



**Elizabeth Muthoni Kahonge (Suing Thro' the Legal Representative of Joseph Kahonge Muthoni (Deceased) v Macharia (Environment & Land Case 57 of 2019) [2022] KEELC 2285 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 57 OF 2019**

**YM ANGIMA, J**

**MAY 12, 2022**

**BETWEEN**

**ELIZABETH MUTHONI KAHONGE (SUING THRO' THE  
LEGAL REPRESENTATIVE OF JOSEPH KAHONGE MUTHONI  
(DECEASED) ..... PLAINTIFF**

**AND**

**JOHN THUO MACHARIA ..... DEFENDANT**

**RULING**

**A. Introduction**

1. The record shows that this suit was heard on 04.10.2021 when the Plaintiff called one witness and closed her case. The Defendant's advocate sought an adjournment twice on the material date to enable him call defence evidence but both applications were rejected. The main reason advanced was that the Defendant had been out of touch with his advocates for long hence the advocate needed more time to get proper instructions. In rejecting the Defendant's bid to adjourn the suit, the court noted that the suit had been pending for 18 years; that the Defendant had not complied with Order 11 of the *Civil Procedure Rules* for several years; and that no good reason had been tendered for the Defendant's absence.
2. Since the Defendant's advocate had no evidence to tender the Defendant's case was closed and the parties were granted 21 days each to file and exchange their respective submissions on the main suit. The record shows that the Plaintiff's written submissions were filed on 25.10.2021 but the Defendant did not file any submissions. The record shows that, instead he filed a notice of change of advocates on 15.11.2021.



## **B. The Defendant's Application**

3. By a notice of motion dated 15.11.2021 brought under Articles 22, 23, 46, 48 and 50 of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap.21), Order 7 rule 16, Order 8 rule 3, Order 40 and Order 50 of the *Civil Procedure Rules*, 2010 (the Rules) and all enabling provisions of the law, the Defendant sought leave to tender his defence out of time as leave to amend his defence.
4. The said application was based upon the grounds set out on the face of the motion and contents of the supporting affidavit sworn by the Defendant on 15.11.2021 and the exhibits thereto. The Defendant contended that he was dissatisfied with the quality of legal services offered by his previous advocates on account of various shortcomings which he pointed out in the application. He contended that his previous advocates had failed to request for vital documents from him to enable them comply with Order 11 of the Rules and to file a trial bundle. He considered the said advocates to have been negligent in failing to obtain all necessary defence documents from him. It is noteworthy that the Defendant did not contend in the supporting affidavit that he was not aware of the hearing date of 4.10.2021.
5. The Defendant further contended that the defence on record did not correctly capture his defence hence he desired leave to file an amended defence before conclusion of the suit. The Defendant further contended that the amendment sought would assist the court in determining the real issues in controversy once for all. The Defendant consequently urged the court to allow the application.

## **C. The Plaintiff's Response**

6. The Plaintiff filed a replying affidavit sworn on 25.01.2022 in opposition to the application. The Plaintiff contended that it was the Defendant's duty to avail all necessary defence documents to his advocates and that he did not have to wait for a specific request from his lawyers. The Plaintiff further contended that the Defendant had not given any explanation for his absence from court on the hearing date.
7. In further response, the Plaintiff contended that it was the Defendant's duty to follow up with his advocates on the progress and prosecution of the suit and that the Defendant was not a diligent litigant. The Plaintiff further contended that the instant suit was an old suit which was filed in 2003 and the Defendant had not explained why it took him 18 years to realize that he did not have the best legal representation. The Plaintiff was of the opinion that re-opening the case would be prejudicial to her and she urged the court to dismiss the application.

## **D. Directions On Submissions**

8. When the application was listed for hearing, it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their submissions. The record shows that the Defendant filed his submissions on 01.03.2022 whereas the Plaintiff filed hers on 02.04.2022.

## **E. The Issues For Determination**

9. The court has perused the Defendant's notice of motion dated 15.11.2021, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
  - a) Whether the Defendant is entitled to be granted leave to tender his defence.
  - b) Whether the Defendant should be granted leave to amend his defence.



- c) Who shall bear costs of the application.

## **F. Analysis And Determination**

### **a) Whether the Defendant is entitled to be granted leave to tender his defence.**

10. The court has considered the material and submissions on record on this issue. The defence case was closed on 4.10.2021 because the Defendant was not present. The Defendant's previous advocate had sought an adjournment on the hearing on the basis that the Defendant had not been in touch with the law firm. The Defendant has not explained why he did not attend court on the hearing date and why he had been out of touch with his previous advocates.
11. Although the Defendant had alleged in the certificate of urgency that he was unaware of the hearing date, there was no sworn statement in the entire supporting affidavit alleging that the Defendant was not informed of the hearing by his previous advocates. If there was any inadvertent omission in advising the Defendant of the hearing date, the previous advocates could have at least sworn an affidavit to that effect or indicated so in their letter to the Defendant dated 5.10.2021. The said advocates could also have indicated as much during the hearing date and use it as a basis for seeking an adjournment. Moreover, if it were true that the Defendant was unaware of the hearing date, he would have indicated as such in his letter to his previous advocates terminating their employment.
12. On the basis of the material on record, the court is satisfied that the Defendant was aware of the hearing date of 4.10.2021. Unfortunately, the Defendant did not render any reasonable explanation or excuse for his failure to attend court on the hearing date. The Defendant's application for adjournment was rejected for reasons which were recorded. The court is thus of the opinion that the Defendant is simply trying to circumvent the court process by seeking to overturn the order refusing an adjournment without following the established process of review or appeal.
13. The Defendant has attacked the quality of professional legal services rendered by his previous advocates. He faulted them for allegedly failing to request for copies of vital documents and failing to file a trial bundle on his behalf. The Defendant has indicated that all along he held into crucial documentary evidence for 18 years waiting for his previous advocates to request for it. The court is of the opinion that it was the duty of the defendant to voluntarily avail copies of all necessary defence documents expeditiously to his advocates at the time of giving instructions. A diligent litigant should not hold onto documentary evidence necessary for his defence without giving copies thereof to his defence lawyers. Be that as it may, the failure to file defence documents has really no bearing on the Defendant's failure to attend court on the hearing date. Even if the court were to find that the Defendant's previous advocates were negligent in their legal representation that cannot be a good basis for re-opening the defence case.

### **b) Whether the Defendant should be granted leave to amend his defence.**

14. The court has considered the material and submissions on record on this issue. Although the court has a wide discretion to allow amendment of pleadings at any stage of the proceedings, the court should be satisfied that a late application has been made in good faith and that it would serve some useful purpose. In this case, the suit is pending judgment after the Defendant failed to testify at the trial. The Defendant's application to re-open the defence case has not been successful hence it would not serve any useful purpose to allow an amendment at this late stage.
15. Furthermore, given the history of the proceedings the court is not satisfied that the application was made in good faith. The Defendant had over 18 years to seek amendment of pleadings but did not do



so. The instant application was filed after refusal of an adjournment of the suit. It may well be a ploy by the Defendant to have his case re-opened through the backdoor after failing to obtain an adjournment on the hearing date. Accordingly, the court is of the opinion that the Defendant is not entitled to leave to amend pleadings in the particular circumstances of this case.

**c) Who shall bear the costs of the application.**

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful party should be deprived of costs. Accordingly, the Plaintiff shall be awarded costs of the application.

**G. Conclusion And Disposal:**

17. The upshot of the foregoing is that the court finds no merit in the Defendant's application for leave to amend the defence and to re-open the defence case. Accordingly, the Defendant's notice of motion dated 15.01.2021 is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM**

**In the presence of:**

Mr. Ms. ndegwa for the Plaintiff

No Appearance for the Defendant

C/A - CAROL

**Y. M. ANGIMA**

**JUDGE**

