



**Neeraj Jayatilaiya Kalaiya v Cheruiyot & 5 others (Environment & Land
Case E394 of 2021) [2022] KEELC 2669 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E394 OF 2021**

**JO MBOYA, J
JUNE 23, 2022**

BETWEEN

NEERAJ JAYATILAIYA KALAIYA APPLICANT

AND

DANCUN CHERUIYOT 1ST DEFENDANT

DIRECTOR OF CRIMINAL INVESTIGATION 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

LAVINGTON SECURITY LIMITED 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

HACHA J. MAROA 6TH DEFENDANT

RULING

Introduction and Background

1. The suit herein was commenced vide Plaintiff dated the 17th November 2021, but which was later amended on the 27th January 2022 and whereby the Plaintiff herein sought for the following Reliefs:
 - a. A Permanent injunction to restraining the Defendant, his agents, employees, workers or persons acting on his behalf and by whatever name called form in any way from entering with, advertising, entering onto, taking possession, remaining upon, trespassing, transferring, alienating, leasing, offering security, dealing with, offering to sell, constructing on, occupying, putting public notices and/or dealing with the property of the Plaintiff/Applicant parcel of land known as L.R No. 1/1392 of any portion thereof pending the hearing and determination of this application.



- b. A Declaration that the Plaintiff is the legal and registered owner L.R No. 1/1392, situate along Ngong Road, Nairobi.
 - c. Order a above be enforced by the OCS Kilimani Police Station.
 - d. The Intended Rectification of the register in relation to the suit property and cancelation of the title, namely Nairobi L.R No. 1/1392 is illegal.
 - e. The Costs of this suit.
 - f. Any other Relief that the court may deem fit and expedient to grant.
2. Following the service of the amended Plaintiff, the 2nd, 3rd, 5th and 6th duly entered appearance and also filed responses to three applications, which had hitherto been filed by the Plaintiff herein.
 3. Be that as it may, on the 25th January 2022, the Parties herein entered into a consent, inter-alia where the three Applications, namely, the Application dated the 17th November 2021, 31st December 2021 and 31st December 2021, respectively, were marked as withdrawn.
 4. On the other hand, it was also agreed that the 2nd, 3rd, 5th and 6th Defendants were to file and serve their statement of defense and the incidental documents within 21 days from the date of the Consent and thereafter the matter was to be mentioned on the 10th March 2022 to confirm compliance.
 5. Come the 10th March 2022 when the subject matter was mentioned, it transpired that the 2nd, 3rd, 5th and 6th Defendants had not filed the statement of defense and the necessary bundle of documents, either within the set timeline or at all.
 6. Pursuant to the foregoing, the counsel for the 2nd, 3rd, 5th and 6th Defendants sought for and obtained extension of time within which to file the statement of defense and the Bundle of documents. For clarity, liberty was granted to the 2nd, 3rd, 5th and 6th Defendants to file the statement of Defense and the requisite list of Documents within 14 days.
 7. On the other hand, the court proceeded to and set down the subject matter herein for hearing on the 20th June 2022.
 8. Be that as it may, when the matter came up for hearing on the 20th June 2022, the Plaintiff's counsel took out an objection and sought to have the Statement of Defense, the list of witness and bundle of documents filed by and/or on behalf of the Defendants to be struck out and/or be expunged from the court record.
 9. In the premises, the subject Ruling relates to and/or concerns the Objection which was taken by the Plaintiff's counsel and whose import and tenor was to expunge the Defence and documents filed by and/or on behalf of the designated Defendants.

Submissions by the parties:

10. It was the Plaintiff's submissions that on the 25th January 2022, the Parties herein entered into a consent, which contained various terms, including timeline for the 2nd, 3rd, 5th and 6th Defendants to file statement of defense and incidental documents.
11. Further, the Plaintiff submitted that despite the timeline stipulated vide the consent, the counsel for the 2nd, 3rd, 5th and 6th Defendants failed to abide by and/or comply with the terms of the consent.



12. On the other hand, the Plaintiff also submitted that arising from the failure to comply with the terms of the consent, the court proceeded to and extended timelines to and in favor of the 2nd, 3rd, 5th and 6th Defendant to file the Statement of Defense and incidental documents and same were directed to do so within 14 days.
13. Nevertheless, the Plaintiff submitted that counsel for the designated Defendants did not comply with the stipulated timelines and same only filed the statement of defense and incidental documents on the 4th April 2022, before serving same on the 28th of May 2022.
14. In the premises, the Plaintiff contended that the statement of defense and the incidental documents were filed and served out of time, albeit without leave of the Honourable court.
15. To the extent that the statement of defense and incidental documents were filed and served out of time, counsel for the Plaintiff sought to have the Statement of Defence and documents struck out and/or expunged from the record of the court.
16. At any rate, the Plaintiff submitted that any document filed before the court without leave are a nullity and hence same cannot be validated by the court or otherwise be excused.
17. Finally, the Plaintiff submitted that even if the court had a discretion on the documents filed without leave, no explanation had been availed and/or offered to the court, to warrant exercised of such discretion in favor of the designated Defendants herein.
18. In a nutshell, the Plaintiff thus sought to have the impugned documents, inter alia, the Statement of Defence struck out and/or expunged, prior to and/or before the commencement of the hearing.
19. On his part, the litigation counsel, namely, Mr. Benson Njagi, conceded and admitted that the Statement of Defense and incidental documents had indeed been filed on the 4th April 2022 and served on the 28th May 2022.
20. Essentially, counsel for the 2nd, 3rd 5th and 6th Defendant conceded and acknowledged that indeed the impugned pleadings and documents were filed out of time and without Leave of the court.
21. Nevertheless, counsel for the 2nd, 3rd 5th and 6th Defendants averred that the issue before hand touches on ownership of the suit property, which is contended to belong to the Zambian High Commission, but was illegally alienated and registered in the name of the Plaintiff.
22. In the premises, counsel for the 2nd, 3rd 5th and 6th Defendants have contended that the subject dispute is one that requires to be interrogated on merit, to authenticate and/or ascertain the validity of the Plaintiff's title and/ or claim to and in respect of the Suit Property.
23. Based on the foregoing, counsel submitted that given the gravity and magnitude of the subject dispute, the procedural lapse to file the pleadings with the stipulated timeline, should not be invoked to lock out the designated Defendants from being heard.
24. Finally, Counsel for the 2nd, 3rd, 5th and 6th Defendants submitted that courts of law do not exist for purposes of meting out discipline and/or punishment on litigants, merely because a mistake and/or blunder has been committed by a Party.
25. Contrarily, it was submitted that courts of law do exist for purposes of rendering Justice and prospering the Rule of law which inter-alia, requires that where appropriate Disputes be heard on merits.
26. In short, Counsel for the designated Defendants pleaded with the court not to strike out the Statement of Defence and/or expunge the impugned documents either in the manner sought or at all.



27. In the alternative, counsel for the 2nd, 3rd, 5th and 6th Defendant sought for Leave of the court to file and serve compliant Statement of Defence and documents albeit out of time.

Issues for determination:

28. Having reviewed and considered the submissions by and/or on behalf off the Parties, two issues do arise for consideration and determination.
29. For coherence, the issues for determination are as hereunder;
- a. Whether the Pleadings and Incidental documents were filed out of time and if so, what is the legal implication of such documents.
 - b. Whether the Court is seized of the requisite Discretion to extend time for the filing of Pleadings and Documents out of time.

Analysis and determination

Issue number 1

Whether the Pleadings and Incidental Documents were filed out of time and if so, what is the legal implication of such Documents.

30. The starting point towards the determination and/or resolution of the first issue herein is to ascertain and/or authenticate whether the statement of defense and the incidental documents were indeed filed within the stipulated timelines, as underscored vide the orders of the court made on the 10th March 2022.
31. For clarity, vide the orders made on the 10th March 2022, the court ordered and/or directed that the 2nd, 3rd, 5th and 6th Defendants were to file and serve their Statement of Defense and the requisite documents within 14 days and not otherwise.
32. However, despite the terms and tenor of the orders of the court, which were rendered on the 10th March 2022, the 2nd, 3rd, 5th and 6th defendants only filed their statement of Defense and incidental documents on the 4th April 2022.
33. On the other hand, having filed their statement of Defense and incidental documents on the 4th April 2022, the 2nd, 3rd, 5th and 6th Defendants did not effect service of the said documents on the Plaintiff, until the 28th May 2022.
34. Clearly, the 2nd, 3rd, 5th and 6th Defendants herein, did not comply with and/or abide by the terms of the court order or at all and on the other hand, it is apparent that the 2nd, 3rd, 5th and 6th Defendants paid scant respect for the orders of the court and in this regard, it is imperative to consider the legal consequences of failure to comply with and/or abide by the orders of the court.
35. Suffice it to note, that court orders are never made in vain and/or futility. To the contrary, same are made to be obeyed, adhered to and/or complied with.
36. In respect of the foregoing observation, I can do no better than to reproduce, adopt and endorse the holding of the Court in the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* (2013) eKLR, where the Court held as hereunder;

“A court order is not a mere suggestion or an opinion or a point of view.



It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door.

If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

37. Based on the foregoing observation, it is obvious that where a Party fails to comply with and/or abide with the terms of the court order, such a Party must suffer the consequences of such failure.
38. In respect of the subject matter, the obvious consequence of such failure would be to strike out and/or expunge the impugned documents/pleadings, which are filed contrary to and in contravention of the court order.
39. On the other hand, where a Party has failed to comply with the terms and tenor of the court order, it behooves the defaulting party to revert back to court and seek leave of the court, prior to and before the filing of any pleadings and documents.
40. For clarity, it is not appropriate and/or legally tenable for such a Party to ignore and/or disregard the terms of the court order and to file such documents and when confronted with an objection seeking to expunge same, to implore the court to validate the irregularly filed documents.
41. To my mind, despite the provisions of Order 50 Rule 7 of the *Civil Procedure Rules* 2010, documents which are filed outside timelines and without Leave of the Court are a nullity and are thus amenable to be expunged.
42. To buttress the foregoing observation, it is imperative to take cognizance of and rely on the decision of the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR, where the Court observed as hereunder;

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.

43. The Jurisprudence flowing from the decisions alluded to in the preceding paragraphs, denote that any documents filed out of time and without leave of the court is therefore ipso jure a nullity and same cannot be condoned, irrespective of the excuse belying the lateness.



44. In the premises and taking into account that the decision of the Supreme Court of Kenya binds this court, I come to the inescapable conclusion that the impugned documents ought not to remain on record and in this regard, same be and are hereby struck out and expunged from the record of the court.

Issue number 2:

45. Having struck out and/or expunged the Statement of Defense and the incidental documents, that were filed and/or lodged by the 2nd, 3rd, 5th and 6th Defendants, on the basis of being nullities, for having been filed out of time without leave, the question that now arises is whether the court has discretion to extent time in favor of the defaulting Party.

46. To my mind, despite the expunction of the offensive Pleadings and documents, the court still has the inherent jurisdiction to consider and application and/or request for extension of time within which to file documents and/or pleadings and where appropriate to grant same.

47. In respect of the subject matter, it is common ground that the dispute revolves around ownership of the suit property, which is claimed by the Plaintiff, as the lawful and registered proprietor thereof, whereas the 2nd, 3rd, 5th and 6th defendants, who are essentially Government Officers/Departments, contend that the suit property belongs to the Zambian High Commission.

48. Essentially, there is a critical issue for determination and which issue bears public interest connotation given the fact that the decision of this court as pertains to the ownership of the suit property, may have a bearing on the co-existence between the Republic of Kenya and the Republic of Zambia, the later whose High Commission is claimed to be the owner of the suit property.

49. Given the likely implication of the decision herein, it is not lost on this court that this is one dispute that ought to be heard and determined on merits, so as to enable the court to pronounce itself with finality on the question of the ownership of and Title to the suit property.

50. To be able to address and/or determine the question of ownership/ Title of the suit property with finality, it would then mean that latitude must be extended to the 2nd, 3rd, 5th and 6th Defendants to file their pleadings and incidental documents and thereafter be able to place before the court all the evidence available and thus facilitate effective and effectual determination of the dispute.

51. At any rate, I beg to observe that the failure and/or lapse that culminated into the late filing of the pleadings and documents, is obviously one that lies at the Door step of the Counsel for the 2nd, 3rd, 5th and 6th Defendants and not otherwise.

52. In the premises, what the court must consider is whether such a lapse, failure and/or omission, ought to dis-entitle the 2nd, 3rd, 5th and 6th Defendants from filing their Documents and presenting their case before the court and being heard on merits.

53. To my mind, mistakes and blunders shall continue to be made from time to time, some by experienced advocates others by upstarts, like the Counsel for the Designated Defendants, but the fact that a mistake has been made, should not ipso facto, drive a Party away from the Seat of Justice.

54. To vindicate and fortify the foregoing observation, it suffices to recall, memorize and adopt the words of wisdom that were underscored vide the decision in the case of *Philip Keiptoo Chemwolo & Another versus Augustine Kubende* (1986)eKLR, where the Court observed as hereunder;

“I think a distinguished equity judge has said:



“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.”

55. Based on the foregoing case law, I am disposed to look at the 2nd, 3rd, 5th and 6th Defendants favorably and with some degree of clemency, to avert the hardship and/or injustice that may obviously arise if latitude is not expanded for the filing of the pleadings and incidental documents.
56. In any event, where such an Application is made, the Court is obligated to consider the Application and to determine whether same is just and ought to be allowed.
57. Suffice it to observe, that while considering an Application for extension of time within which to file Pleadings, lists of documents and additional witness statements or better still leave to do so, the court is called upon to taking into account various circumstances, inter-alia, the stage where the hearing has reached and whether the adverse Party would be disposed to suffer prejudice or Injustice, not compensable by an award of Costs.
58. Be that as it may, it is important to note that the Power of the court to extend time is well stipulated under the law. For clarity and in this regard, it is appropriate to refer to the provisions of Section 95 of the Civil Procedure Act, Chapter 21, Laws of Kenya, which provides as hereunder;
 95. Enlargement of time:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.
59. Discernable from the provisions of Section 95 (supra), is the fact that the Court has a discretion, albeit, which is unfettered but which ought to be exercised judiciously and not otherwise.
60. Based on the foregoing, the 2nd, 3rd, 5th and 6th Defendants are therefore pleading with the court to exercise discretion and to grant the leave sought. In any event, it has been explained that the lateness to file the documents within the stipulated time, was a mistake of the counsel and hence same ought not to be visited upon the said Defendants.
61. In my humble view, the reasons availed and/or ventilated by the Counsel for 2nd, 3rd, 5th and 6th Defendant constitute a Sufficient cause and/or basis, to warrant the grant and/or exercise of Discretion.
62. In respect of the foregoing, I adopt and endorse the holding of the Court in the case of Patriotic Guards Ltd V James Kipchirchir Sambu [2018] eKLR, where the Court pronounced itself thus:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.” (Emphasis added)



63. In my view and taking into account the fact that the hearing in respect of the subject matter has not commenced, I find it appropriate and expedient to extend time within which the 2nd, 3rd, 5th and 6th Defendants ought to file and serve the Statement of Defense and the incidental documents.

Final Disposition:

64. Having evaluated the twin issues that were isolated and/or identified for determination herein, it is now appropriate and/or expedient to render a Dispositive order.

65. In the premises, the Orders that commend themselves to me are as hereunder;

- a. The Statement of Defense dated the 29th March 2022, albeit filed on the 4th April 2022, together with the Documents attached thereto be and hereby struck out and expunged from the Record of the Court for having been filed out of time and without leave of the court.
- b. Liberty be and is hereby granted to the 2nd, 3rd, 5th and 6th Defendants to file and serve compliant documents, namely, Statement of Defense and the requisite documents within 14 days from the date hereof.
- c. The Plaintiff be and is hereby granted liberty to file Reply to Defense, if any, and same to be filed and served within 14 days from the date of service of the defense.
- d. The Plaintiff shall also have the liberty to file and serve additional witness statements and bundle of documents, if any and same to be filed and served with 14 days from the close of pleadings.
- e. The Parties herein are hereby directed to file and serve duly indexed, paginated and bound bundle of documents.
- f. Subject to compliance with the directions enumerated hereinbefore, the matter shall thereafter proceed to full hearing, without reverting to case conference and in this regard, the Parties are implored to comply with the timeline set.
- g. Costs of the Application shall abide the cause.

66. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. Shiunda H/B for Mr. Osundwa for the Plaintiff

Mr. Benson Njagi for the 2nd, 3rd, 5th and 6th Defendants

No appearance for the 1st and 4th Defendants

