedings in circumstances where the same issues of fact or law arise between the claimant and the defendant as arise in an action between the defendant and the third party. The Civil Procedure Rules give the defendant an avenue through which the defendant is to prompt the court for such joinder.
2. Through an ex parte Chamber Summons brought under Order 1 Rule 15 of the Civil Procedure Rules and dated the 17<sup>th</sup> November 2014 the Defendant ,in this cause, seeks orders
  - a. that the Court be pleased to extend time within which the application [to issue third party notice] is to be made
  - b. That leave be granted to the Defendant to issue third party notice upon Beatrice Wachera Mwangi *alias* Rose Nyambura *alias* Wacera Mwangi
  - c. That costs of the application] be in the cause.
3. The application was grounded on the fact that the Defendant had finally managed to identify and trace the intended third party. An affidavit in further support of the application was duly sworn by a manager of the Defendant Company. The application itself was urged before me by Mr. Wandati on 28<sup>th</sup> November 2014.
4. I have placed consideration on the submissions of learned counsel on behalf of the Defendant /applicant. I have also considered the application wholly. The suit against the Defendant entailed a claim in an actionable trespass *quare clausum fregit*. The Plaintiff was filed on 21st August 2009. The Defence was filed on 23<sup>rd</sup> November 2011. The pleadings thereafter closed in mid-December 2011.
5. Due to the statutory court vacation, the Defendant pursuant to the relevant rules had up till the end of January 2012 to file any application for third party proceedings. The Defendant did not do so but instead prepared the case for trial following the Court's directions on 3<sup>rd</sup> May 2012. Over two years later, the Defendant still had not applied to take out third party proceedings. There was

delay. It is that delay that the Defendant wants the Court to excuse. The court's discretion is sought for the time to be extended.

6. Extension of time for the performance of an act or process under the Civil Procedure Rules is a purely 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 delay and if any prejudice will be occasioned to the opposite party.
7. The delay in making an application to take out third party proceedings in this matter spanned over two years. That is certainly inordinate if one considers the fact that the rules only donate to a defendant a fourteen-day window to make the application for third party proceedings.
8. However, was and is the delay excusable? No reason appears to have been advanced by the Defendant. Counsel for the Defendant reiterated the statement on the face of the application that "*the Defendant has now been able to trace and identify the third party*". This leads to the assumption that the Defendant genuinely spent a while , if not a good two years, tracing the intended third party.
9. I would not agree. The Defendant was always aware of the third party. The Replying Affidavit filed on 28<sup>th</sup> August 2009 by the Defendant made reference to the intended third party and so did the Supplementary Affidavit filed on the 10<sup>th</sup> day of September 2009 by the Defendant. The Statement of Defence filed on 23<sup>rd</sup> November 2011 as well made reference to the intended 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.
10. I am conscious of the overriding objective enshrined under Sections 1A & 1B of the Civil Procedure Act (Cap 21) as supported by Article 159 of the Constitution. Under the double-O-principle, undue regard ought not be placed on technicalities whilst dispensing justice and when applying or interpreting the procedural 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 with equal measure and force.
11. 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: see Section 1B of the CPA.
12. In the instant case, allowing the application will only stagnate the case. The parties have agreed on the issues for trial and the case had 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.
13. The now obvious result of the foregoing is that I will not exercise my discretion in favour of the Defendant in view of the inordinate and inexplicable delay. I decline to extend time for filing an application to take out third party proceedings. The application dated 17<sup>th</sup> November 2014 must be dismissed, and it is, but with no order as to costs.

14. Orders accordingly.

**Dated, signed and delivered at Nairobi this 5<sup>th</sup> day of December, 2014.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

.....

for the Applicant

.....

for the Respondent