



Afikasa Real Estate Limited v Scorpio Enterprises Limited (Environment & Land Case 1 of 2020) [2023] KEELC 22395 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 1 OF 2020
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

AFIKASA REAL ESTATE LIMITED PLAINTIFF

AND

SCORPIO ENTERPRISES LIMITED DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 22nd March, 2023 by the Defendant/Applicant seeking the following Orders:
 1. That this application be certified urgent and heard *ex parte* in the first instance.
 2. That this Honourable Court be pleased to grant leave to the Defendant to file its list and bundle of documents together with witness statements and list of witnesses.
 3. That the costs for the application be provided for;
2. The application is opposed by the respondent who filed grounds of opposition on 10/7/2023 stating, quoted verbatim, as follows:
 1. That the application herein is wanting in merit, misconceived and its prayers are unjustified;
 2. That the Notice of Motion offends the principal of Reipublicae Ut Sit Finis Litium (in the interest of society, litigation must come to an end) being that the matter was filed in 2010 and having the matter go back to pre-trial is an abuse of the court process and affront to the Respondent's right handled expeditiously since it will only prolong the matter;
 3. That the supporting affidavit by the Advocates on record is undated and not commissioned thus does not comply with Rule 9 of the [Oath and Statutory Declaration Rules](#) made under



Rule 6 of the *Oaths and Statutory Declarations Act*, Cap 15 Laws of Kenya in that it is not stamped and sealed;

4. That further to the above, there is nothing to show that the Defendants or one of them actually was sick as they alleged in the supporting affidavit;
 5. That further to the above, there is nothing for the Court to take judicial notice of other than to ensure that it directions have been complied with;
 6. That the application is *prima facie* defective and it violates the Respondent's right under article 159 (2) (d) of *the Constitution* of Kenya and overriding objective under Section 1A and 2B of the *Civil Procedure*;
 7. That from the foregoing, it is clear that there are no infractions the Honourable Court nor the Plaintiff may have committed to warrant the granting of the Orders that might lead delay of justice by the Court and there is nothing shown;
 8. That we therefore pray that the application be dismissed with costs.
3. The application was disposed of by way of written submissions, with the applicant filing its submissions on 11/10/23 and the respondent on 21/11/23. I have had consideration of the application the grounds of opposition and the submissions of the parties in preparing the present ruling. The issue that arises is whether the defendant ought to be granted leave to file its list and bundle of documents together with witness statements and list of witnesses.
4. The defendant's grounds for the application are that it has not been able to comply with pre-trial directions as to the filing of the documents it seeks to file, yet it has a counterclaim of ksh 16,919,335/ = against the plaintiff which is larger than the plaintiff's claim against it, with the possibility of a set-off at the end of the suit. It states that it needs to have the documents filed in order to defend the case and prove its counterclaim. The reasons for the failure to file the documents in time are that the advocate was under considerable work pressure, that both directors of the defendant were abroad to facilitate the treatment of one of them who was unwell. It is stated that if the orders sought are not granted the defendant would suffer grave prejudice.
5. The defendant relied on the case of *Tennyson Nyinge Chilyalya & 60 Others v The Kenya Electricity Transmission Co Ltd* Malindi ELC 63 of 2015 for the proposition that the court's discretion in such matters as the present was unfettered but must be exercised judiciously, that some of the considerations in such an application were the length of the delay; that reasons and the possible prejudice that each party was likely to undergo, the conduct of the parties and the need to protect a party's opportunity to fully agitate its case.
6. It was urged that the affidavit in support of the application demonstrates that the directors were abroad because one director was diagnosed with cancer and was undergoing treatment in Italy. For that reason, they were unable to consult with their advocate to have the necessary documents prepared and filed. Citing the case of *Esther Mukulu Mutuku v Rahab M'kiama & 2 Others* 2022 eKLR the defendant urged that the court has discretion to grant the orders sought. the case of *Mansukhlal Jesang Maru v Frank Wafula* 2021 eKLR was also cited for the proposition that there would be no prejudice suffered by the respondent that can not be compensated for by way of costs per chance the application was granted.
7. On its part the plaintiff relied on Order 2 Rule 14 as to when pleadings should have closed, and urged that it is couched in mandatory terms. It also relied on the provisions of Order 11 Rule 3(1) of the *Civil Procedure Rules*, stating that those provisions made it mandatory to perform the acts stated



thereunder, which the defendant failed to do. It protests that it was not even notified of the defendant's circumstances and learnt of them in the current application, one year of the close of pleadings. It urges that there are no attachments to the affidavit that show that the directors were indeed abroad for treatment, or that indeed any of them suffered from cancer. Citing *Raila Odinga & Others v IEBC & Others* Scpet nos 2,4 And 5 of 2013 2013 eKLR, the plaintiff stated that the Supreme Court set out the principles applicable in such circumstances and urged that allowing the filing of the proposed documents would be prejudicial to the plaintiff. It cited the lapse of time gone and relied on [Legal Notice no 5178](#) Rule 28, emphasizing that the court can issue appropriate directions to ensure that parties take pre-trial directions seriously. It also asserted that Article 159 of *the constitution* can not be used in aid of the defendant in the present circumstances, and each case has to be dealt with on its own merits. It is stated that the contents of the affidavit in support of the motion do not demonstrate convincing grounds for the grant of the application.

8. The defendant's defence is on the record.
9. Though the suit was instituted on 21/1/2020 and subsequently scheduled for pre-trial directions on 2/3/2020. However, the parties took time in an application seeking that the plaintiff's advocates be disqualified, dated 26/3/2021 which was determined on 2/11/2021. It is also the correct position that the matter has come up for pre-trial directions on several occasions, with the plaintiff stating that they have complied while the defendant kept seeking more time to comply. The deputy registrar before whom the matter continually came up for pre-trials finally referred the matter to the Judge on 19/9/2022. The present motion was filed on 22nd March, 2023 after the judge had set down the matter for hearing once. On that date, that is 9/2/2023, the plaintiff's counsel was ready to proceed while the defendant's counsel successfully sought that the matter be removed from the hearings list for the day to enable him familiarize himself better with it. thereafter the present application was filed. I have noted that the application also took some time before it came to be heard, possibly because of the inability of the court to sit, and it only took off on 5/10/2023.
10. It is noteworthy that no bundle of documents proposed to be filed has been attached to the application. It is therefore not clear to the court what documents the defendant intends to file perchance it is granted leave. However, it was clear from as far back as 24/6/2019 when the defendant filed a setoff and counterclaim in CMCC land case no 18 of 1019 that it considered itself entitled to such reliefs.
11. The defendant also filed a defence on 19/5/2020 in the present suit. nevertheless, I would say that the defendant has had a very lengthy period to comply with the rules and has not. The fact that it has not is not necessarily indicative that it does not have any documents to be filed.
12. This court has perused the original file for CMC ELC no 18 of 2019 and found numerous documents of the defendant filed therein. Either there was due to some sloppiness in the preparation of the present application or that the said documents are not relevant to this case that the said documents were not attached to the present application. This court cannot tell. However, it matters that this court has called for and retained the record in the lower court case for hearing and determination whether separately or as consolidated with the present suit. Neither the present suit nor the suit from the lower court has been heard on their merits.
13. What this court is intent on emphasizing is that when such an application as the current one has been made in such circumstances as prevail now, the court being a court of justice must ask itself if it is proper to bar the applicant from filing the documents it desires to and whether the respondent may suffer any prejudice. One thing that this court must bear in mind is that this is the first formal application being made in that regard, and that the dispute appears to require a full and final determination on its



merits. Secondly, only some delay may result, and that delay is compensable by way of condemning the applicant to costs, including those incurred in the present application.

14. The court will turn away from procedural and other technicalities where it is still possible to grant the orders sought and arrive at substantive justice in the case, for that ultimate end is what the court was constituted for. For that reason, it is necessary for this court to allow any action on the part of the applicant as will enable a hearing on the merits especially now that the hearing has not commenced.
15. The upshot of the foregoing is that I allow the application dated 22/3/2023 in terms of prayer no 2 thereof. I also issue the following further facilitative orders:
 - a. The defendant shall file and serve all the documents it wishes strictly within 21 days of this order.
 - b. The plaintiff shall be at liberty to respond to the defendant's filings within 21 days of service.
 - c. This matter shall be mentioned on 29/2/2024 for confirmation of compliance and for taking of a hearing date.
 - d. The costs of the present application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 14TH DAY OF DECEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

