



Taloi (In his Own Capacity & as Administrator of The Estate of Luka Kenyia Mpateei & Luke Lemayian) & 4 others v Taloi & 9 others (Environment & Land Case E002 of 2021) [2022] KEELC 3723 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E002 OF 2021**

**CG MBOGO, J
JULY 26, 2022**

BETWEEN

**BEN OLOISHORUA LUKA (IN HIS OWN CAPACITY & AS
ADMINSTRATOR OF THE ESTATE OF LUKA KENAYIA MPATEEI & LUKE
LEMAYIAN) 1ST PLAINTIFF**

**JOSEPH MEITAMEI MPAAYEI (IN HIS OWN CAPACITY & AS
ADMINSTRATOR OF THE ESTATE OF LUKA KENAYIA MPATEEI & LUKE
LEMAYIAN) 2ND PLAINTIFF**

SANE LUKE MPAYEEI 3RD PLAINTIFF

EMMANUEL TOIKAN MPAYEEI 4TH PLAINTIFF

MEITEIKINI LUKA 5TH PLAINTIFF

AND

RAITA TALOI 1ST DEFENDANT

SUYIANKA NKOORA 2ND DEFENDANT

TINTI SUYANKA 3RD DEFENDANT

KULAL TALOI 4TH DEFENDANT

MEISIASHI TALOI 5TH DEFENDANT

MOITALEL LETOLUO 6TH DEFENDANT

MAKILI LETOLUO 7TH DEFENDANT

OLOLKIONOR 8TH DEFENDANT

REUBEN NCHOE 9TH DEFENDANT



RULING

1. Before this court for determination is the notice of motion application dated April 25, 2022 expressed to be brought under article 47,48,50,159 (2) (a) (d) of the Constitution, sections 1A,1B and 3A of the Civil Procedure Act and Order 50 rule 6 and Order 51 rule 1 of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. That the honourable court be pleased to arrest its ruling in this suit slated for April 26, 2022 and admission of submissions in respect of the instant suit pending the hearing and determination of this application interpartes.
 3. That the honourable court be pleased to issue further or better orders as shall meet the ends of justice.
 4. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of Raita Taloi, the 1st applicant/defendant herein sworn on even date. The 1st applicant/defendant deposed that this matter was to come up for a ruling on April 26, 2022 on a notice of motion application dated May 26, 2021 and that on the date set for the ruling, his counsel on record was unable to attend court and he was informed of the ruling date after visiting the registry. Further, that the respondents/plaintiffs herein failed to serve their counsel with submissions to the said application to enable him respond and file the same and that the matter is sensitive and if the ruling is delivered without their voice being heard, they will be prejudiced. As such, they are willing to abide by any terms the court will impose as a consequence of granting the prayers in this application. Also, that it is in the interest of justice that their written submissions filed together herewith be admitted, deemed as duly filed with leave of court and considered before the ruling herein is delivered and that no prejudice will be occasioned on the respondents/plaintiffs if the application is allowed.
3. The respondents/plaintiffs did not file a response and neither did they file written submissions.
4. The applicants/defendants filed written submissions dated June 20, 2022. The applicants/defendants raised two issues for determination, which are whether the application dated April 25, 2022 meets the threshold to grant the prayer to arrest the ruling and who bears the costs of the suit. The applicants/defendants submitted that on the date the matter was set for the ruling, their advocate did not attend court and only later learnt of the ruling date after visiting the registry and it was upon the court or the respondents/plaintiffs' counsel to inform them of the next date the matter was to come up and neither the court nor the respondents/plaintiffs informed their counsel. The applicants/defendants further submitted that they have acted in good faith and have filed their defence through their former counsel with an aim to seek justice and that it is trite law that every person has an inalienable right to a fair hearing which is the cornerstone of the rule of law. While relying on the case of Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR and Bank of Africa Kenya Limited v John Karanja Njenga Civil Suit No 420 of 2015 the applicants/defendants submitted that the oxygen principles advocate for justice to all and since the court is clothed with power to hear both parties then they should be allowed to present their case.



5. The applicants/defendants further submitted that the respondents/plaintiffs should bear the costs of this application and relied on the case of Republic versus Rosemary Wairimu Munene Ex-parte Applicant versus Ihururu Dairy Farmers Co-operative Society Limited.
6. I have considered the application and the written submissions filed by counsel for the applicants/defendants and the issue for determination is whether the application dated April 25, 2022 has merit.
7. In order for the court to arrive at a just determination, it is necessary that I reproduce the events that culminated to the filing of the instant application.
8. A look at the proceedings of this court indicate that on June 15, 2021, the matter was coming up for hearing of the notice of motion application dated May 24, 2021 filed by the respondents/plaintiffs where counsel for the applicants/defendants informed the court that his firm comes on record replacing the previous firm- Murithi Kireria & Associates Advocates and the court gave directions that the respondents/plaintiffs to serve the applicants/defendants with the notice of motion application dated May 24, 2021 and a further mention date was given on July 22, 2021 to confirm filing of written submissions. On July 22, 2022, both parties were absent and a further mention date was given for the September 29, 2021. On September 29, 2021 both parties were absent and this court directed the Deputy Registrar to issue a mention notice to the parties to attend court for mention of the matter on November 3, 2021. On November 3, 2021 the respondents/plaintiffs were present and the applicants/defendants were absent. On this date, the respondents/plaintiffs confirmed that they had filed their written submissions which is on record. Counsel further informed the court that the applicants/defendants were yet to serve him with their response and for this reason, the application stood unopposed. This court noted that the Deputy Registrar had served the mention notice via email the previous day i.e. on November 2, 2021 in the evening and directed the respondents/plaintiffs' counsel to serve the applicants/defendants counsel with a mention notice for December 13, 2021. On December 13, 2021 was a holiday and the court mentioned the matter on December 14, 2021 and issued a mention notice for February 15, 2022.
9. On February 15, 2022, counsel for the respondents/plaintiffs was present whereas counsel for the applicants/defendants was absent. On this date the court confirmed that being satisfied with the affidavit of service filed by the respondents/plaintiffs, the applicants/defendants counsel was duly served. However, the mention notice on record was served upon the firm of Mureithi Kereria & Associates Advocates. Based on the above sequence of events, the court reserved the application for ruling to be delivered on April 26, 2022 and directed the respondents counsel to serve the applicants' counsel with a ruling notice.
10. The applicants/defendants fault the court and counsel for the respondents/plaintiffs for failing to serve their counsel with a ruling notice and deposed that their counsel only became aware of the ruling notice when he visited the registry. I disagree with counsel for the applicants/defendants on faulting the court for the reason that this court gave further directions that the respondents/plaintiffs' do serve the applicants/defendants with a ruling notice. It was upon the respondents/plaintiffs' counsel to serve the applicants/defendants with the same.
11. On April 26, 2022 when the matter came up for mention, counsel for the applicants/defendants informed the court that on the date the matter was mentioned, he had difficulty logging in the virtual platform and it was after writing to the court that he was informed of the ruling date slated for April 26, 2022. Counsel for the respondents/plaintiffs was absent. I do note that counsel has not produced the said letter he wrote to the court. On this date, the court directed the applicants/defendants counsel to serve the respondents/plaintiffs with the directions and gave a further mention date for May 19, 2022.



12. On May 19, 2022, counsel for the respondents/plaintiffs was absent and the court gave a further mention on May 30, 2022. On May 30, 2022, both parties were present. Counsel for the respondent/plaintiffs raised the issue of the applicants'/defendants counsel representation for the reason that they have never been served with a notice of change of advocates and sought that the applicants/defendants counsel comes on record properly. Counsel for the applicants/defendants in response stated that they filed a notice of change of advocates on June 11, 2021 when the firm of Murithi Kireria & Associates Advocates had filed an application dated June 3, 2021 to cease acting. For the record, the application is pending as it has not been heard. On this date, the court directed that the applicants/defendants counsel serves the respondents/plaintiffs' counsel with a notice of change of advocates, the court gave a further mention date for June 20, 2022. For the avoidance of doubt, the notice of change of advocates dated June 15, 2021 is on record.
13. It should also be noted that the notice of motion application dated May 24, 2021 seeks to strike out the applicants/defendants Statement of defence dated March 3, 2021 and if granted, then judgment be entered in favour of the plaintiff as prayed in the plaint.
14. Article 159 of the *Constitution* provides;
 - (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this constitution.
 - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this constitution shall be protected and promoted.
 3. Traditional dispute resolution mechanisms shall not be used in a way that—
 - (a) contravenes the bill of rights;
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - (c) is inconsistent with this constitution or any written law.
15. The objective of the *Civil Procedure Act* provides: -
 - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court. [Act No 6 of 2009, Sch.]



16. Further, the duty of the court in achieving the above is:-

- (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

17. I do note that the applicants/defendants counsel came on record on June 11, 2021 *vide* a notice of change of advocates. However, this court is unable to tell whether the same was served upon the respondents/plaintiffs' counsel despite this court's directions issued on May 30, 2022. This could be the reason why counsel for the respondents/plaintiffs served the mention notice dated January 31, 2022 upon the firm of Mureithi Kireria & Associates Advocates. I do also note that there are no written submissions to the notice of motion application dated May 24, 2021 as deposed in paragraph 8 of the 1st applicant/defendant supporting affidavit. There is also no notice of motion application dated May 26, 2021 pending ruling.

18. This court being guided by the overriding objective as cited above, and bearing in mind the duty of this court to ensure the just determination of the proceedings, and the issues raised in the notice of motion application dated May 24, 2021, it is in the interest of justice that I allow the notice of motion application dated April 25, 2022 in terms of prayer 3 and direct that the applicants/defendants to file written submissions with respect to the notice of motion application dated May 24, 2021 within 7 days from today's date. Mention to confirm compliance and fixing a date for ruling on August 2, 2022 before the Deputy Registrar. There are no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 26TH JULY, 2022.

MBOGO C.G

JUDGE

26/7/2022

In the presence of: -

CA: Timothy Chuma

