



Twiga Chemical Industries Limited v Game Ranching Limited & 3 others (Environment & Land Case 189 of 2018) [2023] KEELC 17608 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 189 OF 2018
CA OCHIENG, J
MAY 31, 2023**

BETWEEN

TWIGA CHEMICAL INDUSTRIES LIMITED PLAINTIFF

AND

GAME RANCHING LIMITED 1ST DEFENDANT

JOHN NORMAN HOPCRAFT 2ND DEFENDANT

LADY CLARE GEORGINA HESKETH (SUED AS LEGAL ADMINISTRATORS OF THE LATE RIGHT HONOURABLE CHRISTIAN MARY BARONESS HESKETH) 3RD DEFENDANT

LORD THOMAS ALEXANDER HESKETH (SUED AS LEGAL ADMINISTRATORS OF THE LATE RIGHT HONOURABLE CHRISTIAN MARY BARONESS HESKETH) 4TH DEFENDANT

RULING

1. What is before Court for determination is the 1st Defendant's Notice of Motion Application dated the August 30, 2022 brought pursuant to Order 2 Rule 15 and Order 51 of the *Civil Procedure Rules*. The 1st Defendant seeks the following orders:-
 1. That this Honourable Court be pleased to strike out the Amended Plaintiff herein dated March 29, 2022.
 2. That costs of this Application be awarded to the Applicant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Dr David Hopcraft where he deposes that vide a Ruling was given by the Court on the Notice of Motion dated December 18, 2018, on March 21, 2022, the Plaintiff was allowed to file and serve an Amended Plaintiff within twenty one (21) days, which lapsed on April 11, 2022. He contends that the Order ceased



to take effect from April 11, 2022. He claims the Plaintiff filed its Amended Plaintiff 78 days out of time after inordinate delay and without the leave of court. Further, that failure to file and serve the Amended Plaintiff within time is contrary to a court order and an abuse of the court process. He insists that the delay by the Plaintiff has occasioned great prejudice to the Defendant. He reiterates that the Plaintiff has and continues to deliberately delay the hearing and determination of the suit.

3. The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by Anantharaman Ramamurthy it Managing Director where he deposes that the said Application is filed in bad faith and solely intended to cause an obstruction to a fair trial of the pending suit. He avers that the 1st Defendant's allegations that the Plaintiff filed its Amended Plaintiff 78 days out of time in breach of the orders of the Court issued in its Ruling delivered on March 21, 2022, is baseless and incorrect because the Plaintiff filed its Amended Plaintiff timeously and within the timelines envisaged by the Court. He contends that as per the Ruling of the Court delivered on March 21, 2022, the Plaintiff was required to file its Amended Plaintiff within twenty one (21) days from the date of the Ruling, which it did on April 5, 2022. Further, that this was within fifteen (15) days from the date of the Ruling of the Court and thereby in conformity with the twenty one (21) days' timeline stipulated by the Court. He explains that since the amendments in the Plaintiff had the effect of joining the 2nd, 3rd and 4th Defendants as parties to the suit, it was incumbent upon the Plaintiff to first obtain summons and serve the Amended Plaintiff together with the summons upon the 2nd, 3rd and 4th Defendants. Further, there was delay by Court in issuing summons to the Plaintiff which were then issued on July 20, 2022 after which the Plaintiff served the 2nd and 3rd Defendants. He reiterates that 1st Defendant's allegations of late filing and service of the Amended Plaintiff 78 days out of time, is deliberately intended to mislead this Honourable Court into issuing unwarranted orders in its favour. He states that it is only on July 1, 2022 that the 1st Defendant wrote to the Plaintiff indicating that it had not been served with the Amended Plaintiff. Further, upon receipt of the letter, the Plaintiff's Advocates immediately served the Amended Plaintiff on the 1st Defendant through email on the same date. He insists that the amendments that were effected were in respect to the added parties namely the 2nd, 3rd and 4th Defendants. Further, that after service, on July 5, 2022 the Plaintiff's Advocates wrote to the 1st Defendant's Advocates apologizing for the delay in service and explaining that the delay was as a result of the failure to obtain summons in good time. He reaffirms that under Article 159(2) (d) of the Constitution, it requires the Court, to exercise judicial authority, and administer justice without undue regard to procedural technicalities. Further, the Plaintiff cannot be faulted in any delay since issuance of summons is done by Court.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and rivalling submissions, the only issue for determination is whether the Amended Plaintiff dated the March 29, 2022 should be struck off with costs.
6. The 1st Defendant in its submissions reiterates its averments as per the Supporting Affidavit and contends that Section 1A of the Civil Procedure Act requires a party to civil proceedings or an advocate for such a party, to assist the court and, to that effect, to participate in the processes of the court as well as comply with the directions including orders of the court. It avers that Article 159(2) of the Constitution is not a cure and a panacea for all manner of procedural lapses and blatant disregard of the law including orders of the court. Further, that the order to file and serve the Amended Plaintiff ceased to have effect from April 11, 2022. It insists that summons were not necessary to serve the 1st Defendant with the Amended Plaintiff. It further submits that there is no reasonable cause shown why the orders of this Honourable Court were not complied with.



7. The Plaintiff in its submissions relies on the averments in its Replying Affidavit and submits that pursuant to the impugned Ruling, on April 5, 2022 it filed its Amended Plaintiff, which was within fifteen (15) days from the date of the said Ruling of the Court and thereby in conformity with the twenty one (21) days' timeline stipulated by the Court. Further, that it was incumbent for it to first obtain summons and serve the Amended Plaintiff together with the summons upon the Defendants but there was delay in issuance of the said summons by the Court Registry. It argues that the amendments made do not change the averments earlier made against the 1st Defendant. Further, no new claims have been made against the 1st Defendant and apart from being served outside the twenty one (21) days period, no conceivable harm has been occasioned upon it. It further submitted that the power to strike out a pleading should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. It avers that the 1st Defendant stands to suffer no prejudice on account of the late service. Further, that the hearing of the pending suit cannot commence until all Defendants have been properly served in accordance with the Civil Procedure Rules and granted an opportunity to file their respective Defences and Pre-trial Directions taken in the presence of all parties.
8. To buttress its averments, it relied on the following decisions: Frenze Investment Limited vs Kenya Way Limited [2001] eKLR; Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR and Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & others (2013) eKLR.
9. The legal provisions governing striking out of pleadings is contained in Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 which stipulates that:

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is an abuse of the process of the court.”
10. In Civicon Limited V Kivumatt Limited & 2 Others (2015) eKLR, the Court of Appeal observed as follows:-

"Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or; whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient



to determine as between him and that party as well as between the parties to the cause or matter.”

11. While in *Delphis Bank Limited v Caneland Limited* [2014] eKLR, the Court of Appeal while dealing with the issue of striking out pleadings held that:-

“The leading local case on interpretation of Rule 13 of Order VI of the *Civil Procedure Rules* on which the application striking the defences was based is perhaps *DT Dobie & company (Kenya) Ltd vs Muchina* which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”

See also the decision in *Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu* [2009] eKLR.

12. In this instance, I note the fulcrum of the dispute herein revolves around proprietary interest in land. The 1st Defendant contends that the Plaintiff filed its Amended Plaintiff dated the March 29, 2022, 78 days late contrary to the Court’s Ruling delivered on March 21, 2022 where it had been granted leave to file and serve it, within twenty one (21) days. It argued that the Court Order lapsed on April 11, 2022 and ceased to take effect from April 11, 2022 hence the Plaintiff’s failure to file and serve the Amended Plaintiff within time is an abuse of the court process. The Plaintiff on other hand insists that it filed its Amended Plaintiff on April 5, 2022, within fifteen (15) days from the date of the Ruling, which was within the timelines envisaged by the Court. The Plaintiff argues that since the amendments in the Plaintiff had the effect of joining the 2nd, 3rd and 4th Defendants as parties to the suit, it had to first obtain summons and thereafter serve the Amended Plaintiff together with the summons upon the 2nd, 3rd and 4th Defendants respectively. However, the Court delayed in issuing the summons and the same was only done on July 20, 2022 after which it served the 2nd and 3rd Defendants. It admits serving the 1st Defendant late and apologizing for the same.
13. On perusal of the Court record, I note the Plaintiff indeed filed its Amended Plaintiff on April 5, 2022. I further note that the Deputy Registrar for this Court indeed issued Summons to Enter Appearance for the 2nd, 3rd and 4th Defendants on July 19, 2022. I find that the 1st Defendant is not being candid by stating that the Amended Plaintiff was filed 78 days late. I opine that the late service of the Amended Plaintiff to the 1st Defendant cannot lead to the striking out of an already filed pleading which has raised triable issues. The 1st Defendant has not demonstrated what prejudice it suffered since the Amended Plaintiff was served upon its’ advocates late. Besides, it has not denied that the Plaintiff apologized for the late service.
14. In *Republic Vs District Land Registrar, Uasin Gishu & Anor* (2014) eKLR Justice Ochieng held that:-
- To my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts’ in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.”
15. Based on the facts as presented while relying on the legal provisions I have quoted as well as associating myself with the cited decisions, I will decline to strike out the Amended Plaintiff as sought by the 1st



Defendant on the ground of late service as this is indeed a procedural technicality which it seeks to rely on. I opine that time can indeed be extended to serve the Amended Plaintiff.

16. It is against the foregoing I find the Notice of Motion Application dated the August 30, 2022 unmerited and will dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

