Marriot Africa International Limited v Murigu & 3 others; Ukombozi Holdings Ltd (Interested Party) (Environment & Land Case 4 of 2021) [2022] KEELC 15578 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15578 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 4 OF 2021

JO MBOYA, J

NOVEMBER 15, 2022

(FORMERLY THIKA ELC CASE NO.115 OF 2019)

BETWEEN

MARRIOT AFRICA INTERNATIONAL LIMITED ..... PLAINTIFF

AND

MARGARET NYAKINYUA MURIGU ..... 1ST DEFENDANT

MARY WANJIKU KANYOTU ..... 2ND DEFENDANT

WILLY KIHARA ..... 3RD DEFENDANT

KANGAITA COFFEE ESTATES LIMITED ..... 4TH DEFENDANT

AND

UKOMBOZI HOLDINGS LTD ..... INTERESTED PARTY

RULING

Introduction and Background

1. The Ruling herein relates to and concerns three (3) separate and distinct Applications. For clarity, the Applications are dated the 26th April 2022, 19th May 2022 and 23rd May 2022, respectively.

2. For completeness, the Application dated the 26th April 2022 has been filed by the 3rd Defendant/ Applicant and same seeks the following Reliefs/ Orders;

    a. That this Application be certified as urgent and service of the same be dispensed with in the first instance;

b. That this Honourable court be pleased to strike out the Plaint herein and dismiss the Plaintiff's/Respondent's entire suit with costs for breach, disobedience, contempt of this Honourable court's orders issued on the 10th March 2022;

c. That this Honourable court be pleased to issue any other order(s) that it so pleases;

d. That Costs of this Application be provided for.

3. The subject Application is premised and anchored on various albeit numerous grounds which have been enumerated in the body thereof. Besides, the Application is supported by the affidavit sworn by the 3rd Defendant on the 25th April 2022 and a further affidavit sworn on the 23rd May 2022.

4. Upon being served with the application herein, the Plaintiff responded thereto vide a Replying affidavit sworn on the 18th May 2022 and in respect of which same has raised a plethora of issues inter-alia, that the impugned Discovery notices were irregular and illegal.

5. Additionally, the application dated the 26th April 2022 was also responded to by the 4th Defendant. In this regard, the 4th Defendant swore a Replying affidavit through the 1st Defendant and same is sworn on the 17th October 2022.

6. The Second Application is dated the 19th May 2022 and same has been filed and lodged by the Plaintiff. For clarity, same seeks the following reliefs;

i. That this Honourable Court be pleased to certify this Application urgent, and service be dispensed with in the first instance.

ii. That this Honourable Court be pleased to forthwith strike out the 3rd Defendant's letters dated 16th December 2020 and 2nd February 2021 referenced as "Discovery Notice Under Order 11 of the Civil Procedure Rules" addressed to the Plaintiff.

iii. That pursuant to the above, this Honourable Court be please to forthwith strike out the 3rd Defendant's Notice of Motion Application dated 26th April 2022.

iv. That in the alternative, this Honourable Court be pleased to order that the Documents requested for by the 3rd Defendant in his Letters dated 16th December 2020 and 2nd February 2021 have been sufficiently produced by the Plaintiff.

v. That the costs of this Application be provided for.

7. The instant application is premised on various grounds contained in the body thereof and same is further supported by the affidavit of Abdul Dawood Hassan sworn on the 19th May 2022.

8. Suffice it to point out that upon being served with the said application, the 3rd Defendant filed a Replying affidavit sworn on the 23rd May 2022 and in respect of which the 3rd Defendant has contended that the Plaintiff herein is guilty of contempt of lawful court orders and hence same ought to be denied and deprived of a right of audience before the Honourable court.

9. Similarly, the said Application has been opposed by counsel for the 4th Defendant who has filed a Replying affidavit sworn on the 17th October 2022.

10. The last Application is the one dated the 23rd May 2022 and same has similarly been filed by the Plaintiff.

11. For coherence, the said Application seeks the following reliefs;

    i. That this Honourable Court be pleased to certify this Application urgent, and service be dispensed with in the first instance.

    ii. That this Honourable Court be pleased to enjoin John Kariuki Kanyotu and Jane Gathoni Muraya, as the 2nd and 3rd Interested Parties respectively.

    iii. That the costs of this Application be provided for.

12. For coherence, the application is premised on the various grounds at the foot thereof and same is similarly supported by the affidavit of Abdul Dawood Hassan sworn on the 23rd May 2022. Besides, the deponent of the supporting affidavit *inter-alia*, contends that the application dated the 26th April 2022, constitutes and amounts to an abuse of the due process of the court.

13. Be that as it may, upon being served with the named application, the 3rd Defendant responded thereto vide a Replying affidavit sworn on the 7th June 2022.

14. Notwithstanding the foregoing, it is apparent and appropriate to point out that the 2nd Defendant neither filed any responses, either by way of Replying affidavit nor Grounds of opposition.

15. Nevertheless, when the matter herein came up for directions, the advocates for the respective Parties, agreed that the three named Applications be heard and canvased simultaneously.

16. Consequently, the honourable court proceeded to and gave directions that the said applications be disposed of and canvassed simultaneously and at the same time.

17. Additionally, directions were also given that the said Applications be canvased by way of written submissions to be filed and exchanged by the Parties, within the set timelines.

18. For completeness, it is imperative to note that the various Parties complied with the directions of the court and filed the written submissions. In this regard, it is appropriate to underscore that the 3rd Defendant filed his written submissions dated the 21st September 2022.

19. On the other hand, the Plaintiff filed written submissions dated the 5th October 2022 while the 1st and 4th Defendants filed their written submissions dated the 17th October 2022.

20. For the avoidance of doubt, the named sets of written submissions, (details in terms of the preceding paragraphs) forms part and parcel of the record of the Honourable court.

Submissions By The Parties:

a. 3rd Defendant's Submissions:

21. Vide the written submissions dated the 21st September 2022, the 3rd Defendant has isolated, highlighted and raised three pertinent issues pertaining and concerning the named Application.

22. In respect of the Application dated the 26th April 2022, counsel for the 3rd Defendant has submitted that the honourable court issued and granted an order on the 10th March 2022, wherein the court directed the Plaintiff to furnish the 3rd Defendant with various documents, whose details had hitherto been disclosed at the foot of the discovery notices dated the 16th December 2020 and 2nd February 2021.

23. Counsel has further submitted that despite the explicit orders of the court, the Plaintiff herein has failed, neglected and refused to comply with or adhere to the terms of the said court order.

24. Consequently, counsel for the 3rd Defendant has added that by failing to comply with the orders of the court, the Plaintiff remains in contempt and hence same ought not to be afforded a right of audience before the honourable court.

25. In this respect, counsel for the 3rd Defendant has cited and relied on the decision in the case of *Sheila Cassatt Issenberg & Another versus Antony Machatha Kinyanjui* (2021)eKLR and *Econet Wireless Kenya Ltd versus Minister for Information & Communication of Kenya & Another* (2005)eKLR.

26. Further, counsel for the 3rd Defendant has also submitted that by failing to produce and supply to the court, the requisite documents which were ordered and directed vide the court order issued on the 10th March 2022, the Plaintiff herein is hellbent to frustrate the expeditious hearing and determination of the dispute before the Honourable court.

27. Premised on the foregoing, learned counsel for the 3rd Defendant has therefore implored the Honourable court to find and hold that the failure to comply with the orders of the court issued on the 10th March 2022, is sufficient ground and basis to warrant the striking out of the Plaintiff's suit.

28. In respect of the 2nd Application, counsel for the 3rd Defendant has submitted that the impugned Discovery notices, which have been sought to be struck out by and at the instance of the Plaintiff herein, are no longer in existence.

29. Additionally, counsel has submitted that the impugned notices were the subject of a subsequent Application which was filed by the 3rd Defendant and which Application was heard and disposed of vide the Ruling rendered on the 10th March 2022.

30. In the premises, counsel for the 3rd Defendant has contended that the impugned Discovery Notices having been subsumed in the Ruling rendered on the 10th March 2022, it is neither practical nor tenable for same to struck out in the manner sought by the Plaintiff herein.

31. Similarly, counsel for the 3rd Defendant has submitted that following the rendition and delivery of the Ruling dated the 10th March 2022, the Plaintiff herein proceeded to and lodged a Notice of Appeal to the Court of Appeal.

32. Consequently and in the premises, it has been submitted that having filed and lodged a Notice of Appeal to the Court of Appeal over and in respect of the Ruling dated the 10th March 2022, the Plaintiff cannot now return before this Honourable court and seek to invite this court to have a second bite on an aspect/limb of the ruling rendered on the 10th March 2022.

33. In a nutshell, counsel for the 3rd Defendant has submitted that the impugned application therefore constitutes and amounts to an abuse of the Due process of the court.

34. As pertains to the Application dated the 23rd May 2022, counsel for the 3rd Defendant has submitted that the intended Interested Parties have no identifiable claim or stake in the suit property and by extension in the subject suit, to warrant their joinder as Interested Parties.

35. In any event, counsel for the 3rd Defendant has submitted that the suit property belonged to the 4th Defendant, who is already a Party and hence, all the issues in controversy can be addressed and dealt with by the court, without the joinder of the Intended Interested Party.

36. Be that as it may, counsel for the 3rd Defendant has added that one of the proposed Interested Party is a Co-administratix of the Estate of James Kanyotu, now deceased and her Interests, if any, are duly represented by the Co-administratix, who are already Parties to the suit.

37. Notwithstanding the foregoing, counsel has also submitted that if the co-administratix was keen to join the subject suit, it was incumbent upon her to apply to be joined and not the Plaintiff to do so.

38. In short, counsel for the 3rd Defendant has submitted that the impugned application seeking the joinder of the proposed Interested Parties is therefore misconceived and legally untenable.

b. Plaintiff's Submissions

39. Vide written submissions dated the 5th October 2022, the Plaintiff has raised and highlighted four pertinent issues for consideration.

40. In respect of the Application dated the 26th April 2022, counsel for the Plaintiff has submitted that the Discovery Notices dated the 16th December 2022 and the 2nd February 2021, which were filed and lodged by the 3rd Defendant were irregular, illegal and unlawful.

41. In this regard, counsel has submitted that the impugned Discovery notices were contrary to the provisions of Section 22(a) of the *Civil Procedure Act* and Section 69 of the *Evidence Act*, Chapter 80 Laws of Kenya.

42. Additionally, counsel for the Plaintiff has submitted that to the extent that the impugned Discovery notices were illegal and unlawful, same therefore ought not to have been acted upon.

43. Further, counsel has submitted that the documents which were sought for at the foot of the impugned Discovery notices have no relevance to the determination of the issues in dispute. In this regard, counsel has added that the said documents will not be useful to the court.

44. In the alternative, counsel for the Plaintiff has also submitted that the impugned documents at the foot of the Discovery notices have since been supplied and availed to the Parties and in particular, the 3rd Defendant herein vide various affidavits which have been filed by the Plaintiff in respect of the subject matter.

45. In particular, the Plaintiff has contended that the impugned documents are contained at the foot of the List and Bundle of documents dated the 1st July 2019, Replying affidavit sworn on 18th May 2022 and Supporting affidavit in respect of the Application dated 19th May 2022, respectively.

46. Owing to the foregoing, counsel for the Plaintiff has therefore contended that the Application dated the 26th April 2022, is therefore misconceived, bad in law and legally untenable insofar as the documents that underpin the said application have hitherto been supplied and availed.

47. In respect of the Application dated the 19th May 2022, counsel for the Plaintiff has submitted that the impugned Discovery notices were illegal and unlawful. Counsel has further submitted that to the extent that the impugned notices were illegal and unlawful same therefore ought to be expunged.

48. In the alternative, counsel for the Plaintiff has submitted that the court ought to find and hold that the Plaintiff has since supplied and availed all the requisite document at the foot of the Discovery notices, save for one single documents, which is contended to be irrelevant and thus not deserving of discovery.

49. In respect of the Application dated the 23rd May 2022, counsel for the Plaintiff has submitted that the named Intended Interested Party are necessary Parties and therefore ought to be joined in the proceedings.

50. Further, counsel for the Plaintiff has submitted that the named intended Interested Parties were/are lawful Directors of the 4th Defendants and same participated in the sale of the suit property to and in favor of the Plaintiff.

51. Owing to the foregoing, counsel has therefore submitted that the joinder of the proposed Interested Parties would therefore go along way in helping the honourable Court to deal with and dispose of all the issues in controversy.

52. Consequently and in the premises, counsel has submitted that it would therefore be appropriate and expedient to join the named Interested Parties in the subject matter.

53. In support of the foregoing submissions, counsel for the Plaintiff has quoted and relied on various decisions *inter-alia*, *Rafiki Micro Finance Bank Ltd versus Zenith Pharmaceticals Ltd* (2016)eKLR, *Concord Insurances Company Ltd versus NIC Bank Ltd* (2013)eKLR, *Co-operative Merchant Bank Ltd versus George Fredrick Wekesa* Civil Appeal No. 54 of 1999 (unreported) and *D.T Dobbie & Co (K) Ltd versus Joseph Mbaria Muchina & Another* (1980)eKLR.

c. 4th Defendant's Submissions

54. The 4th Defendant filed written submissions dated the 17th October 2022 and same has raised, highlighted and amplified three pertinent issues for consideration.

55. First and foremost, counsel for the 4th Defendant has submitted that the Plaintiff herein, just like any other Party is bound to comply with and adhere to the terms of orders of the Honourable court.

56. Consequently, counsel has submitted that to the extent that this honourable court had issued and granted orders on the 10th March 2022, it therefore behooved the Plaintiff to comply with the terms of the court order until and unless the said court orders have been varied, rescinded and or quashed.

57. In the premises, counsel contended that the failure and refusal by the Plaintiff to comply with the terms of the order of the court is tantamount to contempt and willful disobedience of lawful court orders.

58. Essentially, counsel for the 4th Defendant has therefore submitted that such willful disobedience ought not to be countenanced and sanctioned by the Honourable court.

59. As a result of the foregoing, counsel for the 4th Defendant has therefore submitted that the Application dated the 26th April 2022, ought to be allowed.

60. In support of the foregoing submissions, counsel for the 4th Defendant has cited and quoted the decision in the case of *Oracle Productions Ltd versus Decapture Ltd & 3 Others* (2014)eKLR, *Lustman & Co (1990) Ltd versus Corperate Business Centre Ltd & 4 Others* (2022) KEHC 42 (KLR) and *Sharif T/a Kemco Auto versus Freight Forwarders Ltd & Another* (2008)eKLR.

61. In respect of the Application dated the 19th May 2022, counsel for the 4th Defendant has submitted that the contents of the impugned Application replicates the contents of the Replying affidavit sworn on the 18th May 2022.

62. In the premises, counsel has contended that the filing of the said application dated the 19th May 2022, constitutes and abuse of the Due process of the Honourable court.

63. To vindicate the foregoing submissions, counsel for the 4th Defendant has cited and quoted the decision in *Republic versus The Chairman District Alcoholic Drinks Regulation Committee & 4 Others , Ex-parte Detlef Heier & Another* (2013)eKLR.

64. Finally, as pertains to the Application dated the 23rd May 2022, counsel has submitted that the orders of the court issued on the 10th March 2022, were explicit and required the Plaintiff to supply and avail the named documents at the foot of the Discovery notices.

65. However, counsel has submitted that despite being aware and knowledgeable of the impugned orders, the Plaintiff has failed, neglected and refused to comply with and abide by the terms of the court order.

66. In the premises, counsel for the 4th Defendant has therefore contended that a person who is in contempt of the lawful court orders ought not to be afforded an opportunity to partake of or accrue any favorable orders from the very court whose orders same has disregarded or disobeyed.

67. In the premises, counsel for the 4th Defendant has therefore submitted that the Application dated the 23rd May 2022 therefore constitutes or amounts to an abuse of the Due process of the Honourable court .

68. Additionally, counsel has added that the suit property belongs to the 4th Defendant and therefore the presence of the 4th Defendant is sufficient to enable the Honourable court to deal with and dispose of all the issues in dispute.

69. In the premises, counsel for the 4th Defendant has therefore submitted that the proposed Interested Parties have no identifiable stake or interests in the suit property to warrant their joinder into the subject suit, either as sought or at all.

70. In a nutshell, counsel for the 4th Defendant has therefor implored the Honourable court to dismiss the applications dated the 19th May 2022 and the 23rd May 2022, respectively.

Issues For Determination

71. Having reviewed the three named Applications, the Supporting affidavits thereto and the Responses duly filed; and having similarly considered the written submissions filed by and on behalf of the Parties, the following issues are pertinent and are thus worthy of determination;

    i. Whether the Plaintiff herein is guilty of willful Disobedience and disregard of lawful court orders issued and granted on the 10th March 2022.

    ii. Whether the willful Disobedience and disregard of the orders of the court, if at all, are of a grave nature to warrant the striking out of the Plaintiff's suit.

    iii. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to re-visit the issue pertaining the Discovery notices and the resultant orders arising therefrom.

    iv. Whether the proposed Interested Parties have any identifiable stake/claim in respect of the Suit Property and whether the Plaintiff has laid a reasonable basis for their Joinder.

Analysis And Determination

Issue Number 1

Whether the Plaintiff herein is guilty of willful Disobedience and disregard of Lawful court orders issued and granted on the 10th March 2022.

72. It is common ground that the 3rd Defendant herein filed and served what was termed as Discovery notices pursuant to and in line with the provisions of Order 11 of the *Civil Procedure Rules* 2010.

73. Pursuant to the discovery notices, the 3rd Defendant sought to be supplied with and availed copies of various documents, which the 3rd Defendant deemed relevant and important for the effectual and effective determination of the issues in dispute.

74. Be that as it may, after the impugned notices were served, the Plaintiff herein did not respond thereto. For clarity, the Plaintiff neither opposed the impugned discovery notices nor did the Plaintiff supply/avail the documents alluded to at the foot of the impugned notices.

75. Owing to the failure by and at the instance of the Plaintiff to comply with and adhere to the terms of the discovery notices, the 3rd Defendant herein was constrained to and indeed filed an application dated the 20th September 2021, wherein the 3rd Defendant sought for an order to compel the Plaintiff/Respondent to avail and supply the named documents at the foot of the discovery notices, which had been issued and served by the 3rd Defendant.

76. Suffice it to point out that the application dated the 20th September 2021 was duly heard and disposed of vide Ruling rendered on the 10th March 2022.

77. For coherence, the Honourable court ordered and directed as hereunder;

> Paragraph 102.
>
> "For clarity, the Plaintiff herein be and is hereby ordered to honor and or comply with the discovery notice which issued and served upon her within 30 days from the date hereof and in default, the 3rd Defendant/Applicant shall be at liberty to apply"

78. It is imperative to state and observe that following the rendition and delivery of the named ruling, the Plaintiff felt aggrieved and dissatisfied and thereafter same filed a Notice of appeal, signifying her desire and intention to challenge the impugned ruling.

79. Nevertheless, despite filing and lodging the Notice of Appeal, the Plaintiff neither moved this honourable court or better still the Court of Appeal for an order of stay of the ruling rendered on the 10th March 2022.

80. Essentially, the ruling rendered on the 10th March 2022 remains in existence and functional for all intents and purposes.

81. In my humble view, it behooved the Plaintiff herein to endeavor to and comply with the terms of the said order. For clarity, it was incumbent upon the Plaintiff to supply and avail to the 3rd Defendant the copies of the documents which were identified and named at the foot of the Discovery notices.

82. Suffice it to point out that the court order had directed provision and filing of the named documents. Consequently, for as long as the order remains in force, without variation and rescission, then compliance therewith was mandatory and peremptory.

83. To this end, it is appropriate to recall and reiterate the dictum in the case of *Hadkinson versus Hadkinson* [1952] 2 All ER, in which Denning LJ said:

> " It is plain and unqualified obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

84. Additionally, there is need for a reminder that court orders are neither mere suggestions nor opinions, for which Parties can choose to comply with or otherwise.

85. For coherence, there is no gainsaying that court orders are binding in nature and have a coercive power behind them and thus same obligate/ enjoin every Party against whom such orders are made to endeavor to and comply therewith.

86. In this regard, I can do no better than to adopt and endorse the holding of the court in the case of *Teachers Service Commission versus 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."

87. Premised on the foregoing, it is my finding and holding that the Plaintiff herein has deliberately and willfully failed, neglected or otherwise refused to comply with the terms of the ruling rendered on the 10th March 2022.

88. Clearly, the failure and neglect to comply with the terms and tenor of the said ruling constitutes and amounts to willful disobedience and thus contempt of the court.

Issue Number 2

Whether the willful Disobedience and disregard of the orders of the court, if at all, are of a grave nature to warrant the striking out of the Plaintiff's suit.

89. Having found and held that the conduct of the Plaintiff herein constitutes and amounts to willful disobedience and contempt of lawful court orders, the next question to be addressed is whether such conduct ought to attract sanction by the court and if so, the nature of sanction.

90. It will be recalled that court orders are neither mere suggestions nor opinions so that Parties have the liberty either to obey or otherwise.

91. Similarly, there is no gainsaying that when a Party, who knows of the existence of a court order, disobeys or disregard same, then such a Party ought to be penalized or better still sanctioned.

92. Be that as it may, the critical question to address in respect of the subject matter is whether the Party at fault, namely, the Plaintiff herein ought to be penalized by striking the suit.

93. Before venturing to address and resolve the foregoing question, it is imperative to underscore that the Honourable court has a discretion to hear a Party who is in contempt of court.

94. To this end, it is important to take cognizance of the dictum in the case of *Hadkinson v Hadkinson* [1952] 2 All ER 567, 575, where the court stated and observed as hereunder

> " I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to

ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reasons is shown why it should not be removed".

95. Other than the foregoing decision, it is also appropriate to refer to the holding of the Court of Appeal in the case of *Rose Detho V Ratilal Automobiles Ltd & 6 Others* [2007] eKLR, where the court stated and held as hereunder:

> " The Courts in this country, both this Court and the superior court, have adopted the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ in Hadkinson's case (*supra*). See *Mawani V Mawani* [1977] KLR 159 And *Joseph Schilling & 2 Others V Stardust Investments Ltd & Another* Nairobi Civil Appeal No. 134 of 1997 (unreported).:

96. It is worthy to note that the decisions quoted and cited in the preceding paragraphs, have concerned instances where the Courts, *inter-alia*, the Court of appeal have been dealing with whether a Party who is guilty in contempt ought to be denied and deprived of a right of audience before court of law.

97. Nevertheless, my understanding of the various holdings that I have referred to connotes that indeed a court of law would still have a discretion on the issue of whether or not to hear a Party, who has been found guilty of or adjudged to be in contempt.

98. Consequently, if the court has a discretion whether or not to hear a Party who has been adjudged to be in contempt of court then, what about striking out of a suit on the basis of (sic) contempt and willful disobedience of lawful court orders.

99. I beg to and do hereby state that striking out of a suit is a draconian step or action, which essentially drives a Party away from the seat of Justice. Consequently, the striking out of a suit/ pleading, is therefore a course which ought to be invoked with necessary circumspection, reluctance and only, as a last resort.

100. To this end, it is appropriate to recall the words of wisdom that fell from the Lips of the Emminent Judges of Appeal and were handed down vide the case of *D.T Dobie & Co Ltd versu Joseph Mbaria Muchina & Another* (1980)eKLR, where the court stated as hereunder;

> " No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

101. Premised on the consequences of striking out, it is now my solemn duty to consider whether the default or failure to supply and avail the impugned documents (which I have found to constitute willful disobedience) should disentitle the Plaintiff from having her case heard and determined on merits.

102. It is not lost on this court that the Right to Fair Hearing and Access to Justice are constitutionally ordained. Consequently, this honourable court has a Primary duty and responsibility to ensure that each and every Party is afforded sufficient latitude and opportunity to ventilate his/her case before the court.

103. Given the importance and significance of the Rights alluded to, it is imperative to reproduce the provisions of Article 48 and 50(1) of the *Constitution* 2010.

104. For convenience same are reproduced as hereunder;

> 48. Access to justice
>
> The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
>
> 50. Fair hearing
>
> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

105. To my mind, to strike out the Plaintiff's suit, on the basis of contempt and willful disobedience, would be tantamount to limiting or restricting the Plaintiff's constitutional rights of Access to Justice and Fair Hearing.

106. Be that as it may, I must underscore and underline the point that the fact that a Party has a Constitutional right of Access to Justice and Fair Hearing, does not bestow upon a Party the right to act with impunity.

107. Nevertheless, in respect of the subject matter, I have agonized over the necessary sanction to mete out against the Plaintiff, for willful disobedience of lawful court orders.

108. However, I must confess that in the process of calibrating on the necessary action, I have recieved appropriate and due guidance from the decision of the Court of Appeal in the case of *Omar Sharrif T/a Kemco Auto Versus Freight Forwarders Limited & Another* [2008] eKLR, where the Court held as hereunder;

> " That position in law is also well stated in the case of *Eastern Radio Service vs. Tiny Tots* (1967) EALR 392 to which we were referred by Ms Amarshi. Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that report as follows:
>
> "It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court. Nor is it, I think, in dispute that willful means intentional as opposed to accidental."
>
> And Sir Clement De Lestang, V.P. stated in that case:
>
> "The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of wilful default."
>
> As we have stated, we think, in order to establish wilful default, a proper application should have been made since the learned Judge had in fact refused to allow prayer 2 in his ruling of 9th February 2007. We note with regret that that was not done.

109. Nourished and duly guided by the holding in the decision cited and quoted in the preceding paragraph, I am not minded to decree the striking out of the Plaintiff's suit at this first instance.

110. Contrarily, I would be minded to afford the Plaintiff an additional latitude, within which to reconsider her position and in particular, to endeavor to and comply with the terms of the ruling that was rendered on the 10th March 2022.

111. Be that as it may, it is imperative to underscore and reiterate, that the Plaintiff is under obligation to comply with the court orders, whether or not same agrees with the terms thereof or otherwise.

112. For coherence, it is appropriate to remind the Plaintiff and her counsel that willful disobedience and disregard of lawful court orders is not one of the avenues, provided and established under the law, (sic) for impugning or impeaching lawful court orders.

Issue Number 3

Whether the Honourable court is seized and possessed of the requisite Jurisdiction to re-visit the issue pertaining the Discovery Notices and the resultant orders arising therefrom.

113. The Plaintiff herein filed the Notice of Motion Application dated the 19th May 2022 and in respect of which same has invited this court to strike out and expunge the named Discovery notices, which were issued and served by the 3rd Defendant.

114. Additionally, the Plaintiff herein has also invited the Honourable court to strike out the application filed by and on behalf of the 3rd Defendant and which seeks to strike out the Plaintiff's suit.

115. To my mind, if the Plaintiff was keen to strike out the application dated the 26th April 2022, filed by the 3rd Defendant, all that the Plaintiff needed was to file anyone of the named documents stipulated vide Order 51 Rule 14 of the *Civil Procedure Rules* 2010.

116. For completeness, the provisions of Order 51 Rule 14(1) and (2) of the *Civil Procedure Rules*, 2010, provides as hereunder;

(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in sub-rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

117. From the foregoing provisions, it is explicit that a Respondent who is served with an application, is obliged and obligated to file anyone of the named documents or a combination thereof.

118. Clearly, a Respondent served with an application cannot by him/herself file another application with a view to striking out the application that was served on same. In this regard, it is my humble finding that the filing of the Application dated the 19th May 2022, was clearly misguided and misdirected.

119. Notwithstanding the foregoing, I must also state that the impugned Discovery notices, which the Plaintiff now seeks to invite the court to strike out and expunge, were indeed the subject of the ruling of the court rendered on the 10th March 2022.

120. For clarity, the Honourable court duly considered the impugned discovery notices and thereafter the court was convinced that the Discovery notices were duly and legally issued and served.

121. Having been persuaded that the impugned Discovery notices were duly and lawfully issued, the court proceeded to and rendered a ruling which compelled the Plaintiff to supply the requisite documents with a stipulated and circumscribed timeline.

122. Essentially, the ruling of the honourable court rendered on the 10th March 2022 subsumed the Discovery notices, which had hitherto been issued and served by the 3rd Defendant.

123. In the premises, it is no longer tenable or feasible to contend that there exists any Discovery notices capable of being expunged or struck out, either in the manner impleaded by the Plaintiff or at all.

124. Additionally, it must be recalled and reiterated that the ruling of the court rendered on the 10th March 2022, is also the subject of a Notice of Appeal issued and filed by the Plaintiff.

125. Insofar as the said ruling is the subject of a Notice of Appeal, it means that the only court that is now seized of the requisite Jurisdiction to interrogate (sic) the validity of the impugned Discovery notices and by extension the court order on discoveries, is the honourable Court of Appeal and not otherwise.

126. Similarly and without hesitation, I come to the conclusion that the limb of the impugned application that seeks the striking out of the named Discovery notices, is misconceived and legally untenable.

127. In any event, it is also appropriate to underscore that the application dated the 19th May 2022, also constitutes and amounts to an abuse of the Due process of the court, to the extent that same is seeking to have this court sit on Appeal of own decision.

Issue Number 4:

Whether the proposed Interested Parties have any identifiable stake/claim in respect of the Suit property and whether the Plaintiff has laid a reasonable basis for their Joinder.

128. The Plaintiff also filed the application dated the 23rd May 2022 and in respect of which the Plaintiff sought to join to named interested Parties.

129. One of the named Interested Parties, is said to be a co-administratix of the Estate of James Kanyotu, now deceased.

130. Premised on the fact, that the said Jane Gathoni Moraya is said to be a co-administratix of the estate of the deceased, counsel for the Plaintiff contends that her joinder in respect of the subject suit, will enable the court to effectively and effectually determine all the issues in dispute.

131. Nevertheless, it must be recalled that the suit property which the Plaintiff states to have bought and acquired, never belonged to the Estate of James Kanyotu, now deceased.

132. To the contrary, the suit property was said to have hitherto belonged and was registered in the name of the 4th Defendant and not otherwise.

133. In any event, the issue as to whether or not the suit property belonged to the Estate of James Kanyotu, now deceased, was dealt with and disposed of vide the ruling of this Honourable Court, differently constituted and which ruling was rendered on the 24th September 2020.

134. Given that the suit property never belonged to the Estate of the said James Kanyotu, now deceased, the question that arises is what identifiable Interests or stake does the proposed Interested Party has in the suit property and by extension in the suit?

135. Suffice it to point out and I am afraid, that no identifiable stake or interests has been identified, highlighted or amplified, to warrant the Joinder of the proposed 3rd Interested Party.

136. On the other hand, the Plaintiff has also sought to join the 2nd proposed Interested Party into the proceedings.

137. For clarity, the reason upon which the 2nd proposed Interested Party is sought to be joined is because same is stated to be a beneficiary of the Estate of James Kayotu, deceased and that same similarly received a portion of the proceeds of the sale of the suit property.

138. Other than the foregoing, it has also been submitted that the proposed 2nd Interested Party was also a director of the 4th Defendant at the time of the sale of the suit property. In this regard, it has been contended that having been a Director, his presence would therefore help the Honourable court to determine the issue of the sale of the suit property.

139. Unfortunately, if the property was sold by or on behalf of the company, then it is only the Company, namely, the 4th Defendant that can legally defend any claim pertaining to the regularity or otherwise of the impugned sale.

140. Additionally, it is also the company that would be answerable and liable, if at all, to any claim made or mounted as pertains to and concerning the impugned property.

141. Certainly, any Director or shareholder of the impugned company cannot be sued or be impleaded in a matter that touches on the affairs of the Company.

142. To this end, it is appropriate to refer to and reiterate the holding in the case of *Omondi versus National Bank Ltd & Another* (2001)eKLR, where the court stated as hereunder;

> " The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights.

143. Finally, it is common knowledge that where a Party is seeking to join or be joined as an Interested Party in a suit, it behooves the Party seeking Joinder to establish and prove that the proposed/intended Interested Party truly has a known and established claim/stake either in the suit property or the suit.

144. In this respect, the holding of the Supreme Court of Kenya in the case of *Francis Karioko Muruatetu versus Republic* (2016)eKLR, is apt and succinct.

145. For coherence, the Supreme Court stated and observed as hereunder;

> (34) With that definition of "interested party," the Court proceeded to hold further [paragraphs 17-18]:
>
> [17] Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.
>
> [18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

(35) This Supreme Court decision was cited by the High Court in *Judicial Service Commission v. Speaker of The National Assembly & 8 Others*, [2014]eKLR. The High Court also cited the definition of 'interested party' in: The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter the "Mutunga Rules")thus:

"Rule 2 of the Mutunga Rules defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation."

(36) Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.

(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

146. In my considered view, the Plaintiff has not laid any reasonable and sufficient basis to warrant the Joinder of the proposed 2nd and 3rd Interested parties in the subject matter.

147. Suffice it to point out that the joinder of a Party as Interested Party is not done for the sake of it, or for cosmetic purposes. It is appropriate for the Party seeking the joinder to authenticate, establish and prove that indeed the presence of the proposed Party would be helpful to the court in the determination of the issues in dispute and controversy.

148. Contrarily, the joinder must not be allowed, if same is merely calculated to muddle and convolute, the issues in controversy and dispute.

149. To this end, the holding of the Court of Appeal in the case of *Pravin Bowry versus John Ward & another* [2015] eKLR, where the Court of Appeal cited the decision in the case of *Deported Asians Property Custodian Board v. Jaffer Brothers Limited* (1999) I EA 55 (SCU) had this to say:

" A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A

party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person." (emphasis by underline).

150. Further, the Court of Appeal has further stated as hereunder,

> " Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined."
>
> .....
>
> From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

151. In a nutshell, the Plaintiff has not satisfied the stated ingredients to warrant the proposed joinder. Consequently, I am not disposed to grant the limb of the application that seeks the joinder of the two named proposed parties.

Final Disposition:

152. Having reviewed and analyzed the various perspective, that were isolated and highlighted in the body of the Ruling herein, it is now appropriate to render the final and dispositive orders.

153. In the circumstances, it is my finding and holding that though the application dated the 26th April 2022 is meritorious and well grounded. However, to grant same at this juncture would run a foul the provisions of Articles 48 and 50(1) of the *Constitution* 2010.

154. On the other hand, the applications dated the 19th May 2022 and the 23rd May 2022, are clearly misconceived, Bad in law and legally untenable.

155. Consequently and in the premises, I am obliged to and Do hereby make the following orders;

i. The Application dated the 26th day of April 2022 be and is hereby Dismissed.

ii. The Application dated the 19th day of May 2022 be and is hereby Dismissed.

iii. The Application dated the 23rd day of May 2022 be and is hereby Dismissed.

iv. Nevertheless, the Plaintiff be and is hereby granted a Further opportunity and latitude to comply with the terms and tenor of the Ruling rendered on the 10th March 2022.

v. For coherence, the Plaintiff be and is hereby directed to File a Bundle of documents containing the named documents alluded to at the foot of the Discovery notices dated the 16th day of December 2020 and the 2nd February 2021 and same be filed and served within thirty (30) days from the date hereof.

vi. In default to comply with clauses (iv) and (v) hereof, the Plaintiffs suit will stand Dismissed with costs for want of compliance with the directions on discoveries, without further reference.

vii. Costs of the three named applications shall be borne by the Plaintiff.

viii. Either Party is at liberty to apply.

156. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2022.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson Court Assistant

Mr. James Nyiha for the Plaintiff.

Ms. Ndunge h/b for Mr Theuri for the 1st Defendant.

Mr. Ruiru Njoroge for the 3rd Defendant.

Mrs. Akedi for the 4th Defendant.

Ms. Gikonyo h/b for Mr. Thuita for the Interested Party.

N/A for the 2nd Defendant.