



REPUBLIC OF KENYA



**Kenroid Limited v Aureum Limited & 8 others (Environment & Land  
Case 100 of 2019) [2022] KEELC 12586 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 12586 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 100 OF 2019**

**OA ANGOTE, J**

**MAY 19, 2022**

**BETWEEN**

**KENROID LIMITED ..... PLAINTIFF**

**AND**

**AUREUM LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**IRENE NZISA WANJIGI ..... 2<sup>ND</sup> DEFENDANT**

**TYL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**KAIRO AUGUSTINE THUO ..... 4<sup>TH</sup> DEFENDANT**

**HORIZON HILLS LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**DAVID NJENGA SAMSON KURIA ..... 6<sup>TH</sup> DEFENDANT**

**HENRY NJOROGE NJENGA ..... 7<sup>TH</sup> DEFENDANT**

**SAMUEL NJUGUNA CHEGE ..... 8<sup>TH</sup> DEFENDANT**

**CISSY KALUNDE MUSEMBI ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

1. In the notice of motion dated November 15, 2021, the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants/applicants have sought for the following orders;
  - a. That the honourable court be pleased to grant leave to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants to file their statements of defence out of time.
  - b) That the honourable court to be pleased to deem the draft defence filed herein as an annexed to the supporting affidavit as a duly filed defence.



- c) The honourable court to issue orders it deems fit in the interests of justice.
  - d) That the costs of and incidental to the application be provided for.
2. The application is supported by the affidavit of the 6<sup>th</sup> defendant who has deponed that the 5<sup>th</sup> defendant/applicant was the registered owner of land reference number 1870/11/200 comprised in grant number IR 65800/1 (the suit property) and that the 5<sup>th</sup> defendant/applicant sold the said land to the 9<sup>th</sup> defendant on September 12, 2018.
  3. According to the 6<sup>th</sup> defendant/applicant; it was a condition of the said agreement that the said purchaser pays 10% of the purchase price and then upon transfer to her name she pays the balance thereof and that currently, the 9<sup>th</sup> defendant is the registered owner of the land.
  4. It was deponed that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants had instructed the firm of M/s MM Muriuki & Co Advocates to represent them in this case by filing a defence and that they visited the court registry on October 14, 2021 only to be informed that the hearing of the case had started and their statement of the defence was not on record.
  5. It was the deposition of the 6<sup>th</sup> defendant that the applicants have a stake in the suit property having been the previous owners; that the 9<sup>th</sup> defendant owes them the balance of the purchase price and that they should be allowed to file their defence out of time.
  6. The 6<sup>th</sup> defendant lastly deponed that the court should not punish them because of the mistake of their advocates who were on record and grant them leave to file their defence to enable them defend their rights; that no prejudice will be suffered if the application is allowed and that they have a defence which raise triable issues.
  7. The 6<sup>th</sup> defendant swore a further affidavit in which he deponed that he has the authority of the 5<sup>th</sup> to 7<sup>th</sup> defendants to file and swear the affidavit; that the applicants appointed the firm of MM Muriuki & Co Advocates with express instructions to represent them and that unknown to them, their advocate look the position that their case had been subsumed in the 9<sup>th</sup> defendant's case.
  8. It is the deposition of the 6<sup>th</sup> defendant that although the 9<sup>th</sup> defendant has filed a defence, that position has exposed them on the specific allegations of fraud and misrepresentation made in the plaint and specifically attributed to them.
  9. It was deponed that they need to canvass evidence on the purported legal stakes of the 1<sup>st</sup> defendant whose claim originates from a parallel company with a similar name to the 5<sup>th</sup> defendant.
  10. It was deponed by the 6<sup>th</sup> defendant that he is a director of Horizon Hills Limited under certificate of registration number C-110776 and not Horizon Hills Limited purported to have been registered on November 24, 2000 under certificate of registration number C-131937 which it shares with the 1<sup>st</sup> defendant.
  11. According to the applicants, Horizon Hills Limited C-131937, has never existed at any time material to the suit and that its purported change of name to the 1<sup>st</sup> defendant, Aureum Limited, is a ruse for the illegal and fraudulent registration of LR 1870/11/200, the suit property.

### **The 1<sup>st</sup> and 3<sup>rd</sup> defendants' response**

12. In the replying affidavit, the 1<sup>st</sup> and 3<sup>rd</sup> defendants' director deponed that the applicants are abusing the process of the court by seeking to undermine and delay the ongoing proceedings in which they have always participated and been part of.



13. According to the 1<sup>st</sup> and 3<sup>rd</sup> defendants, the procedure is clear on the timelines within which a party should file their defence and supporting documents; that the applicants willfully failed and or refused to file the same and that the applicants cannot at this late stage when the hearing has commenced purport to change their counsel and use that as a ruse to circumvent the rules on filing of responses.
14. It was deponed that the applicants have elected not to file their defences, list of documents and witness statements; that the proceedings before the court belong to the parties and not the advocates and that it is not open to parties to fail to adhere to and comply with the rules.
15. The 1<sup>st</sup> and 3<sup>rd</sup> defendants' representatives finally deponed that the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants were initially represented by the law firm of MM Muruiki & Partners Advocates; that the firm of Kamanza & Partners Advocates later on filed a notice of change of advocates and that in the light of the foregoing, the law firm of AN Geka & Co Advocates cannot file or present any documents for and on behalf of the said persons.
16. It was deponed that the notice of appointment of advocates used by the firm of AN Geka & Co Advocates is defective and should be struck out; that there is no company presently known as Horizon Hills Limited and that the application should be dismissed. The applicants filed submissions which I have considered. The respondents did not file any submissions.
17. In the plaint, the plaintiff has averred that vide an agreement dated June 21, 2018, it purchased the suit property from Aureum Limited, the 1<sup>st</sup> defendant. According to the plaintiff's pleadings, while in the process of discharging its obligations under the agreement, it became aware that the suit premises had been unlawfully transferred to the 9<sup>th</sup> defendant after the unlawful cancellation of entries in the title registering the certificate of change of name from Horizon Hills Limited to Aureum Limited.
18. In the plaint, the plaintiff has averred that by taking advantage of the confusion caused by the registration of two separate companies with the name of Horizon Hills Limited, the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants purported to transfer the suit property to the 9<sup>th</sup> defendant and that the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants are holding themselves out as the shareholders and directors of the 5<sup>th</sup> defendant's company.
19. The plaintiff has sought for an order of specific performance of the sale agreement dated June 21, 2018 entered into between the plaintiff and the 1<sup>st</sup> defendant and in the alternative, a refund of the purchase price of Kshs 50,000,000 together with interest.
20. In their defence, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants averred that the illegal attempt by the 9<sup>th</sup> defendant to generate an illegal title over the suit property has been reported to the police. On her part, the 9<sup>th</sup> defendant averred in the defence that she is the registered proprietor of the suit property having purchased it for valuable consideration from Horizon Hills Limited (the 5<sup>th</sup> defendant) on September 12, 2018 and that the 6<sup>th</sup> and 7<sup>th</sup> defendants executed the sale agreement on behalf of the seller, Horizon Hills Limited.
21. The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants' case is that although they instructed an advocate to file a defence on their behalf, they were made to believe that their case was subsumed in the 9<sup>th</sup> defendant's defence and that they have since learnt that their advocate never filed a defence on their behalf which is prejudicial. They are seeking for leave to file a defence out of time.
22. Order 7, rule 1 of the [Civil Procedure Rules](#) provides as follows:

' 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.'

23. Order 36 rule 7 of the Civil Procedure Rules contemplates situations where the defence may not be filed within the stipulated timeline. The said provision of the law provides as follows:

' Leave to defend may be given unconditionally, or subject to such terms as to giving security or time of trial or otherwise, as the court thinks fit.'

24. The court has been granted power to enlarge time for filing of pleadings in certain circumstances under order 50, rule 6 of the Civil Procedure Rules which provides as follows:

' Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'

25. Article 50 of the [Constitution](#) provides for the right to a fair hearing while article 47 provides for access to justice for all. The enlargement of time for a party to file a defence is a discretionary power that the court has. However, such discretion has to be exercised judiciously and not on caprice, whim, likes or dislikes (see [Patriotic Guards Limited vs James Kipchirchir Sambu \[2018\] eKLR](#)).

26. In exercising this discretion, the court will be guided by two major considerations being whether sufficient cause has been demonstrated and whether the defence raises triable issues. These twin principles were restated in the case of [Patel vs East African Cargo Handling Services Ltd \[1974\] EA 75](#) as follows:

' I am satisfied that the failure to attend the hearing by the applicant was due to his negligence but a genuine error on the part his lawyer. Consequently, I hold that the applicant has demonstrated a sufficient cause upon the court can exercise its discretion.

However, before the court can set aside its ex parte decision or proceeding is trite law that it must consider whether the applicant has any defence which raises triable issues.'

27. The issue of what a triable issue entails was ventilated by the Court of Appeal in the case of [Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono \(2015\) eKLR](#) as follows:

' A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term 'triable' as, 'subject or liable to judicial examination and trial.' It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.'

28. In the Ugandan case of [Sebei District Administration vs Gasyali \[1968\] EA 300,301,302](#) the court adopted the reasoning in [Jamnadas Sodha vs Gordandas Hemraj \(1952\) 7 ULR 7](#) where it was stated as follows:

' The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether



the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.'

29. In the case of *Mbaki & Others vs Macharia & Another* (2005) 2 EA 206, at page 210, the Court of Appeal held that:

' The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.'

30. It is not in dispute that at one point, the suit property was owned by a company known as Horizon Hills Limited. According to the 1<sup>st</sup> defendant, the said Horizon Hills Limited changed its name to Aureum Limited because there was another company bearing the name of Horizon Hills Limited, and thereafter sold the suit property to the plaintiff.

31. The 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants have been sued on the basis that they purported to be directors of Horizon Hills Limited. According to the affidavit of the 6<sup>th</sup> defendant, Horizon Hills Limited whose registration number is C-131937 and which changed its name to Aureum Limited, has never existed at any time and that its purported change of name to the 1<sup>st</sup> defendant was a ruse for the illegal and fraudulent acquisition of LR 1870/II/200 (the suit property).

32. It was deponed by the 6<sup>th</sup> defendant that he is a director of Horizon Hills Limited under certificate of registration number C-110776 and not Horizon Hills Limited purported to have been registered on November 24, 2000 under certificate of registration number C-131937 which changed its name to the 1<sup>st</sup> defendant and purported to sell the suit property to the plaintiff.

33. The depositions of the 1<sup>st</sup> and 3<sup>rd</sup> defendants, and the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants clearly shows that the issue of ownership of the suit property will only be resolved after the court has established which of the two 'Horizon Hills Limited' was a genuine company.

34. That being so, and considering that serious allegations of fraud have been raised as against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants, the said defendants should be allowed to file a defence, witness statements and documents to enable this court to effectively and completely adjudicate upon and settle all question involved in the suit.

35. Indeed, it is only after hearing the applicants that this court will be able to determine the issue of ownership of the suit property conclusively. In fact, none of the parties has shown the prejudice it/he will suffer in the event the applicants are allowed to participate in these proceedings.

36. That being so, the application dated November 15, 2021 is allowed as follows:

- a) Leave be and is hereby granted to the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants to file and serve their statements of defence out of time.
- b) The 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants to file and serve their statements of defence documents and witness statements within 14 days of service.
- c) The plaintiff is at liberty to file a reply to defence within 7 days from the date of service.
- d) Parties are at liberty to apply on the manner in which the trial should proceed upon closure of the pleadings.
- e) Each party to bear his/its own costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

**OA ANGOTE**

**JUDGE**

**In the presence of;**

Mr Otieno Willis for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Mr Bernard Otieno for 9<sup>th</sup> Defendant

No appearance or Applicants

No appearance for Plaintiff

Mr. Kamau for Attorney General

Court Assistant – John Okumu

