



**Price Investment Limited v Kenya Ports Authority & 2 others (Environment & Land Case 98 of 2019) [2022] KEELC 15249 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15249 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 98 OF 2019  
EO OBAGA, J  
NOVEMBER 24, 2022**

**BETWEEN**

**PRICE INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**UASIN GISHU LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**UASIN GISHU COUNTY GOVERNEMENT ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of notice of motion dated April 7, 2022 in which the 1<sup>st</sup> defendant/applicant seeks to have the interlocutory judgment entered against it set aside and it be allowed to serve its defence and comply with order 11 of the [Civil Procedure Rules](#) out of time.
2. The affidavit in support of the applicant's application is sworn by Ms Winnie Cheruiyot, a principal state counsel who states that initially, the Attorney General was instructed to appear for the 2<sup>nd</sup> respondent, the Uasin Gishu Land Registrar. The Attorney General entered appearance for Uasin Gishu Land Registrar but the case against Uasin Gishu Land Registrar has since been withdrawn.
3. The deponent of the affidavit states that as the case against Uasin Gishu Land Registrar had been withdrawn, their office file remained dormant. When the Attorney General was served with a hearing notice, the deponent of the supporting affidavit called the office of the applicant who confirmed that the Attorney General could go ahead to defend them.
4. It is after this confirmation that the Attorney General proceeded to enter appearance and filed the present application. The applicant states that failure to file defence was as a result of miscommunication between the office of the applicant and the Attorney General. The miscommunication arose because ordinarily, state corporations appoint their private lawyers to act for



them and only instruct the Attorney General only when they expressly need the services of the Attorney General as was in this case.

5. The applicant states that the land in issue was public land reserved for aviation purposes and was not available for allocation to private entities. The applicant further argues that the interlocutory judgement was obtained irregularly as no leave was obtained before the same could be obtained as required under order 10 rule 8 of the [Civil Procedure Rules](#).
6. The applicant's application was opposed by the plaintiff/respondent based on a replying affidavit sworn on April 22, 2022. The respondent contends that the applicant's application is unmerited as it contains lies and half-truths and concealment of facts.
7. The respondent states that the summons to enter appearance were duly served upon the applicant who proceeded to enter appearance but did not bother to file a defence despite being served with mention notices on the progression of the suit.
8. The respondent contends that the Attorney General has not complied with order 9 rule 9 of the [Civil Procedure Rules](#) and that there has been no explanation why the applicant's lawyer who initially entered appearance changed her mind and decided to instruct the Attorney General three years later on.
9. The respondent further states that the draft defence attached does not raise a credible defence and reasonable cause of action to warrant admission and that if the applicant's defence is allowed, the respondent will suffer irreparable loss as it has spent a lot of resources securing advocates attendance before court every time the matter comes up in court.
10. The parties were directed to file written submissions. The respondent filed submissions on September 23, 2022. The applicant filed submissions on September 26, 2022. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the applicant has demonstrated that it has ground which will warrant the court to exercise its discretion in its favour.
11. I notice from the replying affidavit that indeed the applicant was served with summons to enter appearance and that there was appearance by Ms Margaret Munene an in-house lawyer of the applicant. I also note that the same lawyer later on on July 1, 2021 wrote to the Solicitor General asking him to take up the matter on behalf of the applicant.
12. It is not uncommon to see state corporations enter appearance through their in-house counsel or privately appointed counsel and later on seek the services of the Attorney General. The mere fact that there was non-compliance with order 9 rule 9 of the [Civil Procedure Rules](#) is not fatal to the applicant's application.
13. The applicant has raised the issue of the respondent not having sought leave to enter judgment in default of defence. The applicant relies on order 10 rule 8 of the [Civil Procedure Rules](#) which states as follows:-

“No judgment in default of appearance or pleading may be entered against the government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”
14. Though order 10 rule 8 of the [Civil Procedure Rules](#) does not mention what constitutes government, rules states that government includes state departments and public officers. It is not clear whether a state corporation which is established under its own Act can be called a department of the government. The same is true of the county governments which are governed by their own Act of parliament.



15. There have been divergent decisions from the superior courts on whether the *Government Proceedings Act* apply to state corporations or county governments. In the case of *Maggy Agulo Construction Co Ltd -Vs- Ministry of Public Health & 4 others* (2020) eKLR, the defendants were Ministry of Public Health, Ministry of Public Works, County Government of Vihiga, Vihiga County Tender Committee and the Hon Attorney General who were named as 1<sup>st</sup> to 5<sup>th</sup> defendants respectively.
16. In the Maggy Agulo Construction Company case (supra) an *ex parte* judgement had been entered against all the five defendants. Two separate applications were made by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants on the one part and 3<sup>rd</sup> and 4<sup>th</sup> defendants on the other part. Justice Musyoka held that all the five defendants were government entities and as the provisions of order 10 rule 8 were never followed, the *ex parte* judgment was set aside. In this case, the judge had quoted the case of *Mana Methodist Hospital Sacco -vs- Commissioner Kenya Revenue authority* (2011) eKLR where the court held that Kenya Revenue Authority is deemed to be the government within the meaning of *Government Proceedings Act*. The court proceeded to set aside the *ex-parte* judgment on ground that there was no leave of court sought as envisaged under order 10 rule 8 of the *Civil Procedure Rules*.
17. The Kenya Airports Authority, the applicant herein just as the Kenya Revenue Authority are state corporations. The applicant herein is established under the *Kenya Airports Authority Act* which stipulates that proceedings against it should not be brought without notice of not less than 30 days is given to the managing director. Again, proceedings against the authority have to be brought within 12 months from the occurrence of the act being complained of or if is a continuing act, within 6 months after the cessation of the act complained of.
18. When it comes to execution proceedings, just as in government, one cannot attach the applicant's property. A certificate of costs is required to be served upon the managing director who can then pay. It is clear from these provisions that this state corporation is deemed to be a government department and hence there has to be compliance with order 10 rule 11 of the *Civil Procedure Rules*. As there was no compliance with order 10 rule 11 of the *Civil Procedure Rules*, the interlocutory judgment was obtained irregularly and there is no room for exercise of the court's discretion as an irregular judgment can even be set aside *ex debito justitiae*.
19. I therefore allow the applicant's application with the result that the interlocutory judgment entered against the applicant is set aside. The applicant is granted leave to file defence within 14 days from the date hereof. The plaintiff/respondent shall bear the costs of this application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Kirwa for the Plaintiff.

Ms. Aduke for 3<sup>rd</sup> Defendant.

Court Assistant –Albert

**E. O. OBAGA**

**JUDGE**

**24<sup>TH</sup> NOVEMBER, 2022**

