



**Abdalla v Hassan & 15 others (Civil Suit 210 of 2021)
[2025] KEELC 1324 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1324 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 210 OF 2021
LL NAIKUNI, J
MARCH 14, 2025**

BETWEEN

HUSSEIN TAREQ ABDALLA PLAINTIFF

AND

DALAL JUMA HASSAN & 15 OTHERS & 15 OTHERS DEFENDANT

RULING

I. Introduction

1. The Ruling of this Honourable Court regards the hearing and determination of the Notice of Motion application dated 1st November, 2024. It was by the Dalal Juma Hassan, Esha Kamaldin, Mohammed Kamaldin and Kamal Kamaldin, the 1st, 5th, 6th and 7th Defendants/Applicants herein under the provision of Order 51 Rule 1 of the Civil Procedure Rules and Section 3A and 63(e) of the *Civil Procedure Act*, Cap. 21.
2. Upon effecting service, the Plaintiff responded to the application through a replying affidavit sworn on 25th November, 2024. The 8th, 9th, 10th, 11th, 12th, 16th and 17th responded through a Replying Affidavit sworn on 25th November, 2024.

II. The 1st, 5th, 6th and 7th Defendants'/Applicants' Case.

3. The Applicants sought for the following orders:-
 - a. Spent.
 - b. That the aforesaid proceedings and all consequential orders thereunder be set aside.
 - c. That the 1st, 5th, 6th and 7th Defendants have a valid Defence to this suit and they ought to be heard.



- d. That the costs of this application be provided for.
4. The application was based on the grounds, testimonial facts and the averments made out under the 10 Paragraphed Supporting Affidavit of DALAL JUMA HASSAN the 1st Defendant/Applicant herein sworn on the same day as the Application. The Applicant deponed as follows:-
- a. Sometimes in the year 2021 the Plaintiff herein through the Law firm of HAK Law Advocates filed this matter against the 16 Defendants herein including the 1st, 5th, 6th and 7th Defendants.
- b. The 16th Defendant ostensibly acting for the family of Akasha initially instructed the firm of Prime Lawyers LLP purportedly to represent all Defendants in this matter. The said firm however did not take immediate action to file a Defence.
- c. Consequently the 16th Defendant sought the services of the Law firm of M/s. Balala & Abed Advocates in place of Prime Lawyers LLP. Just like its predecessor, the new law firm failed to file a Defence on the Defendant's behalf as required by law up until now.
- d. While the 1st, 5th, 6th and 8th Defendants were laboring under the belief that their interests were covered by Nargis (16th Defendant) and their Advocates to file the Defence but which never happened, the matter proceeded ex - parte without them participating and or putting in their Defence thus violating their right to be heard.
- e. Upon realizing the indolence on the part of the aforesaid advocates and that the matter was proceeding to an advanced stage, the 1st, 5th, 6th and 7th Defendants instructed the Law firm of M/s. M.A Mwinyi Advocate to act on their behalf in place of that of M/s. Balala and Abeid Advocates. Annexed and marked as "A2" was a copy of notice of change of advocate dated 2nd October, 2024.
- f. At no time did the 1st, 5th, 6th and 7th Defendants ever receive any information from the said advocates yet they were keen and ready to participate in this matter as demonstrated in the Draft Statement of Defence annexed hereunder. Annexed and marked as "A3" was a copy of the draft Defence.
- g. At the time of the transaction the 7th and 8th Defendants were underage hence did not have the capacity to transact. Annexed in the affidavit were identity cards marked as "A4(1)" and "A4(2)".
- h. Adding to the foregoing paragraph 8 even though the Plaintiff alleges to have paid, the Plaintiff has so far made only deposited payment of the purchase price and had not paid the suit sum in full as alleged or at all.

III. The Responses by the 8th, 9th, 10th, 11th, 12th, 16th and 17th Defendants/Respondents to the application

5. The 8th, 9th, 10th, 11th, 12th, 16th and 17th Defendants/Respondents filed 13 Paragraphed Replying Affidavit sworn on 25th November, 2024 by NARGIS AKASHA ABDALLA in opposition of the application where the Deponent swore that:-
- a. On 22nd January, 2024, the 1st, 5th, 6th, 8th and 12th Defendants/Respondents instructed the Law firm of Balala and Abed Advocates to act on their behalf in this matter in place of Prime Lawyers LLP. Annexed in the affidavit and produced as exhibits were true copies of the Notice of change dated 22nd January 2024 and 11th June 2024 collectively marked as "NAA – 1".



- b. Prior to them instructing their Advocates on record, the Applicants were being represented by the Law firm of Prime Lawyers and neither did they file a Statement of Defence.
- c. This matter had been referred for mediation and most of the Applicants were unavailable for the mediation proceedings and court proceedings.
- d. This prompted the Applicants to authorize him to appear, plead, swear and act on their behalf in this matter. Annexed in the affidavit and produced as exhibits were authorities filed dated 18th July 2024 authorizing the Deponent to appear, plead, swear and act on their behalf in this matter marked as “NAA – 2”.
- e. From that point, the Deponent pleaded, swore and acted on behalf of the Applicants in this matter and a Defense dated 18th September 2024 was filed together with the accompanying documents Annexed in the affidavit and produced as exhibits a copy of the defence and accompanying documents were authorities filed dated 18th July 2024 authorizing the Deponent to appear, plead, swear and act on their behalf in this matter marked as “NAA – 3”.
- f. On 25th September, 2024 the matter proceeded for hearing and majority of the applicants were physically and virtually present in court but none raised an objection or wished to address court when the matter was proceeding for hearing as they had authorized the Deponent to do so on their behalf.
- g. The case was closed and the Honourable court proceeded to issue directions on filing of the submissions but the Applicant’s Advocate came on record on 2nd October 2024 and having failed to properly peruse the pleadings, he attempted to mislead this Honourable that no defense had been filed for the applicants.
- h. This matter had been referred for mediation and most of the Applicants were not present during these mediation proceedings and it was now evident that the applicants are hell-bent on frustrating these proceedings.
- i. Despite the fact that the Deponent had been authorized to act on their behalf, the Applicants were always notified on the progress of their matter as he was keen to forward all letters from their Advocate and also discuss the same with them.
- j. In light of the above, the Deponent confirmed that he was authorized to act on behalf of the Applicant’s, a defense and accompanying documents were filed, the applicants were always updated on the progress of the case and their application was a waste of court’s time, has been brought in bad faith and should be dismissed with cost.

IV. The Replying Affidavit by the Plaintiff/Respondent

6. The Plaintiff/Respondent also filed a 11 Paragraphed Replying Affidavit sworn by HUSSEIN TAREQ ABDALLA and dated on 25th November, 2024 in opposition of the application. He deposed that:
 - a. The instant suit was heard on the 25th September 2024 where two witnesses testified; himself for the Plaintiff and Nargis Akasha Abdalla on behalf of all the Defendants. Both parties closed their respective cases and the court granted parties further directions on the filing of submissions and a judgment date was reserved for the 20th January 2025.
 - b. Averments by the 1st Defendant that the 1st, 5th, 6th and 7th Defendants did not takepart in the hearing process is false; for the reason that on the 25th September 2024, the hearing



proceeded with Nargis Akasha Abdallah testifying on behalf of the Defendants upon filing written authorities from the respective Defendants, including the 1st, 5th, 6th and 7th Defendants. (Annexed in the affidavit a copy of the written authorities dated 18th July, 2024).

- c. The Applicants had not denied the written authorities to act that were filed by the Law firm of M/s. Balala & Abed. The provision of Order 1 Rule 3 of the Civil Procedure Rules, 2010 that provides:-

“Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, or act for such other in any proceeding, and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding-

- (b) The authority shall be in writing signed by the party giving it and shall be filed in the case..”

- d. In response to Paragraph 4 of the Supporting affidavit by Dalal Hassan Juma, the firm of Balala & Abed had filed a Statement of Defence dated 18th September, 2024 on behalf of the 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 16th and 17th Defendants herein. Annexed in the affidavit was a copy of the Statement of Defence dated 18th September, 2024.

- e. The Applicants had not denied granting authority to the firm of Balala & Abeid to act on their behalf in the matter.

- f. The 16th Defendant, Nargis Akasha was also the alleged administrator of the Estate of Kamaldin Akasha, therefore given the fact that the plaintiff is a third party to the Estate, the 16th Defendant was properly vested with the authority to represent the rights of the beneficiaries pursuant to the provision of Order 31 Rule 1 of the Civil Procedure Rules, 2010 which provides as follows:-

“In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.”

- g. The applicants’ prayers were in the way of equitable reliefs and therefore they must approach court with clean hands. However, they had clearly demonstrated they were tainted by virtue of their deceitful averments claiming that there was no defence on record.
- h. The Applicants willfully and deliberately gave the 16th Defendant the authority to testify on their behalf and all that they want now was a second bite at the cherry.
- i. The Application was thus frivolous and abuse of court process for the orders sought therein are inconsequential and trifling.

V. Submissions

7. While all the parties appeared before the Honourable Court, it was directed that the Notice of Motion application dated 1st November, 2024 be disposed of by way of written submissions. Pursuant to that, by the time of penning down this Ruling, the Honourable Court was only able to access the written



submissions by the 1st, 5th, 6th & 7th Defendants/Applicants herein. Having deferred the delivery of the Judgement of this matter on 30th January, 2025 in order to accommodate this application, the Court reserved to render its Ruling accordingly on 14th March, 2025.

A. The Written Submissions by the 1st, 5th, 6th and 7th Defendants/Applicants

8. The 1st, 5th, 6th and 7th Defendants/Applicants through the Law firm of M/s. M.A. Mwinyi Advocates filed their written submissions dated 22nd November, 2024. The Learned Counsel provided Court with the background of this application was that the instant suit has proceeded ex - parte without the 1st, 5th, 6th and 7th Defendants being afforded an opportunity to be heard on the main suit filed against them as part of the Defendants. Despite the fact that the 16th Defendant purportedly acted for the family and had initially instructed two different law firms to represent the 1st, 5th, 6th and 7th Defendants among others, the 16th Defendant nor the appointed advocates never updated the rest of the Defendants they were representing on the progress of the matter. It was only the 16th Defendant who was updated on its progress but she never relayed any information to the rest of the represented Defendants. Consequently, the 1st, 5th, 6th and 7th Defendants were neverheard. As a result of not being informed, the 1st, 5th, 6th and 7th Defendants instructed their present advocate who at the time of coming on record, the matter had already been fixed for Judgement on 30th January, 2025.
9. The Learned Counsel submitted that the only issue for determination was whether all proceedings herein be set aside. The 16th Defendant, without the knowledge of the 1st, 5th, 6th and 7th Defendants/Applicants instructed two various Law firms to act on their behalf in this matter. Unfortunately, the four Defendants never received any communication on the status of their case. They never personally approached M/s. Balala and Abed Advocates or any other advocate to represent them. Even upon the unauthorized appointment of their purported advocate, they were never called as witnesses. They were never informed of any hearing. The four Defendants were not given an opportunity to be heard.
10. In conclusion, the Learned Counsel submitted that the 1st, 5th, 6th and 7th Defendants were not afforded to an opportunity to be heard. Their right to be heard was violated. Consequently, all proceedings herein that were conducted in their absence be set aside.

VI. Analysis and Determination

11. I have carefully read the pleadings herein being the Notice of Motion application dated 25th September, 2024 by the 1st, 5th, 6th & 7th Defendants/Applicants herein, the responses from the other parties, the written Submissions, the cited authorities, the relevant and appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
12. For the Honourable Court to arrive at an informed, just, fair and reasonable decision, it has framed two (2) issues of the subject matter for its determination. These are:
 - a. Whether the Notice of Motion application dated 1st November, 2024 is merited?
 - b. Who will bear the Costs of this application?

Issue No. a). Whether the Notice of Motion application dated 1st November, 2024 is merited.

13. Under this Sub – heading, the Honourable Court has deduced the main substratum as being whether the proceeding should be set aside and that the Applicants be allowed to file a Statement of Defence. From the records, this matter was instituted in 2021. During this whole time the Applicants have actively participated in these proceedings up to the point that the date for the delivery of the Judgment



was issued its when it was realized that the 1st, 5th 6th & 7th Defendants/Applicants had not filed a Defence whatsoever as required by the provision of Order 7 of the Civil procedure Rules, 2010.

14. Legally speaking, according to the provision of Orders 5 and 7 of the Civil Procedure Rules, 2010, where a Defendant (s) has been served with a summons to appear the said Defendant (s) shall, unless some other or further order be made by the court, file their Defence within fourteen days after having 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. It will be seen from the above, that a Defendant is supposed to file his Defence within 14 days after entering an appearance and such Defence needs to be filed within 14 days from the date of filing. Upon keen perusal of the Court records, and in their own admissions, I have not seen a Memorandum of Appearance nor a Defence by the 1st, 5th, 6th & 7th Defendants herein in the court file on behalf of the Applicants.
15. This is a question of discretion at this point. The Applicants have come to Court 4 years after the filing of the suit to plead that their advocate was indolent in not filing their Defence. The Applicants have not given this Court any good reason behind their delay in filing the defence. This matter was set down for hearing, and it proceeded on for hearing in their presence. Indeed, the matter was logically concluded and was set down for delivery of Judgment on 20th January, 2025. In order to sustain the principles of natural Justice, the Honorable Court deferred the delivery of the Judgement in order to accommodate the dispensation of this application. It has been mentioned within the application, that if the application is not allowed, the applicant stands to suffer irreparably. I am not persuaded.
16. I am concerned that if the Applicants are allowed to file their Defence at this stage without leave of Court the unprocedural manner they are conducting themselves especially with this suit will be wrongful, irregular and improper. This Court shall not take part in being part of compromising the suit because of the indolence of a party most especially because a party should be aware of what is happening in their suit. I am guided by the Equity maxim – “Equity does not aid the Indolent”. After all, this Honourable Court is not persuaded at all that the Applicants have adduced any pragmatic nor cogent reason to warrant it allowing the application. Furthermore, in doing so at this late time in the progress of the matter, it will tantamount in re – opening of this case altogether most likely to an extend of the parties seeking and thus being accorded leave to file further documents or even amending their pleadings, or filing of Counter – Claims and finally to a point of conducting a Pre – Trial conference afresh under the provision of Order 11 of the Civil Procedure Rules, 2010. That would be perpetuating the doctrine of “Justice Delayed is Justice Denied” and that “Litigation Must come to an end”. For the above reasons, the application is dismissed with costs.

Issue No. b). Who will bear the costs of the application.

17. It is trite law that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action and proceedings in any litigation. The proviso of Section 27 (1) of the *Civil procedure Act*, Cap. 21 holds that Costs follow the events. By the event, it means the outcome and the results of the legal action.
18. In the instant case, the 1st, 5th, 6th and 7th Defendants/Applicants herein shall pay the costs of this application.

VI. Conclusion & Disposition

19. Consequently, upon the elaborate analysis of the issues raised herein, the Honourable Court based on the principles of preponderance of Probabilities and balance of convenience, it proceeds to make the following orders:-



- a. That the Notice of Motion application dated 1st November, 2024 by the 1st, 5th, 6th and 7th Defendants/Applicant herein lacks merit and hence it be and is hereby dismissed with costs.
- b. That the Judgment date remains as scheduled by the Court on 30th May, 2025.
- c. That 1st, 5th, 6th and 7th Defendants shall pay the costs of this application.

It is so ordered accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 14TH DAY OF MARCH 2025.

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HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT
AT
MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Kiptoo Advocate holding brief for Mr. Kiplangat Advocate for the Plaintiff/Respondents.
- c. No appearance for the 1st, 5th, 6th & 7th Defendants/Applicants.
- d. M/s. Ndegwa Advocate for the 8th, 9th, 10th, 11th, 12th, 16th & 17th Defendants/Respondents.

