



**Fmaily Shade Africa Limited v Mukuria & another (Environment & Land
Case 100 of 2020) [2024] KEELC 1695 (KLR) (5 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 100 OF 2020
EK WABWOTO, J
APRIL 5, 2024**

BETWEEN

FMAILY SHADE AFRICA LIMITED PLAINTIFF

AND

JAMES GITAU MUKURIA 1ST DEFENDANT

JANE WANJIKU GITAU 2ND DEFENDANT

RULING

1. The Defendants moved the Court vide a Notice of Motion Application dated January 25, 2024, accompanied by a supporting affidavit sworn by James Gitau Mukuria seeking the following orders:
 - i. Spent.
 - ii. That the Honourable Court be pleased to review orders granted to the Plaintiff's application dated December 15, 2023.
 - iii. That this Honourable Court do grant the 1st and 2nd Defendants leave to file and serve their Replying affidavit.
 - iv. That costs be in the cause.
2. The Application was premised on Order 45 of the [Civil Procedure Rules](#), Section 1A,1B,3A of the [Civil Procedure Act](#) and made on five grounds;
 - i. The Plaintiff filed an application dated 15th December under a certificate of urgency.
 - ii. The Plaintiff served the application and order to the Defendants on January 19, 2024.
 - iii. The Application was to come up for hearing on January 24, 2024.



- iv. The Defendants' advocate attended the hearing on the said date however she could not be heard.
 - v. The application was allowed without the Defendants being heard.
3. The Defendants filed submissions dated February 16, 2024 in which they submitted that there was an apparent error, specifically in relation to the issue of service that had led to granting of the said orders. Additionally, it was submitted that there was a misrepresentation by the Plaintiff's advocate and on the Defendants' advocate had logged in but faced technical challenges. It was argued that since an apparent error had been proven, they were entitled to the orders sought.
 4. The Plaintiff opposed the application vide a replying affidavit dated January 31, 2024 sworn by William Murethi and submissions dated February 22, 2024. It was argued that service of the Application was duly effected vide separate emails on December 20, 2023 and January 19, 2024, therefore the Defendants had at least two working days 22nd & 23rd January 2024 to respond to the application which they never did nor protested the service.
 5. It was also argued that the Defendants stands to be prejudiced since the Honourable Court entered judgement in favour of the Plaintiff on August 30, 2023 which included an eviction order against the Defendants and since then the ninety-day stay had lapsed on November 30, 2023. It was further argued that the Respondent had not provided the Court with any reasonable justification on why they have not vacated the suit premise to date.
 6. I have considered the application, evidence and written submissions filed by the parties. In my view, the issue that arises for determination is whether Defendants application has met the threshold for grant of the orders sought.
 7. I have scrutinized the Court records which confirms that a Notice of Change of Advocates on behalf of the Defendants was filed by the firm of Achach & Associates Advocates LLP on November 23, 2023. The record further confirms that the Plaintiff served the application dated 15th December and Court order dated December 18, 2023 via email to owuochadvocates@gmail.com (being the Defendants' prior advocates) on December 20, 2023.
 8. The Plaintiff argued that they later served the Respondent via a different email- info@achachllp.co.ke. on January 19, 2024. However, the Court has not found any such affidavit of service on record. It is therefore prudent in the spirit of upholding fairness and right to fair hearing to accord the Defendants an opportunity to defend themselves.
 9. In the foregoing, this Court finds that the Notice of Motion application dated January 25, 2024 is merited and will proceed to allow the same in the following terms:
 - i. This Court's orders issued on January 24, 2024 with regards to the application dated December 15, 2023 are hereby set aside.
 - ii. The 1st and 2nd Defendants are hereby granted leave to file and serve their Replying affidavit within 7 days of delivery of this ruling.
 - iii. The Plaintiff is granted leave of 7 days to file further affidavit if necessary.
 - iv. The Notice of Motion Application dated December 15, 2023 shall be set down for hearing afresh.
 - v. Each party shall bear own costs of this application.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF APRIL 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Masinde for the Plaintiff.

Ms. Kariuki for the Defendants.

Court Assistant; Caroline Nafuna.

