



Mungai & another (Suing as the Personal Representative of the Estate of Stephen Mungai Kamau) v Allied Group for Business Investment Limited & 3 others (Environment & Land Case 981 of 2015) [2023] KEELC 287 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 981 OF 2015
OA ANGOTE, J
JANUARY 26, 2023**

BETWEEN

**RICHARD WARUINGI MUNGAI 1ST PLAINTIFF
GEORGE MACHEHO MUNGAI 2ND PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
STEPHEN MUNGAI KAMAU**

AND

**ALLIED GROUP FOR BUSINESS INVESTMENT LIMITED 1ST DEFENDANT
BEN NJAU KAYAI T/A NJAU KAYAI & CO. ADVOCATES 2ND DEFENDANT
ROGER OTIENO SAGANA & ABDIWAHID AHMED BIRIQ T/A SAGANA,
BIRIQ & CO. ADVOCATES 3RD DEFENDANT
THE CHIEF LAND REGISTRAR 4TH DEFENDANT**

RULING

1. The 2nd plaintiff herein filed a notice of motion dated July 1, 2022 in which he has sought the following orders:
 - a. That this court be pleased to enlarge the time within which the 2nd plaintiff may file his reply to defense and defense to counterclaim.
 - b. That this honourable court be pleased to grant leave to the 2nd plaintiff to file his reply to defense and defense to counterclaim.
 - c. The annexed reply to defense and defense to counterclaim be deemed duly filed upon payment of the requisite court fees.



- d. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it as well as the affidavit sworn in support by the 2nd plaintiff. The 2nd plaintiff deponed that his previous advocates neglected to file a reply and defence to the 1st defendant's defence and counterclaim dated December 21, 2015 and that this failure of the advocate only came to light when the 1st defendant filed an application dated August 3, 2021.
 3. The 2nd plaintiff deponed that the mistakes of counsel should not be visited on innocent litigants; that the 2nd plaintiff has a constitutional right to defend the counterclaim filed against him and that the defendants will not suffer any prejudice if the orders sought are granted.
 4. The 1st defendant, in its grounds of opposition dated October 14, 2022, averred that the application is an abuse of court process as the plaintiffs were served with the defence and counterclaim in 2015; that the delay is inordinate and the reasons advanced for the failure to file the reply and defence to the counterclaim are unsatisfactory and do not warrant the exercise of discretion on the plaintiff's behalf, and that the 1st defendant will be prejudiced because the plaintiff is guilty of laxity in prosecuting this suit, including failure to file the reply to defence and defence to counterclaim within the lawful timelines.
 5. The 3rd defendant opposed the application vide a replying affidavit in which he deponed that this application is a tactic by the 2nd plaintiff to delay the determination of this matter and that pleadings in this matter closed in 2019.
 6. According to the 3rd defendant, the matter has been scheduled for hearing severally and adjourned at the instance of the plaintiffs and that since this suit was instituted, the plaintiffs have depicted lack of interest by seeking unnecessary adjournments or filing extraneous applications.
 7. The 3rd defendant has argued that allowing this application will delay the hearing and determination of this suit; that this matter has been pending before the court for seven years and is yet to be set down for hearing; that the suit has prejudiced the 3rd defendant whose reputation has been on the line for such number of years and that the plaintiffs have not shown the steps they have taken to comply and prosecute their matter.
 8. The 3rd defendant deponed that allowing the orders sought would shift the footing of the parties to the advantage of the plaintiffs, yet parties should have equal footing, and that should this court find it fit to allow the application, same must be granted under stringent conditions to ensure the plaintiffs prosecute their case, failure to which the suit be dismissed with costs to the 3rd defendant. All the parties filed their respective submissions and authorities which I have considered.

Analysis and Determination

9. The only issue for determination before this court is whether the court should enlarge time within which the 2nd plaintiff should file his reply to defence and defence to counterclaim. The 1st and 3rd defendants have vehemently opposed the application, which they have termed as an abuse of the court process and meant to delay the hearing of the suit.
10. This suit was instituted in 2015 by the plaintiffs, who averred that the 1st plaintiff owned the parcels of land known as LR No 36/111/96 and LR No 36/111/13 situate in Eastleigh, Nairobi county, and that the 2nd plaintiff held such property in trust for him. It is their case that the 2nd defendant unlawfully purported to sell the suit property to the 1st defendant by forging the 1st plaintiff's signature and that



the 3rd defendant unlawfully issued a notice to vacate to the plaintiffs' tenants and also presented for registration a fraudulent indenture in respect to the suit property.

11. The plaintiffs, Richard Waruingi Mungai and Stephen Mungai have in the course of trial passed on, which has had a significant impact on the prosecution of this suit. While the 2nd plaintiff was duly substituted, this court ruled on May 26, 2022 that the 1st plaintiff's case had abated.
12. This application has been brought under sections 1A,1B and 3A of the *Civil Procedure Act* as well as order 51 rule 1 of the *Civil Procedure Rules*. Section 1A of the *Civil Procedure Act* sets out the overriding objective of the Act, which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
13. Section 1B prescribes the duty of the court in furthering the said overriding objective, which is to handle all matters before it for purposes of attaining the aims of just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and the use of suitable technology.
14. Extension of time is an equitable remedy, which is to be exercised at the discretion of the court. Section 95 of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules* set out the court's wide discretionary power to enlarge such time upon such terms as the justice of the case may require.
15. The law provides that an order for enlargement of time may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extend such time and of any order made thereon will be borne by the parties making such application, unless the court orders otherwise.
16. The principles for extension of time were ably set out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where it held that a court exercising its discretion to extend time had to consider the following factors:
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."



17. In *Whispering Palms Estate Limited & 3 others v Radio Africa Group Limited & 3 others* [2021] eKLR the court held that where delay is in question, the court ought to consider not just the length of such delay, but the circumstances of the case as well:

“In handling a raised issue of delay, the court should not only confine itself to the number of days, weeks, months and years. It should consider the period plus all other factors/ circumstances of the case. Would there be any serious prejudice to either of the parties if the suit is dismissed or sustained? Factors to be considered would include: the nature of the case, importance of the claim or subject matter, legal capacity of parties and their rights. See *Allen v Alfred Melphine & sons* [1968] IALLE.R 543; *Agip Kenya Limited v Highlands Tyres Limited* [2001] KLR 630; *Birket v James* [1978] AC 207.”

18. Taking into consideration the duration of delay and the circumstances of the case, what is for consideration is whether the 2nd plaintiff has laid a basis to the satisfaction of this court that the delay in filing the reply to defence and defence to counterclaim was excusable, and that the defendants will not suffer prejudice if the orders prayed for are granted.
19. The proceedings herein show that the 1st defendant’s defence and counterclaim dated December 21, 2015
20. It is needful to note that the 2nd plaintiff came on record on May 8, 2017, following the demise of the deceased in January 2016. Further, this suit was delayed between February 2019 and December 2019 when the 1st plaintiff fell ill and succumbed to his illness. The unfortunate demise of the plaintiffs was beyond their control. In that respect, this court finds that the delay in prosecuting the suit was caused partially by the death of the plaintiffs.
21. The 2nd plaintiff has attributed the failure to file the requisite pleadings within the stipulated timelines to the mistakes of its previous counsel on record. In *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR, Apaloo JA held as follows:
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. 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 the purpose of imposing discipline.”
22. From the record of the court, the 2nd plaintiff’s current advocates came on record on January 3, 2020, two years before this application was filed. It is thus not sufficient for the 2nd plaintiff to lay this error on his previous advocate. A litigant must, after all, be vigilant, making all efforts to follow up on the conduct of their case with their advocate.
23. This is especially critical when seeking an equitable remedy such as extension of time, as equity aids the vigilant and not the indolent. However, despite the delay, the 2nd plaintiff has demonstrated an interest in proceeding with the case, and more so, defending the counter claim.
24. Despite the prolonged delay by the 2nd plaintiff in filing the current application, and considering that trial has not commenced, and will not commence in the next two weeks, I am persuaded that justice in this matter will be done and seen to have been done by allowing the 2nd plaintiff’s application. That way, all parties will get an opportunity to ventilate their cases.



25. In view of the foregoing, the court allows the 2nd plaintiff's application as follows:

- a. This court hereby enlarges the time within which the 2nd plaintiff may file his Reply to defence and defence to counterclaim.

*

b. The 2nd plaintiff is granted leave file his reply to defence and defence to counterclaim upon payment of the requisite fees within 14 days of the date hereof.

c. The 2nd plaintiff to pay to the 1st and 3rd defendants costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JANUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Bunyu for plaintiff/Applicant

Mr. Sagana for 3rd defendant

Mrs Chelagat holding brief for Isa for 1st defendant

Mr. Mulwa for Intended 1st Party

Mr. Allan Kamau for 4th defendant

Court Assistant – Valentine

