



**Sheikh v Narok County Government & another (Environment & Land
Case 5 of 2018) [2023] KEELC 16357 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 5 OF 2018
CG MBOGO, J
MARCH 23, 2023**

BETWEEN

ABDI NASIR SHEIKH PLAINTIFF

AND

NAROK COUNTY GOVERNMENT 1ST DEFENDANT

ABDI MOHAMED YUSUF 2ND DEFENDANT

RULING

1. Before this court for determination is a chamber summons application dated June 27, 2022 and a notice of motion application dated November 1, 2022.
2. The chamber summons application is filed by the 1st defendant and expressed to be brought under Order 2 Rule 15 (1) (c), Order 3 Rule 2 (a), Order 4 Rules 1 (2), Order 8 Rule 6, Order 17 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act seeking the following orders: -
 1. That the honourable court be pleased to strike out the amended plaint dated May 27, 2022 for non-compliance with Order 4 Rule 1 (2) of the Civil Procedure Rules 2010.
 2. That in any event, this suit be dismissed for want of prosecution.
 3. That the costs of this application be borne by the plaintiff.
4. The application is premised on the grounds on the face of it and more particularly as set out in the supporting affidavit.
5. The application is supported by the affidavit of the 1st defendant sworn on June 27, 2022 by Elizabeth Sanangoi Olochoki-County Secretary. The 1st defendant deposed that ever since this matter came up for site visit on December 6, 2019, the plaintiff has failed to take the necessary steps to prosecute the



matter. Further, that when this matter came up for directions on January 18, 2022, this court issued directions which the plaintiff has failed to comply with and that despite the matter being mentioned several times, the plaintiff vide mention on May 31, 2022 did not comply with directions issued on January 18, 2022 and was in violation of Order 3 Rule 2 (a) and Order 4 Rule 1 (2) of the [Civil Procedure Rules](#) as it was not accompanied by a verifying affidavit.

6. The 1st defendant further deposed that during the mention of the matter on June 8, 2022, it emerged that the plaintiff had once again filed two other amended plaints and served the same on June 2, 2022 and June 8, 2022. Further, that the 1st defendant's counsel pointed out these issues to the court that unless the same is rectified, it will file an application seeking that the plaint be struck out.
7. The 1st defendant deposed that the plaintiff is not only indolent in advancing this matter but has willfully disobeyed the directions of this court and is no longer interested in prosecuting this suit.
8. The 1st defendant deposed that it continues to suffer immense prejudice as a result of the plaintiff's indolence and it would be in the interest of justice that the application is allowed.
9. The application was opposed by the replying affidavit of the plaintiff sworn on August 31, 2022. The plaintiff deposed that at the time the matter proceeded for hearing at the site on December 6, 2019, the 1st defendant had not filed and served its defence and that when the matter came up for mention on February 25, 2020, the 1st defendant sought for 7 days to file and serve its statement of defence and accompanying documents.
10. The plaintiff further deposed that when this matter came up for mention on March 16, 2020 and April 29, 2020, the 1st defendant was yet to file its statement of defence. Further, the 2nd defendant filed an application seeking to be enjoined in the matter which was heard and determined vide a ruling delivered on November 8, 2021.
11. The plaintiff further deposed that when this matter came up for mention on January 18, 2022, the 1st defendant through its counsel sought leave to file and serve its statement of defence. That the 2nd defendant was also given time to regularize their appearance.
12. The plaintiff further deposed that the inability to file and serve his amended plaint was due to the fact that he was out of the country and he believes that his advocate filed and served the amended plaint upon counsel for the defendants on May 31, 2022. Further, that although it was irregular to direct that he amends and serve his amended plaint, his advocate had to go out of his way in forming an opinion on the probable cause of action against a party in this matter who had not filed and served any statement setting out his cause of action and or nature of claim against him.
13. The plaintiff further deposed that the [Civil Procedure Rules](#) provides that once a party has been admitted into the proceedings, they are required to file and serve a statement stating their cause of action which was never done by the 2nd defendant herein and if there is any delay in prosecution of the matter, then the 1st defendant has contributed substantially to the delay in not filing and serving its statement of defence, witness statements and list of documents if at all.
14. In conclusion, the plaintiff deposed that since he had filed a verifying affidavit accompanying the plaint on January 18, 2018, there is no requirement that a new verifying affidavit be filed alongside an amended plaint.
15. The notice of motion application dated November 1, 2022 is filed by the plaintiff and expressed to be brought under Article 50 and 159 of the [Constitution](#) and Sections 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#) seeking the following orders: -



1. Spent.
2. That this honourable court be pleased to arrest its ruling on the 1st defendant's/respondent's application dated the June 27, 2022 fixed for the 28th day of November, 2022 pending the hearing and determination of this application inter-parties.
3. That the plaintiff/applicant be granted leave to comply with the directions of this honourable court by filing an amended plaint that complies with the provisions of Order 4 Rule 1 (2) of the *Civil Procedure Rules, 2010*.
4. That the plaintiff/applicant amended plaint filed herewith be deemed to be properly on record and in compliance with the provisions of Order 4 Rule 1 (2) of the *Civil Procedure Rules, 2010*.
5. That this honourable court be pleased to issue further orders and or directions as shall deem fit and just in meeting the ends of justice.
6. That the costs of this application be in the cause.
16. The application is premised on the grounds on the face of it and more particularly as set out in the supporting affidavit of the plaintiff.
17. The application is supported by the affidavit of the plaintiff sworn on even date. The plaintiff deposed that his failure to file a verifying affidavit accompanying the amended plaint was as a result of his erroneous interpretation of the provisions of Order 4 Rule 1 (2) of the *Civil Procedure Rules* as he was of the considered view that since he had filed a verifying affidavit accompanying the plaint dated January 18, 2018, there was no requirement that a new verifying affidavit be filed alongside an amended plaint.
18. The plaintiff further deposed that after having a closer look at the provisions of law and decided cases, he is of the view that a verifying affidavit ought to be filed with the amended plaint. Further, that this court has powers and the discretion to grant the orders in the interest of justice without due regard to technicalities. Also, that the omission or failure to attach the verifying affidavit is curable and in any case the defendants will not be prejudiced in any way.
19. The plaintiff further deposed that this court has powers, discretion and the jurisdiction to arrest its ruling slated to be delivered on October 28, 2022 pending the hearing and determination of this application inter partes.
20. This court on November 24, 2022 directed that both applications be canvassed by way of written submissions. However, none of the parties filed written submissions to the chamber summons dated June 27, 2022.
21. With regard to the application dated November 1, 2022, the plaintiff filed written submissions dated February 17, 2023. The plaintiff raised two issues for determination as below: -
 1. Whether the circumstances of this case are of such nature as to warrant this court to invoke the overriding objectives of Sections 3 & 3A of the *Civil Procedure Act* and Article 159 (2) (d) of the *Constitution*.
 2. Whether a mistake of an advocate can be visited on the client?
22. On the first issue, the plaintiff submitted that Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 and Section 59 of the *Interpretation and General Provisions Act* Cap 2 clothes this court with powers to allow pleadings filed out of time especially where there are no mala fides on the part of the party



- seeking the court indulgence. Further, that the inadvertent failure by a party should not render civil proceedings incurable now that the plaintiff has endeavoured to rectify the mistake. The plaintiff relied on the cases of *Kenya Power & Lighting Company Limited versus Benzene Holdings Limited T/A Wyco Paints*, Civil Appeal No 132 of 2014, *DT Dobie & Company (Kenya) Limited versus Joseph Mbaria Muchina & Another* [1980] eKLR, *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & Others* [2013] eKLR, *Central Kenya Limited versus Trust Bank Limited & 5 Others* [2000] eKLR and *Kenya Ports Authority versus Kenya Power & Lighting Company Limited* [2012] eKLR.
23. The plaintiff further submitted that Article 159 (2) (d) of the *Constitution* makes it clear that when called upon to administer justice, the courts shall not be blindly enslaved by procedural technicalities as was held in the cases of *First National Finance Bank Limited versus Universal Apparels (EPZ) Limited & 2 Others* [2017] eKLR, *Standard Chartered Financial Services Limited & 2 Others versus Manchester Outfitters (Suiting Division) Limited (Now known as King Wollen Mills Limited & 2 Others* [2016] eKLR.
 24. The plaintiff further submitted that in appropriate cases, the court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. The plaintiff submitted that the advocate genuinely and without prejudice believed that since he had filed a verifying affidavit accompanying the plaint dated May 18, 2018, there was no requirement that a new verifying affidavit ought to have been filed accompanying the amended plaint. Reliance was placed in the case of *Richard Murigi Wamai versus Attorney General & Another* [2018] eKLR.
 25. On the second issue, the plaintiff submitted that the advocate regrettably and erroneously interpreted the provisions of Order 4 Rule 1 (2) of the *Civil Procedure Rules* and for this reason, a mistake of counsel should not be visited upon a litigant. That in the interest of justice and the stage of this suit, no prejudice would be suffered by the defendants if the amended plaint is allowed.
 26. The 1st defendant filed written submissions dated March 3, 2023. The 1st defendant raised one issue for determination which is whether the circumstances of this case warrants the arrest of the ruling of this honourable court that was set to be delivered on the 28th day of November, 2022.
 27. The 1st defendant submitted that the application has been brought in bad faith as the plaintiff had enough time to file an amended plaint compliant with the relevant salient provisions of the law. Further, that the excuse given by the plaintiff is shallow as he is a person who has the provisions of the law and judicial precedents at his disposal and therefore had the know-how.
 28. The 1st defendant further submitted that this court ought to take notice that when the matter was mentioned on June 8, 2022 in a bid to offer justice to all the parties, this court granted the plaintiff leave to amend his plaint which he failed to follow the directions of the court thus necessitating the filing of the application to strike out.
 29. The 1st defendant submitted that this court has severally exercised its discretion by affording the plaintiff more time but he failed to comply. The 1st defendant relied on the provisions of Section 59 of the *Interpretation and General Provisions Act*, Cap 2 and submitted that it would be mala fides on the plaintiff's part to seek the court's indulgence once again after being afforded such opportunity severally.
 30. The 1st defendant submitted that the inadvertent failure by the plaintiff in rectifying his pleadings cannot be termed as a mistake and that the indolence on the part of the plaintiff has been derailing the parties herein. Further, that the plaintiff was aware of the consequences of the application dated June 27, 2022 and there is no new and important fact that the plaintiff has brought to warrant the arrest of



- this ruling and which is causing anxiety and anguish on the 1st defendant. The 1st defendant relied on the case of *Mary Igoki Mutuaruchi versus Johnson Rwigi* [2019] eKLR.
31. The 1st defendant submitted that none of the reasons advanced by the plaintiff warrant the arresting of the ruling as the circumstances in this case purely indicate the plaintiff has not been vigilant and has delayed in the filing and service of the amended plaint. The 1st defendant further submitted that the instant application is not based on any exceptional and unusual circumstance as was held in the case of *Tom Oywa Mboya versus Director of Public Prosecutions* [2022] eKLR.
 32. I have analysed and considered both applications, relevant replies and the written submissions to the application dated November 1, 2022.
 33. The issues for determination at this stage are as follows: -
 - a. Whether this court ought to strike out the amended plaint dated May 27, 2022.
 - b. Whether this court should grant leave to the plaintiff to file an amended plaint annexed to its application dated November 1, 2022.
 - c. Who should bear the costs.
 34. In answering the above questions, it is necessary for this court to get to the bottom of both applications which as admitted by both parties appear to date back to the events that took place on December 6, 2019.
 35. A perusal of the court proceedings shows that on December 6, 2019, the court went for a scene visit of land parcel plot Narok Township/ 378 where the plaintiff testified. The proceedings on the said date show that the plaintiff's testimony was to be completed in court. Further hearing was slated for February 25, 2020. On February 25, 2020, the defendant was granted leave to file its defence within 14 days.
 36. This matter came up again before court on April 29, 2020 where the 1st defendant sought for more time to file its defence and statement. On January 18, 2022 the 1st defendant sought for time to file its defence and comply with Order 11 of the *Civil Procedure Rules*. Equally, the plaintiff was directed to amend his plaint.
 37. On March 23, 2022, the plaintiff was granted 30 days to comply with the orders of this court issued on January 18, 2022. Since then, the plaintiff never complied up until the 1st defendant filed the chamber summons dated June 27, 2022 seeking to strike out the plaint. Even then, the plaintiff failed to comply and sought to rectify his omissions by seeking to arrest the ruling of this court that was slated for November 28, 2022.
 38. A perusal of the record indicates that the 1st defendant filed a memorandum of appearance dated January 26, 2018. The 1st defendant has never filed its statement of defence despite requesting for time to do so and being granted leave to file its statement of defence.
 39. Order 4 Rule 1 (2) of the *Civil Procedure Rules* provides: - "The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above."
 40. In *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR the court stated: -
 - " 11 The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the



end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

41. In the case of *Geoffrey K Mathiu & 10 Others v Clerk County Council Meru Central & Another* [2008] eKLR, it was held: -

"I hold the view..., that a verifying affidavit has a separate life independent of the plaintiff it verifies. It does not go to the root of the dispute which is contained in the plaintiff. That failure to file a proper and regular verifying affidavit or at all can be rectified with the court's leave.

See also *Microsoft Corporation V Mitsumi Computer Garage Ltd & Another*, HCCC Nai. 810 of 2001. Furthermore, Order VII rule 1(3) does not impose a compulsory duty on the court to strike out any plaintiff not accompanied by a verifying affidavit. It simply provides that: -

"(3) The court may of its own motion or on an application of the defendant order to be struck out any plaintiff which does not comply with sub rule (2) of this rule."

42. In *David Jonathan Grantbam & Another -vs- National Social Security Fund* [2007] eKLR, the plaintiff sought leave to file an amended plaintiff and an amended verifying affidavit under Order VIA rules 3, 5 and 8, Order VII rule 2 Order XVIII – Rule 1, 4 and 7 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act*.

The court quoting Njagi J stated

"The plaintiff and the verifying affidavit are entirely different documents altogether and leave to amend the plaintiff does not incorporate leave to amend the verifying affidavit. The court went ahead to hold the view that a verifying affidavit was not covered by Section 35 of the Advocates Act since verifying affidavits were introduced by LN 36/2000. The court held by granting leave to amend a plaintiff, the verifying affidavit by necessity needed to be amended."

43. The court however proceeded to give the plaintiff leave to file a compliant verifying affidavit to cover the amendments in the further amended plaintiff.

44. Having said the above and while placing reliance on the above cited authorities and bearing in mind the overriding objective of this court as provided under Section 3 (1) of the *Environment and Land Court Act*, this court shall grant the parties a chance to put their respective houses in order in the following terms: -

- i. The plaintiff's amended plaintiff dated November 1, 2022 be and is hereby deemed as duly filed. The plaintiff to pay any requisite filing fees within 7 days from the date hereof.
- ii. The plaintiff upon filing the amended plaintiff dated November 1, 2022, to serve the defendants within 7 days.



- iii. The defendants to file and serve their defence within 21 days from the date of service of the amended plaint.
- iv. The chamber summons application dated June 27, 2022 is hereby dismissed.
- v. The notice of motion application dated November 1, 2022 partially succeeds in terms of orders i. above.
- vi. Each party to bear its own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 23RD DAY OF MARCH, 2023.

MBOGO C.G.

JUDGE

23/3/2023

In the presence of:

T.Chuma:CA

