



REPUBLIC OF KENYA



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Lakeview Development Limited v Belgo Holdings Limited & another (Environment & Land Case E064 of 2020) [2023] KEELC 16314 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E064 OF 2020**

**JO MBOYA, J
MARCH 16, 2023**

BETWEEN

LAKEVIEW DEVELOPMENT LIMITED PLAINTIFF

AND

BELGO HOLDINGS LIMITED 1ST DEFENDANT

THE LAND REGISTRAR 2ND DEFENDANT

RULING

Introduction and Background

1. The Ruling herein is in respect of an informal Application by and on behalf of the 1st Defendant to deem the Plaintiff's suit as struck out on account of non-compliance with the Case Management Request dated the 15th of March 2022, albeit filed on the 18TH of March 2023; and in respect of which the 1st Defendant had sought that the Plaintiff does respond to the itemized issues contained at the foot of the Case Management Request.
2. For coherence, the impugned Case Management Request dated the 15th of March 2022 had itemized and addressed the following issues:
 - i. Notice to produce for inspection documents referred to in the Plaintiff.
 - ii. Notice to give discovery of documents.
 - iii. Notice to admit documents.
 - iv. Request for Further and better Particulars of the Plaintiff.



3. Suffice it to point out that the Case Management Request was duly served upon the Plaintiff and the 2nd Defendant, respectively. In this regard, it therefore behooved the Plaintiff to respond to the case management request within the prescribed timelines.
4. Nevertheless, it is apparent that despite having been duly served with the case management request, the Plaintiff herein failed and neglected to respond thereto, culminating into the matter being mentioned on various albeit numerous dates, resting with the Mention on the 7th of December 2022.
5. Be that as it may, on the 7th of December 2022, this Honourable Court was called upon to make precipitate directions towards procuring compliance on the part of the Plaintiff and with a view to paving way for further proceedings in the matter.
6. In the premises, the Honourable Court proceeded to and made the following orders:
 - i. The Plaintiff be and is hereby granted 14 days to file and serve the requisite response to the case management schedule.
 - ii. In default to file and serve the response to the case management schedule in terms of clause (i) hereof, the Plaintiff herein shall stand struck out without any further reference to court.
 - iii. Costs shall be in the cause.
 - iv. Mention on the 18th of January 2023, to ascertain compliance and if any, to fix a date for further directions.
7. Subsequently, the Plaintiff herein proceeded to and filed various responses. For clarity, the Plaintiff filed a Reply to the Notice to give discovery of documents, Reply to Notice to produce for inspection and Request for further and better particulars of the Plaintiff.
8. As pertains to the Notice to admit documents, the Plaintiff herein filed a letter in respect of which same expressed their sentiments and/or response. For clarity, the letter is dated the 21st of December 2022.
9. It is worthy to state and underscore that the named documents, details whereof have been alluded to in the preceding paragraph, were indeed lodged on the court on the 21st of December 2022. For clarity, it is apparent that same were filed and lodged with the Honourable Court within the stipulated timeline set vide the Court Order of 7th December 2022.
10. Despite the foregoing, learned counsel for the 1st Defendant has contended that the Plaintiff herein has not responded to the case management request dated the 15th of March 2022; and in this regard, same has therefore implored the Court to find and hold that the Plaintiff has not complied with the Orders of the Court and thereafter to decree that the Plaintiff's suit stands struck out.
11. Owing to the nature of the arguments that were being ventilated by counsel for the 1st Defendant, the Honourable Court ordered and directed that the informal objection be canvassed by way of written submissions. In this regard, the 1st Defendant proceeded to and filed two sets of submissions, inter-alia, the submissions dated 2nd February 2023 and the latter one dated the 22nd of February 2023.
12. On the other hand, the Plaintiff has filed written submissions dated the 20th of February 2023 and in respect of which same has inter-alia, contended that there was timely and prompt compliance with the orders of the Honourable court made on the 7th of December 2022. In this regard, the Plaintiff has contended that the orders made by the court on the said date are therefore spent.



Submissions by the Parties

Submissions by the 1st Defendant

13. On behalf of the 1st Defendant, learned counsel has raised, highlighted and amplified two salient issues for consideration and determination by the court.
14. Firstly, learned counsel for the 1st Defendant has submitted that the Plaintiff herein was obliged to respond to the case management request within the timeline set and prescribed vide the Court Order made on the 7th of December 2022.
15. In addition, learned counsel has submitted that despite being aware of and privy to the terms and tenor of the Court Order made on the 7th of December 2022, the Plaintiff herein failed to comply therewith and in particular to respond to the case management request.
16. Furthermore, learned counsel has submitted that as pertains to the notice to admit, the Plaintiff herein did not comply with the terms of the said notice to admit, save that the Plaintiff generated a letter dated the 21st of December 2022 and in respect of which same contended as hereunder:

“We are in receipt of a notice to admit documents from yourselves dated the 15th March 2022, in reaction to which we hereby propose to exercise our right for and on behalf of the Plaintiff as contained in the said notice, to examine said documents before we can render attention to the said notice”.
17. According to learned counsel for the 1st Defendant, the Plaintiff herein has not responded to the case management request and in particular, the aspect thereof relating to the Notice to admit documents.
18. As pertains to the discovery of documents, learned counsel for the 1st Defendant has contended that the response which has been given/offered by the Plaintiff is inadequate, unsatisfactory and otherwise replete with belated excuses. In short, it is the 1st Defendant’s position that the aspect of discovery of documents has also not been duly responded to.
19. In respect of the limb touching on production of the documents alluded to and contained in the body of the Plaintiff, learned counsel for the 1st Defendant has submitted that the response is similarly, inadequate.
20. Furthermore, learned counsel for the 1st Defendant has also submitted that aspects of the responses which have been given by the Plaintiff are dishonest and merely meant to cover up all dishonest contentions/ allegations made in the Plaintiff.
21. Finally, as regards further and better particulars, learned counsel for the 1st Defendant has similarly argued that the response is neither adequate nor satisfactory. In any event, counsel has contended that there are aspects where the Plaintiff has been unable to substantiate the allegations made in the Plaintiff.
22. In a nutshell, it is the contention by learned counsel for the 1st Defendant that the Plaintiff herein has neither responded to the case management request nor complied with the terms of the court order.
23. Secondly, learned counsel for the 1st Defendant has submitted that the terms and tenor of the court order were so clear and explicit and hence it behooved the Plaintiff to tender the requisite response.
24. Furthermore, learned counsel for the 1st Defendant has gone ahead to contend that the word ‘requisite’ means imperative, mandatory and peremptory. In this regard, learned counsel has stressed that the Plaintiff herein has no window to choose what to respond to and what not to respond to.



25. On the other hand, learned counsel also submitted that the Plaintiff has not placed before the Honourable court any Affidavit evidence to show that there are certain documents which same has not been able to avail or are either lost or burnt. In this regard, counsel has contended that such allegations, inter alia, that some Documents were burnt and/ or lost, are hence not bona fide at all.
26. In a nutshell, learned counsel for the 1st Defendant has contended that the Plaintiff has not responded to the case management request and hence the Court should confirm the order striking out the Plaintiff's suit.
27. Additionally, learned counsel for the 1st Defendant has submitted that once the Plaintiff's suit is struck out for want of compliance with the Court Order made on the 7th of December 2022, then the Honourable Court should be inclined to and award costs to the 1st Defendant.

Submissions by the Plaintiff

28. Learned counsel for the Plaintiff in his submissions has similarly, identified, highlighted and amplified two issues for determination by the Honourable Court.
29. First and foremost, learned counsel has contended that the Plaintiff herein has duly responded to the Case Management Request dated the 15th of March 2022 and filed by the 1st Defendant.
30. In this regard, learned counsel for the Plaintiff has invited the Honourable Court to the various documents which were filed by and on behalf of the Plaintiff. For clarity, counsel has invited the attention of the Court to the following documents:
 - i. Reply to the Notice to reproduce for inspection documents referred to in the Plaintiff dated the 21st December 2022.
 - ii. Reply to Request for Further and better Particulars.
 - iii. Reply to Notice to give discovery of documents.
 - iv. Letter dated the 21st of December 2022, in response to Notice to admit documents.
31. In the premises, learned counsel for the Plaintiff has submitted that the filing of the named documents, details whereof have been alluded to in the preceding paragraph, constitutes response to the case management schedule filed by and on behalf of the 1st Defendant.
32. Additionally, learned counsel for the Plaintiff has also submitted that the named responses were duly filed and lodged with the Court on the 21st of December 2022 and thus same were filed within the prescribed timelines stipulated in terms of the Order rendered on the 7th of December 2022.
33. In a nutshell, learned counsel for the Plaintiff has therefore invited the Honourable Court to find and hold that same has duly and promptly complied with the Court Order.
34. Secondly, learned counsel for the Plaintiff has submitted that as pertains to Notice to admit, it behooved the 1st Defendant to intimate to the Plaintiff the time and place where same would be able to inspect the documents, prior to and before confirming which of the documents are admissible and which of the Documents, same would be averse to admitting.
35. Nevertheless, counsel for the Plaintiff has submitted that despite issuing the response and seeking the indulgence of the 1st Defendant to procure an appointment for purposes of inspection, the 1st Defendant has remained adamant and failed to respond to the request to view the documents.



36. Furthermore, counsel for the Plaintiff has also submitted that a failure to respond to the Notice to admit has known legal consequence. In this regard, counsel pointed out that if the court were to find that there was (sic) no response to the Notice to admit, the only deeming effect would be that the Plaintiff has admitted the authenticity of such documents.
37. To this end, learned counsel for the Plaintiff has cited and quoted the decision of the Court in the case of *Belgo Holdings Ltd vs Robert Kotch Otachi & Another* (2008) eKLR, where the Honourable Court had the occasion to speak to the legal implication of a Notice to admit and the consequences of failure to respond thereto.
38. Finally, counsel for the Plaintiff has submitted that to the extent that the Plaintiff has duly responded to the case management request, it is not appropriate for this Honourable Court to proceed and decree that the Plaintiff's suit be struck out.
39. In any event, learned counsel for the Plaintiff has added that striking out of a suit is a draconian measure, which ought to be exercised with due caution and circumspection. In this regard, counsel reiterated that such an order would have drastic consequences on the right of the Plaintiff to be heard on merit.
40. In a nutshell, counsel has invited the Court to find and hold that the Plaintiff has duly responded to the Case Management Request and by extension, complied with the Orders of the Court made on the 7th of December 2022.

Issues For Determination

41. Having evaluated and reviewed the Case Management Request filed on the 18th of March 2022 and having taken into account the written submissions filed by and on behalf of the Parties, I come to the conclusion that the following issues are pertinent and are thus worthy for determination:
 - i. Whether the Plaintiff has responded to the Case Management Request filed by and on behalf of the 1st Defendant?
 - ii. Whether the Response, if any, by the Plaintiff was undertaken within the timeline contained in the order made on the 7th of December 2022?

Analysis and Determination

Issue Number 1

Whether the Plaintiff has responded to the Case Management Request filed by and on behalf of the 1st Defendant?

42. It is common ground that the 1st Defendant herein proceeded to and crafted a Case Management Request, wherein same identified and isolated four pertinent aspects which the Plaintiff was required to respond to.
43. For ease of reference, the specific areas alluded to at the foot of the case management request referred to inter-alia the following items:
 - i. Notice to produce for inspection documents referred to in the Plaintiff.
 - ii. Notice to give discovery of Documents.
 - iii. Notice to admit Documents.



- iv. Request for Further and better Particulars of the Plaintiff.
44. Upon being served with the Case Management Request, it behooved the Plaintiff herein to respond thereto within the stipulated and prescribed time. However, it is not lost on the court that the Plaintiff herein did not respond to the case management schedule/request within the statutory 14 days period.
45. Be that as it may, the matter herein was variously mentioned, resting with the Mention on the 7th of December 2022, whereupon the Honourable Court made and issued precipitate orders directed at the Plaintiff herein.
46. Suffice it to point out that the Orders of the Court made on the 7th of December 2022, granted to and in favor of the Plaintiff an opportunity and/or latitude to respond to the case management request within 14 days.
47. It is imperative to state and underscore that the Plaintiff herein thereafter proceeded to and filed and served various responses on the 21st of December 2022. For clarity, the responses that were filed by the Plaintiff include the following:
- i. Reply to the Notice to produce for inspection documents referred to in the Plaintiff dated the 21st of December 2022.
 - ii. Reply to Request for Further and better Particulars.
 - iii. Reply to Notice to give discovery of documents.
 - iv. Letter dated the 21st of December 2022, in response to Notice to admit documents.
48. Despite the filing of the assorted responses, details in terms of the previous paragraph, the 1st Defendant herein has now contended that the impugned responses are neither sufficient nor satisfactory. Consequently, learned counsel for the 1st Defendant has sought to impress upon the Court to find and hold that the Plaintiff has not responded to the case management request.
49. On the contrary, learned counsel for the Plaintiff has contended that the documents/responses filed constitutes appropriate response to the case management request filed by the 1st Defendant.
50. Consequently and in the premises, what therefore arises and thus deserving of determination, is whether the Plaintiff has duly responded to the case management request, either as envisaged under the law or otherwise.
51. To start with, there is no gainsaying that a party who is served with a case management request containing various aspects, is called upon to respond thereto as stipulated and provided for under the law.
52. For clarity, the important word to take cognizance of is response. Having taken cognizance of the foregoing observation, it is now appropriate to interrogate whether the Plaintiff herein has responded to the case management request as required under the law or otherwise.
53. In my humble view, the Plaintiff herein has filed the requisite responses to all the pointed aspects contained in the body of the case management request. For clarity, the responses speak to and answers, the issues that were sought for by the 1st Defendant.
54. Furthermore, in the course of responding to the itemized case management request, the Plaintiff has supplied responses/explanations pertaining to various perspectives and/ or aspects, that were contained in the Case Management Request.



55. Be that as it may, I have noted that learned counsel for the 1st Defendant has contended that the responses filed are neither adequate nor satisfactory. In any event, learned counsel for the 1st Defendant has added that some of the responses constitute excuses which are meant to cover up dishonest contentions made in the Plaintiff.
56. Nevertheless, the issue for determination by this Court is not whether the responses tendered and submitted by the Plaintiff are adequate and satisfactory. In any event, what is adequate and satisfactory is relative and debatable depending on which side of the divide one sits/stands.
57. However, for the Honourable Court, the question to be determined is whether there has been a response, to the case Management Request as provided for under the Law, or otherwise. Indeed, the case management request that was filed by and on behalf of the 1st Defendant sought that the Plaintiff does respond to same.
58. In my humble view, the Plaintiff has indeed supplied a response in the manner envisaged under the law.
59. Furthermore, where a party, in this case the 1st Defendant, who issues a case management request/interrogatory deems that the adverse party (read the Plaintiff) has not suitably responded, then such a party is obligated to file a suitable Application for due consideration by the Honourable Court.
60. In this respect, it is appropriate to take cognizance of the provisions of order 2 rule 10 (2), (3), (4), (5) and (6) of the *Civil Procedure Rules*, 2010.
61. For coherence, the provisions of order 2 rule 10 provide as hereunder:
10. Particulars of pleading [Order 2, rule 10.]
- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing:
 - (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
 - (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
 - (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party:
 - (a) where he alleges knowledge, particulars of the facts on which he relies; and
 - (b) where he alleges notice, particulars of the notice.
 - (4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.



- (5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.
- (6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.
62. In my humble view, the documentation that has been filed by and on behalf of the Plaintiff constitutes the requisite answers/response to the case management request. For coherence, the First Defendant had sought for response by the Plaintiff to the named aspects of the Case Management Request and, in my view, the Responses, have been availed.
63. Before departing from the issue herein, there is one more matter that deserves mention, nay short address. For clarity, this relates to the legal implication of a Notice to admit.
64. In my humble understanding, where a party to a suit generates a Notice to admit, the adverse party who is served with such a Notice is obligated to respond thereto either by filing a Notice of non-admission or better, still let it lie.
65. However, in the event that the adverse party does not respond to a Notice to admit, the legal implication and consequences attendant thereto shall be that the adverse party is deemed to admit the authenticity of the named documents alluded to and contained at the foot of the Notice to admit.
66. In the circumstances, assuming that the Plaintiff herein has not responded to the Notice to admit in the manner contended by the 1st Defendant, then the 1st Defendant should in my humble view be home and dry, as pertains to the impugned documents.
67. In this regard, I share the sentiments and holding of the Honourable Judge in the case of *Belgo Holdings Ltd vs Robert Kotch Otachi & Another* (2008) eKLR, where the court stated and held as hereunder:
- (4) The Plaintiff relies on two affidavits in support of the application. The first is sworn by James Ochieng’ Oduol, learned counsel for the Plaintiff, in which he states that the Defendants’ failure to make discovery and produce the said Title documents is deliberately intended to delay trial of the suit. Mr. Oduol further depones that on the 25th October 2007 and 27th November 2007 he caused to be served upon the Defendants Notices to Admit documents and the Defendants having failed to inspect the documents in question or to give notice specifying such of them as they did not admit, the Defendants are deemed to have admitted the authenticity of all such documents.
68. Furthermore and in any event, where the question of non-compliance or failure to respond to discovery/case management request is concerned, the Honourable Court still has the discretion to ascertain and/or authenticate whether the failure is informed by willful and intentional default or otherwise.
69. Nevertheless, the discretion of the Court on whether or not to strike out a suit on account of non-compliance with discoveries, is no doubt exercised on a case-by-case basis, albeit taking into account the interests of justice.



70. In this respect, I beg to adopt and reiterate the holding in the case of *Omar Sharrif T/A KEMCO Auto vs Freight Forwarders Limited & Another* [2008] eKLR, where the Court held as hereunder:

“That position in law is also well stated in the case of *Eastern Radio Service vs. Tiny Tots* (1967) EALR 392 to which we were referred by Ms Amarshi. Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that report as follows:

“It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a wilful disregard of the order of the court. Nor is it, I think, in dispute that wilful means intentional as opposed to accidental.”

And Sir Clement De Lestang, V.P. stated in that case:

“The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of wilful default.”

As we have stated, we think, in order to establish wilful default, a proper application should have been made since the learned Judge had in fact refused to allow prayer 2 in his ruling of 9th February 2007. We note with regret that that was not done.

71. In a nutshell, I come to the conclusion that the Plaintiff herein duly filed a response to the case management request which was lodged by and on behalf of the 1st Defendant herein. Consequently, the question of non-compliance as propagated by the 1st Defendant does not arise.

Issues Number 2

Whether the Response, if any by the Plaintiff was undertaken within the timeline contained in the order made on the 7th of December 2022?

72. Barring repetition, on the 7th of December 2022, this Court made specific orders which were directed to and intended to attract compliance by the Plaintiff herein.

73. Pursuant to the orders under reference, the Plaintiff was to file the requisite response to the case management request within 14 days, w.e.f 7th December 2022.

74. By dint of the Orders of the Court, the 14 days that were granted to and in favor of the Plaintiff were to be reckoned and computed by excluding the day when the Order was made but including the last day in the computation of time.

75. For purposes of appreciating the manner in which time is computed and to ascertain whether the responses were filed within set timelines or otherwise, it is appropriate to take cognizance of order 50 rules 8 of the Civil Procedure Rules, 2010.

76. For ease of reference, the said provisions of order 50 rules 8 provide as hereunder:

8. Computation of days [Order 50, rule 8.]

In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court,



the same shall be reckoned exclusively of the first day and inclusively of the last day.

77. Bearing the scheme of computation of time stipulated and underlined vide the provisions alluded to in the preceding paragraph, I come to the conclusion that the responses that were filed and served on the 21st of December 2022 were duly filed within the prescription alluded to in the Order of the Court.
78. In the premises, it is my finding and holding that the default clause, namely, where the Honourable Court ordered that in default of compliance with the Court Order the Plaintiff's suit shall stand struck out, did not accrue.
79. Put differently, the terms and tenor of the Orders of the Honourable Court alluded to lapsed and extinguished, the moment the Plaintiff filed the named responses.
80. In view of the foregoing, this Honourable Court has no basis and/or foundation upon which to venture and order that the Plaintiff's suit to be struck out. For coherence, the striking out was on non-compliance and not otherwise.
81. In a nutshell, it is my finding and holding that the issue of striking out or better still, the Plaintiff standing struck out, was overtaken by events, rendered redundant and otiose by compliance on behalf of the Plaintiff.

Final Disposition

82. Having examined and analyzed the twin issues that were pertinent for consideration and determination, I come to the conclusion that the Plaintiff filed the requisite response(s) to the Case Management Request.
83. Additionally, I have come to the conclusion that the question of whether the response filed was sufficient and satisfactory, including whether aspects of the responses were dishonest and meant to cover up certain allegations in the Plaintiff, were issues that could not be ventilated in the absence of a suitable Application duly supported by evidence.
84. Consequently and in view of the foregoing, the informal Application by and on behalf of the 1st Defendant to deem the Plaintiff as struck out on account of non-compliance, be and is hereby dismissed with costs to the Plaintiff only.
85. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16th DAY OF MARCH 2023.

HON. JUSTICE OGUTTU MBOYA,

JUDGE

In the Presence of:

Benson - Court Assistant.

Mr. Mukuha Kamau h/b for Mr. Bwire for the Plaintiff.

Mr. James Ochieng' Oduol for the First Defendant.

Mr. Allan Kamau for the Second Defendant.

