



Primix Enterprises Limited v Fidei Holding Limited & 3 others (Environment and Land Case Civil Suit 497 of 2012) [2023] KEELC 18473 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 497 OF 2012**

**LN MBUGUA, J
JUNE 29, 2023**

BETWEEN

PRIMIX ENTERPRISES LIMITED PLAINTIFF

AND

FIDEI HOLDING LIMITED 1ST DEFENDANT

KIKI INVESTMENT LIMITED 2ND DEFENDANT

GEORGE NGURE KARIUKI 3RD DEFENDANT

**STATUTORY MANAGER OF UNITED INSURANCE COMPANY
LIMITED 4TH DEFENDANT**

RULING

1. Before me is the 2nd and 3rd Defendants' Notice of Motion application dated May 19, 2023 seeking leave to file their statement of defence out of time. The application is premised on grounds on its face and on the 3rd Defendant's supporting affidavit sworn on May 19, 2023. He avers that he was suited together with the 2nd Defendant vide an amended plaint dated October 10, 2012. He blames numerous applications on the part of the Plaintiff for the delay in prosecuting this matter. He states that they are yet to put in their defence and argues that since no judgement in default has been entered, no prejudice will be occasioned to the Plaintiff as well as the 1st and 4th Defendants. He adds that they have a good defence which raises triable issues. He has annexed their draft statement of defence.
2. The application is supported by the plaintiff vide the replying affidavit of Alphonse Mutinda, its counsel, sworn on June 2, 2022. He avers that although the 2nd and 3rd Defendants delayed in filing their defence, their participation in this suit will assist the court in arriving at a fair decision.
3. The application is opposed by the 1st and 4th Defendants vide the replying affidavit sworn on May 30, 2023 by Albert M Wafula, Counsel from the firm on record for the 1st and 4th Defendants. He avers that



this matter has been scheduled for pre-trial on several occasions and the same certified ready for hearing and hearing dates given yet the 2nd and 3rd Defendants did not deem it fit to file their defence. He points out that the 2nd and 3rd Defendants have participated in this suit and filed pleadings like responses to applications yet failed to file a defence for a period of over 10, years thus the court should not assist an indolent party as the delay occasions injustice to the 1st and 4th Defendants.

4. The application was canvassed by way of written submissions. The 2nd and 3rd Defendants filed written submissions dated June 5, 2023, raising the following issues;
 - a. Whether or not the delay has been inordinate.
 - b. Whether or not the defence raises triable issues.
5. On the 1st issue, they submit that the multiple applications filed herein to a larger extent have contributed to and affected the timelines for compliance, thus they should be granted leave as the matter was not ripe for determination of the main suit.
6. They submit that the omission of the defence is not deliberate and it is therefore excusable. They rely on the case of *Shah v Mbogo* 967EA PG 123 as well as the case of [*Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & others* \[2013\] eKLR](#).
7. On the 2nd issue, they submit that paragraph 3 (i) –(xvi) of their defence outlines their acquisition of the suit property and the sale by the 1st Defendant to the Plaintiff. They also argue that for fairness, equity and justice, the application should be allowed.
8. The 1st and 4th Defendants’ written submissions are dated June 2, 2023. They submit that while the court has unfettered discretion to grant the orders sought, the same may only be exercised judiciously.
9. It is their submission that the 2nd and 3rd Defendants are guilty of inordinate delay, pointing out that there is inexcusable failure by the applicants to file their defence within the stipulated time upon coming on record in year 2012 yet they actively participated in the proceedings herein.
10. They 1st and 4th defendants further argue that while the 2nd and 3rd Defendants claim that that there has been numerous applications in the suit, there has only been 3 applications for determination by the Court which did not bar them from filing their defence if they so wished.
11. They submit that the pendency of this old suit filed way back in 2012 occasions injustice to them since they have suffered liability in defending the suit. They also argue that Article 159 2 (b) of the [*Constitution*](#) demands that cases should be disposed off expeditiously as justice delayed is justice denied. They add that it was the primary duty of the 2nd and 3rd Defendants to take steps to progress their case by filing their defence within the stipulated time as provided by the law which is a requirement of justice and overriding objective in assisting the court to attain expeditious and just disposal of cases.
12. They rely on the cases of [*Power Plant Engineers Ltd v Business Partner International* \[2019\] eKLR](#), [*Anthony Kaburi Kario & 2 others v Ragati Tea Factory Company Limited & 10 others* \[2014\] eKLR](#) as well as the case of [*Governors Balloon Safaris Ltd v Skyship Company Limited & another* \[2013\] eKLR](#).
13. I have duly considered the arguments raised herein including the rival submissions. I note that this suit was commenced by a plaint dated August 9, 2012 and amended on October 10, 2012. The record indicates that the 1st and 4th Defendants filed their statement of defence way back in the year 2012.
14. The 2nd and 3rd Defendants have never filed a defence yet they have all along participated in the suit. They even filed a response to the Plaintiff’s application seeking injunctive orders as well as the Plaintiff’s application dated May 29, 2015. It is therefore quite surprising that they failed to file a defence.



15. Timelines for filing a defence are provided for under Order 7, rule 1 of the [Civil Procedure Rules](#) which provides that;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

16. The reason advanced by the 2nd and 3rd Defendants in a bid to explain the delay is that the suit was clogged with numerous applications. This is untrue and meant to mislead the court. The record indicates that not more than 5 applications have been filed in this matter. In any case, even if there were many applications in the matter, they did not bar the 2nd and 3rd Defendants from filing a defence. It would not have been a licence to flout the prescribed time frames.

17. What more, this suit has been set down both for pre-trial directions and main hearing on several occasions, so much so that on January 19, 2023, the court gave a Last Adjournment for the hearing of the case now scheduled on July 5, 2023. It was only after the said directions that the applicants brought forth their current application. This appears to be a case of mere inaction; See [Dilpack Kenya Ltd Vs William Muthama Kitonyi](#) (2018) eKLR. This suit has been in the corridors of justice for a period of 11 years and counting. Justice delayed is justice denied, so goes the 17th century maxim; See my decision in [Lawrence Kinyua Mwai vs Nyariginu Farmers Co Ltd & Another](#) (2019) eKLR as well as [Isiolo Stage View Enterprises v Isiolo County Government & 2 others](#) [2018] eKLR.

18. In the case of [Mobile Kitale Service Station vs Mobil Oil Kenya Limited & Another](#) (2004) eKLR, Warsame J (As he then was) stated that;

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the plaintiff. The negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”
Emphasize added.

19. The upshot of the analysis herein is that the application dated May 19, 2023 is not merited, the same is hereby dismissed with costs to the 1st and 4th defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

