



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MUSINGA, GATEMBU, & M'INOTI, JJA.

CIVIL APPEAL NO. 84 OF 2012

BETWEEN

THE ATTORNEY GENERALAPPELLANT

AND

TORINO ENTERPRISES LIMITED.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Gacheche, J. dated 4th July 2011

in

HC Pet No. 38 of 2011)

RULING OF THE COURT

We were poised to hear this appeal on 9th December 2019 when **the respondent, Torino Enterprises Ltd**, informally applied for admission of a replying affidavit, supplementary record of appeal, written submissions, and a list and digest of authorities out of time. The respondent filed the said replying affidavit and the supplementary record of appeal to respond to additional evidence adduced by the appellant pursuant to leave granted by this Court on 22nd February 2019. The respondent's counsel, **Dr Kiplagat**, explained that the respondent was unable to file the replying affidavit and the supplementary record of appeal on time because it had to first to look for evidence, which was not readily available, to counter the additional evidence adduced by the appellant. He urged us to exercise our discretion and admit the said documents out of time in the interest of justice.

The appellant, the Attorney General, while not objecting to the admission of the respondent's written submission and list and digest of authorities, raised a two-pronged objection to the respondent's application for extension of time. In the first limb of the objection, which was relevant to the application for extension of time, **Mr. Eredi**, learned counsel for the appellant, submitted that respondent's delay in filing both the replying affidavit and the supplementary record of appeal was inordinate. He contended that by the order of the Court dated 22nd February 2019, the respondent was granted leave to file a replying affidavit, if any, within 14 days of service of the appellant's additional evidence. He urged that although the appellant's additional evidence was filed and served on 8th March 2019, the respondent did not file its replying affidavit and supplementary record of appeal until 3rd December 2019, which was inordinate and inexcusable delay. He also contended that the respondent's delay was intended to conduct the appeal by ambush.

On the second limb of the objection, which, with respect, cannot be properly entertained before determination of the application for extension of time, counsel submitted that the documents in the replying affidavit were prejudicial to the appellant, were classified and marked "secret" and inadmissible under **sections 79, 80, 81 and 82** of the **Evidence Act**.

In response, the respondent maintained that it had presented good reasons why it was not able to honor the timeline set by the court and on the basis of which the court could exercise discretion in its favour. The respondent further urged us not to deny it the opportunity to respond to the appellant's newly adduced evidence, maintaining that the court must first look at its rebuttal evidence to enable it determine its admissibility and relevance.

Before we address the appellant's objection, it is apt to set out the brief background to the appeal. On 10th March 2011, the respondent filed a petition in the High Court claiming that it had acquired the property known as **LR No. 22524**, measuring 83.910 Ha (the suit property) from the original allottee, **Renton Company Ltd**, for a consideration of **Kshs 12,000,000**, and that subsequently the **Department of Defence** trespassed on the said property and unlawfully encroached and fenced off 90 acres thereof. The respondent therefore prayed for among others, declarations that the occupation of part of the suit property by the Department of Defence amounted to compulsory acquisition of the

suit property and was in violation of the right to property under **Article 40** of the **Constitution**, restoration of possession or in the alternative payment of **Kshs 1, 530,000,000**. The appellant opposed the petition and denied encroaching on the suit property. It averred that the suit property was public property and its acquisition by the respondent was illegal and unlawful.

By a judgment dated 4th July 2011, the High Court (**Gacheche, J.**) found in favor of the respondent and direct the appellant to restore possession of the suit property to the respondent within 30 days or in the alternative to pay to it **Kshs. 1,530,000,000**. The appellant was aggrieved and filed the present appeal, followed by an application for leave to adduce further evidence, which it contended would show that the suit property was indeed illegally obtained by the respondent.

Upon hearing the application, this Court allowed the same and granted the appellant leave to adduce additional evidence. The terms of leave were as follows:

“1. Leave be and is hereby granted to the applicant to adduce and file additional evidence limited to the following documents:

i) A copy of the survey plan 179/18 for LR No. 13461;

ii) A copy of letter of allotment dated 19th December 1999;

iii) A copy of the transfer signed on behalf of Renton Co Ltd;

iv) A copy of the letter from the Department of Defence to the Commissioner of Lands dated 22nd February 1995;

v) Letters from Head of the Public Service to the Commissioner of Lands dated 3rd August 1998 and 8th July 1999;

vi) The plaint and defence in Nairobi ELC No. 282 of 2012

2. The additional evidence be adduced by means of affidavit and filed as supplementary record of appeal within 14 days of the date hereof;

3. The respondent to file a replying affidavit, if any, to the supplementary record of appeal within 14 days of service;

4. Costs of this application to abide by the outcome of the appeal.”

As earlier intimated, pursuant to the above order, the appellant filed the supplementary record of appeal on time but the respondent did not file its replying affidavit until about ten months later.

Turning to the objection raised by the appellant, it is trite that although expeditious determination of disputes demands that timelines set by the Court must be strictly adhered to, the Court still has unfettered discretion to extend time if the ends of justice so demand. Two clear constitutional principles, articulated in **Article 159** of the Constitution, are always in play in objections like the one raised before us, and calls for pragmatic balance rather than robotic adherence. The first principle, set out in **Article 159(2)(b)**, demands that justice shall not be delayed, hence set timelines must be respected. The second principle, in **Article 159(2) (d)** demands that justice shall be administered without undue regard to procedural technicalities, meaning that where the interests of justice so demand, the Court may excuse non-compliance with the timelines it has set. It is also for that reason that the overriding objective demands of the Court, when it is interpreting the law or exercising its powers, to act justly in every situation, to pay regard to the principle of proportionality, to create a level playing ground for all the parties and as much as possible, to dispose of disputes on merits rather than on technicalities. (See ***Kensilver Express Ltd & 137 Others v. Commissioner of Insurance & 4 Others, CA No Nai. 39 of 2009***).

In this case the respondent's delay is not insubstantial. However, the respondent has explained that from the nature of the documents presented by the appellant in the additional evidence, it required more time to source for and present its rebuttal evidence. Purely from the peculiar circumstances of this appeal where the appellant was allowed to present new and additional evidence, we are satisfied that it will not serve the ends of justice to summarily deny the respondent an opportunity to respond to that evidence merely because it was not able to comply within the time set by the Court. We also take into account that one of the appellant's primary considerations was that if the appeal was heard on 9th December 2019 as scheduled, the appellant was going to be ambushed and prejudiced. That, however, is no longer a genuine concern because the appellant will now have sufficient time to consider the respondent's evidence in rebuttal.

As regards the admissibility of the respondent's rebuttal evidence to the appellant's additional evidence, we think that this objection is premature. The issue before us is whether we should extend time in favor of the respondent and deem its documents, filed out of time, to have been filed within time. It is only after the determination of the application for extension of time that the issue of admissibility of the presented evidence will be considered and at that, during the hearing of the appeal. The appellant is clearly conflating issues when he mixes matters of extension of time with relevance and admissibility of evidence. Our perception therefore is that the Court, when it hears the appeal, will have a proper opportunity to weigh that evidence and determine its admissibility and relevance relative to the new and additional evidence adduced by the appellant in its supplementary record of appeal.

For the foregoing reasons, we allow the respondent's informal application for extension of time and deem its replying affidavit, supplementary record of appeal, written submissions and list and digest of authorities filed on time. Any objections as to relevance and admissibility of that evidence, will be dealt with at the hearing of the appeal. Costs of this objection will abide the outcome of the appeal. It is so ordered.

Dated and delivered at Nairobi this 24th day of January, 2020

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR