



REPUBLIC OF KENYA



KENYA LAW
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**Amos & 3 others v Kimani (Administrator of the Estate of late
Francis Mburu Kimani & 7 others (Civil Suit 593 of 2014)
[2022] KEHC 14647 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 593 OF 2014
EC MWITA, J
OCTOBER 28, 2022**

BETWEEN

**DUNCAN NDEGWA AMOS 1ST PLAINTIFF
ROSEMARY MUTHONI MWANGI 2ND PLAINTIFF
S.J.RICHARD OLANG 3RD PLAINTIFF
CAROL MUTHONI MUTUA NJAU 4TH PLAINTIFF**

AND

**KENNEDY MWANGI KIMANI (ADMINISTRATOR OF THE ESTATE OF LATE
FRANCIS MBURU KIMANI 1ST DEFENDANT
JAMES IRURA KAGWAMBA 2ND DEFENDANT
MUVIR HOLDINGS LIMITED 3RD DEFENDANT
ERICK AGBEKO 4TH DEFENDANT
BIREE HUSSEIN MIRE 5TH DEFENDANT
TIONAL BANK OF KENYA LIMITED 6TH DEFENDANT
ENGEN KENYA LIMITED 7TH DEFENDANT
REGISTRAR OF COMPANIES 8TH DEFENDANT**



RULING

1. This is a notice of motion dated May 3, 2021 brought under sections 1A and 3A of the *Civil procedure act*, (the Act) and Orders 8 rule (2); 12 rule (6); 45 rule (1) and (5) and 51 rules (1) and (15) of the *Civil Procedure Rules* (the rules). The motion seeks to set aside orders made on May 3, 2021 granting leave to amend the plaint and that application seeking leave be heard afresh and the applicants be allowed to respond to that application. The application is premised on the grounds on the face of the motion and the affidavit of sworn on the same day.
2. The gist of the application as can be seen from the affidavit of James Irura Kagwamba, the 2nd applicant, and the grounds on the face of the motion, is that the 2nd and 3rd applicants though desirous of opposing the application for leave to amend dated January 15, 2021, they were had not filed a replying affidavit due to communication breakdown with counsel regarding signing of the replying affidavit. The 2nd applicant was only informed on May 1, 2021 that the matter would come up on May 3, 2021 and there was need to sign a replying affidavit.
3. The 2nd applicant went to counsel's Chambers on May 3, 2021 at 7.50 am to sign the affidavit but counsel was able to log into court at 8.10 am only to be informed that the matter had already been dealt with and the application for leave to amend allowed.
4. The applicants take the view that the grounds they intended to raise against the application for leave to amend included res judicata and sub judice as the matters raised in that application had been the subject of litigation in another suit (HCCC No 248 of 2006). They pray that their application be allowed, leave granted be set aside and the application for leave be heard afresh.
5. The 1st and 2nd respondents oppose the application through a replying affidavit sworn by Duncan Ndegwa Amos. According to the 1st and 2nd respondents, the application for leave to amend was served on the 2nd and 3rd applicant's counsel in January 2021 and the matter came before court on March 11, 2021 and the 2nd and 3rd applicant's counsel requested for time to file a response to that application. The application was set down for hearing on May 3, 2021 and any counsel intending to oppose the application was granted 7 days to file their responses.
6. The 1st and 2nd respondents assert that the applicants are not candid to the court since they did not file a replying affidavit as directed by the court but only filed together with the present application. The respondents also point out that the applicant clearly stated at paragraph 3 of their supporting affidavit that the 2nd applicant was in constant communication with their advocates office but was not informed that he was to sign an affidavit. He was informed on May 1, 2021 that the case was coming up on May 3, 2021 he had to sign a replying affidavit which contradicts what they say in the grounds on the face of the motion.
7. The respondents argue that the amended plaint has already been filed and served and any issues the applicants intend to raise can be dealt with in the defence. They urge that the application be dismissed.

Determination

8. I have considered the application, the response, submissions filed by the parties and perused the record. The applicants urge this court to reverse the orders made on May 3, 2021 granting leave to amend the plaint and hear that application afresh.



9. On March 11, 2021, counsel for the parties appeared before Mativo, J (as he then was) for the application dated January 15, 2021 seeking leave to amend. The applicants in the present application were represented by Miss Wangari. The court directed that the application be heard orally and counsel intending to oppose that application were given seven days within which to file a reply. The court then set the application for hearing on May 3, 2021.
10. On May 3, 2021 when the application came up for hearing, there was no representation for the 2nd and 3rd applicants who were respondents in that application. There being no opposition, the application for leave to amend was allowed as prayed and the amended plaint was to be filed and served within 7 days. The current application was then filed on the same day seeking to set aside the order granting leave to amend and reopen that application for hearing afresh.
11. There is no doubt that 2nd and 3rd applicants had been given 7 days to file a response to the application but did not comply. On the date set for hearing of the application, they were also not present. The court allowed the application and granted leave to amend.
12. The applicants have not shown good reason, first; why they did not file their response to that application within the time granted. Second, their advocate was not in court when the matter was called out and heard. Had the applicants complied with directions of the court and filed their response, the court would certainly have considered that response even in their advocate's absence.
13. The respondents assert that they have already filed and served the amended plaint pursuant to the leave granted on May 3, 2021 and, therefore, any issues the 2nd and 3rd applicants may have can be addressed in the defence.
14. Whether or not to set aside the orders granted on May 3, 2021 calls for exercise of discretion. That discretion must however be exercised judiciously and on sound basis. The applicants have not demonstrated that they have good reason for this court to exercise the discretion in their favour. The reason given that their advocate logged into court late is not sufficient reason to interfere with the court's exercise of discretion given that the applicants had not even complied with directions on filing of a response.
15. The respondents have already filed and served the amended plaint as directed, and it is now more than one year since the amended plaint was filed. The argument by the applicants that they intend to raise some issues is not, on its own, a ground for setting aside orders which were complied with as soon as they were made, one year ago. The applicants have not told the court what it should do with the amended plaint already filed and served pursuant to the impugned leave.
16. This application is, with respect, an example of why cases take so long to determine as parties endlessly fight over applications that do assist in resolving the real dispute they have presented to court for adjudication. The plaint having been amended, the applicants want the court to reverse the train and start the application for leave to amend all over again instead of focusing on the real issue in controversy. That is not the best way to deal with this matter.
17. In the circumstances, I do not find merit in the application. If granted, the application will only succeed in delaying this matter to the detriment of all parties. The application dated May 3, 2022 is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

E C MWITA
JUDGE

