



Marriot Africa International Limited v Murigu & 3 others; Ukombozi Holdings Ltd (Interested Party) (Environment & Land Case 4 of 2021) [2024] KEELC 1699 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 4 OF 2021
JO MBOYA, J
APRIL 4, 2024
(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 Interested Party/3rd Defendant to the counterclaim has approached the Honorable Court vide Notice of Motion Application dated the 16th of February 2024, brought pursuant to the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as well as Article 159(2)(d) of *the Constitution* 2010 and in respect of which the Applicant has sought for the following reliefs [verbatim]:
 - i.Spent.
 - ii. The Witness Statement and List of Documents filed herewith by the Interested Party/3rd Defendant to the counterclaim be admitted out of time.



- iii. Costs of the Application be in the cause.
2. The instant Application is premised and anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application beforehand is supported by the Affidavit of Bishop Jimmy Kimani, sworn on even date and in respect of which the deponent has averred inter-alia that the Applicant herein deserves the opportunity to file and serve the bundle of documents under reference, so as to enable the Honorable Court to fully appreciate the issues in dispute and thereafter render an effective determination pertaining to and concerning all the issues in dispute.
 3. Upon being served with the Application under reference, the 1st Defendant/Respondent filed a Replying affidavit sworn on the 22nd of February 2024; whereas the 3rd Defendant filed an elaborate Replying Affidavit sworn on the 21st of February 2024. Furthermore, the 4th Defendant also filed a Replying Affidavit albeit sworn by Margaret Nyakinywa Murigo, who avers that same is one of the Directors of the 4th Defendant/Respondent.
 4. On the other hand, the Plaintiff/Respondent and the 1st Defendant to the Counterclaim, intimated to the court that same shall not be filing any response to the subject Application. For good measure, no response was ever filed by and on behalf of the said Plaintiff and the 1st Defendant to the Counterclaim.
 5. Fast forward, the subject Application came up for Mention on the 22nd of February 2024, whereupon the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently, and in this regard, the court proceeded to issue directions towards the filing and exchange of the written submissions within circumscribed timeline[s].
 6. Pursuant to and arising from the direction[s] of the court, the Applicant herein proceeded to and filed written submissions dated the 26th of February 2024, whereas the Plaintiff/2nd Defendant to the Counterclaim filed written submissions dated the 7th of March 2024. Besides, the 1st Defendant/Respondent filed written submissions dated the 29th of February 2024.
 7. On the other hand, the 3rd Defendant/Respondent filed written submissions dated the 28th of February 2024, whilst the 4th Defendant/Respondent filed submissions dated the 28th of February 2024.
 8. For coherence, the various written submissions [details in terms of the preceding paragraphs] forms part of the record of the court.

Parties' Submissions

a. Applicant's Submissions

9. The Applicant herein filed written submissions dated the 24th of February 2024, and same adopted the grounds contained at the foot of the Application as well as the averments contained in the body of the Supporting Affidavit. Furthermore, the Applicant herein has thereafter ventured forward and highlighted three [3] salient and pertinent issues for consideration and determination by the Honourable court.
10. Firstly, Learned counsel for the Applicant has submitted that the instant Application has been filed and/or made in good faith and with a view to placing before the court further evidence and documents [materials], which are relevant to the issues in dispute and hence shall enable the court to effectively determine the dispute beforehand, once and for all.



11. Additionally, Learned counsel has submitted that the instant Application has not been filed with a view to scuttling the expeditious hearing and determination of the suit, either as alleged by the 1st, 3rd, and 4th Defendants/Respondents or at all.
12. In view of the foregoing, Learned counsel for the Applicant has contended that the subject Application is informed by good faith [bona fides] and hence the court should find merit in same and thereafter proceed to and grant the liberty sought.
13. Secondly, Learned counsel for the Applicant has submitted that the Application beforehand is meritorious and hence should be allowed, insofar as it is the duty [obligation] of the court to afford all the Parties to a dispute an opportunity to tender and place before the court all the relevant material[s] and not otherwise.
14. Other than the foregoing, Learned counsel for the Applicant has also submitted that in an endeavor to ensure that all the Parties are afforded a fair hearing, it behooves the Honourable Court to facilitate the production of all the relevant material, as opposed to suffocating and/or suppressing the production of such evidence.
15. Thirdly, Learned counsel for the Applicant has submitted that even though the 1st, 3rd and 4th Defendants/Respondents had adverted to and contended that same shall suffer prejudice, no evidence has been tendered or placed before the Honourable Court to demonstrate what prejudice, if any, the said Respondents shall be exposed to suffer or at all.
16. In any event, Learned counsel for the Applicant has submitted that if the introduction of the witness statement and bundle of documents would create the need to recall PW1 who has since testified and been cross examined, then the court has the requisite mandate and/or Jurisdiction to grant the adverse Parties liberty to recall the said witness, either for further cross examination and re-examination, or examination thereof afresh.
17. To vindicate the foregoing submissions, Learned counsel for the Applicant has cited and relied on the provisions of Order 18 Rule 10 of the Civil Procedure Rules 2010 as read together with Section 146 of the *Evidence Act*, Chapter 80 Laws of Kenya.
18. Other than the foregoing, Learned counsel has also submitted that the admission of the further witness statement and documents shall enable the court to render substantial justice and in this regard, Learned counsel for the Applicant has cited and relied on inter-alia the holding in the case of *Vivian Muir vs Mzoori Ltd* (2017) eKLR, *Neeraj Jayatilaiya Kalayia vs Cheruiyot & 5 Others* [Environment and Land Case E394 of 2021] [2022] KEELC 2669 [KLR] [23rd June 2022] [Ruling] and *Hangover Kakwacha Hotel Ltd vs Philip Adundo & Leonard Adundo T/a Hangover Kakwacha hotel* (2018) eKLR.
19. In view of the foregoing, Learned counsel for the Applicant has therefore implored the court to find and hold that the instant Application is meritorious and thus ought to be granted.

b. Plaintiff's/Respondent's Submissions

20. The Plaintiff/Respondent filed written submissions dated the 7th of March 2024, and in respect of which same has highlighted and canvassed three [3] issues for determination by the Honourable Court.
21. First and foremost, Learned counsel for the Plaintiff/Respondent has supported the said Application and submitted that the Application beforehand has been mounted in good faith, [bona fide] so as to enable the court to interrogate all the relevant documents attendant to and touching on the issues that are in dispute.



22. Instructively, Learned counsel for the Plaintiff/Respondent has ventured forward and cited the decision in the case of *Malike Co Ltd vs Attorney General (2000)* eKLR, in support of the meaning and tenor of what constitutes good faith.
23. Secondly, Learned counsel for the Plaintiff/Respondent has submitted that it is the duty and business of the court to facilitate a fair hearing, informed by the production of all the relevant materials that would enable the court to appreciate and comprehend the dispute beforehand.
24. Further, and in any event, Learned counsel for the Plaintiff/Respondent has submitted that the Honorable Court ought not to glorify procedural and technical rules over and above substantive justice. For good measure, Learned counsel has submitted that it behooves the Honourable Court to pursue substantive justice as opposed to over reliance on procedural technicalities.
25. In support of the foregoing submissions, Learned counsel for the Plaintiff/Respondent has cited and relied on inter-alia the holding in the case of *D. Chandulal K Vora & Co Ltd vs Kenya Revenue Authority (2017)*eKLR and *PKICH Chesimaya vs Lumakorwai Achipa (2020)* eKLR, respectively.
26. Thirdly, Learned counsel for the Plaintiff/Respondent has submitted that the introduction of the witness statement by and on behalf of the Applicant as well as the admission of the documents which are proposed to be tendered by the Applicant herein, shall not cause and/or occasion any prejudice[injustice] to and/or against the Defendants/Respondents or at all.
27. In any event, Learned counsel for the Plaintiff/Respondent has submitted that if any prejudice will arise and/or accrue to the Defendants, then such prejudice can be taken care of and/or mitigated by recall of PW1 who has hitherto testified and been cross examined.
28. Furthermore, Learned counsel for the Plaintiff/Respondent has submitted that the court has discretion in determining whether or not to allow the production of additional documents and evidence at any stage of the proceedings, subject to there being a suitable explanation for the delay in the filing of [sic] the further documents.
29. In support of the foregoing submissions, Learned counsel for the Plaintiff/Respondent has cited and relied on the holding of the court in the case of *Pinnacle Projects Ltd vs Presbyterian Church of East Africa, Ngong Parish & Another [2019]*eKLR, where the court highlighted the ingredients/elements to be taken into account prior to and before allowing an Application to tender additional evidence and documents.
30. In a nutshell, Learned counsel for the Plaintiff/Respondent has submitted that the Defendants/ Respondents have neither established nor demonstrated any prejudice that same, [Defendants/ Respondents] may suffer and/or accrue if the orders sought are granted.
31. Arising from the foregoing, Learned counsel for the Plaintiff/Respondent has therefore invited the Honourable Court to find and hold that the subject Application is not only made in good faith, but same is calculated to help/enable the court to reach a final determination on all the issues in controversy.

c. 1st Defendant's Submissions

32. The 1st Defendant filed written submissions dated the 29th of February 2024, and in respect of which Learned counsel for the 1st Defendant/Respondent has raised and canvassed three [3] salient issues for due consideration by the Honourable Court.



33. First and foremost, Learned counsel for the 1st Defendant/Respondent has submitted that the Application beforehand has been filed and mounted with unreasonable and inordinate delay, which delay has neither been accounted for nor explained at all.
34. As concerns the impact and effect of the delay, learned counsel has submitted that insofar as the Application has been filed with inordinate delay, the Defendants/Respondents shall be disposed to suffer grave injustice and prejudice.
35. Furthermore, Learned counsel for the 1st Defendant/Respondent has submitted that the extent of prejudice and injustice that shall be suffered, is such prejudice which cannot be indemnified and/ atoned for by an award of costs, either as propagated by the Applicant or at all.
36. Secondly, Learned counsel for the 1st Defendant/Respondent has also submitted that the court issued various directions pertaining to and/or concerning the filing and exchange of the list and bundle of documents as well as witness statements but despite the clear terms of the court order, the Applicant herein failed and/or neglected to comply with the orders of the court.
37. To the extent that the Applicant herein failed and/or neglected to comply with the orders of the court, Learned counsel for the 1st Defendant/Respondent has therefore submitted that the endeavor to bring forth the additional list of documents is neither legally tenable nor justifiable.
38. In support of the submissions that the Defendants/Respondents and more particularly the 1st Defendant/Respondent shall suffer prejudice, same [learned counsel for the 1st Defendant/ Respondent] has cited and relied on inter-alia the case of Mansuk Halal Jesang Maru vs Frank Wafula [2021] eKLR and Johana Kipkemei Too vs Hellen Too [2014] eKLR, respectively.
39. Thirdly, Learned counsel for the 1st Defendant/Respondent has also submitted that the Applicant herein was obliged and/or obligated to tender and place before the court credible evidence to demonstrate why the documents and/or witness statement were neither filed nor served in accordance with the direction[s] of the Court, which had hitherto been granted.
40. Nevertheless, learned counsel for the 1st Defendant/Respondent has submitted that in respect of the instant matter, Learned counsel for the Applicant has failed to tender and/or produce any credible reason [explanation] to underpin the failure to tender and produce before the court the Witness Statement and the various Document[s] which no doubt, were under the custody of the Applicant from the onset.
41. Other than the foregoing, Learned counsel for the 1st Defendant has also submitted that the business of the court ought to be carried out and conducted diligently by all the parties, and not in a manner which exhibits that a particular party is geared towards litigating by instalments and/or essentially, delaying the effective and expeditious disposal of the dispute.
42. As concerns the subject matter, Learned counsel for the 1st Defendant/Respondent has submitted that no basis has been laid and/or placed before the Honourable Court to warrant the condonation and/ or sanction the delay in the filing of the subject application.
43. To this end, Learned counsel for the 1st Defendant/Respondent has proceeded to and cited inter-alia Raila Amollo Odinga & 5 Others vs IEBC & 3 Others, Supreme Court Petition No. 3, 4 and 5 of 2013 [2013] eKLR; Johana Kipekemei Too vs Hellen Too [2014] eKLR and Aloise Oceno D'suba vs Rajnikant Narsishah & another [2017] eKLR, respectively.



44. In short, Learned counsel for the 1st Defendant/Respondent has submitted that the Applicant herein has neither approached the court in good faith or at all, and that in any event, the scheduled Application is devoid of merits and thus ought to be dismissed with costs.

d. 3rd Defendant's Submissions

45. Vide written submissions dated the 28th of February 2024, the 3rd Defendant/Respondent has adopted and reiterated the averments contained in the body of the Replying Affidavit sworn on the 21st of February 2024 and thereafter canvassed three pertinent issues for determination by the court.
46. First and foremost, Learned counsel for the 3rd Defendant/Respondent has submitted that the instant Application has been made and mounted in bad faith [mala fides] and same is merely intended to defeat the orders and directions of the court which were issued on the 23rd of January 2023 and 23rd of March 2023 respectively, wherein the court granted to and in favor of the various parties set timelines within which same were to file and exchange the bundle of documents.
47. Instructively, Learned counsel for the 3rd Defendant/Respondent has submitted that even though the Applicant [Interested Party] was aware of and privy to the orders for filing and exchange of the list and bundle of documents, same failed and/or neglected to file the requisite documents and hence the same [Applicant herein] cannot now be heard to pretend that same has valuable documents to be tendered and produced before the court.
48. Secondly, Learned counsel for the 3rd Defendant/Respondent has submitted that the Applicant herein is keen to bring forth the additional witness statement and bundle of documents with a view to plugging the gaps that were exposed in the case of the Plaintiff/Respondent during cross examination.
49. In this regard, Learned counsel for the 3rd Defendant/Respondent has contended that the current Application constitutes and/or amounts to an abuse of the due process of the court and in any event, same has not been made in good faith.
50. Thirdly, Learned counsel for the 3rd Defendant/Respondent has submitted that the Applicant herein has neither tendered nor placed before the court any plausible reason or at all, as to why the witness statement and the bundle of documents which are now sought to be produced, were never tendered to the court and the parties in the first instance.
51. In the absence of any credible and/or plausible reason for the failure to file the impugned witness statement and bundle of documents, Learned counsel for the 3rd Defendant has therefore submitted that the Applicant has not provided any lawful basis to warrant the exercise of a Judicial/ Equitable discretion in favor of the Applicant.
52. In view of the foregoing, Learned counsel for the 3rd Defendant has contended that the subject Application is defeated by the Doctrine of Laches on account of the indolent conduct and behavior of the Applicant herein.
53. In a nutshell, Learned counsel for the 3rd Defendant has submitted that the Applicant herein has neither met nor established a sufficient cause and/or basis to warrant the grant of the reliefs sought at the foot of the Application beforehand. Consequently, and in this regard, learned counsel for the 3rd Defendant has implored the court to proceed and dismiss the subject application.



e. 4th Defendant's Submissions

54. The 4th Defendant has filed written submissions dated the 29th of February 2024, and in respect of which same has raised, highlighted and canvassed two [2] salient issues for determination by the Honourable Court.
55. Firstly, Learned counsel for the 4th Defendant/Respondent has submitted that whenever a litigant, the Applicant herein not excepted, is desirous to partake of the equitable discretion of the court, then same is obligated to tender and/or place before the court credible reasons to explain why the application was not tendered and/or produced before the court at the first instance.
56. To the extent that no explanation has been tendered and/or availed to the court, learned counsel for the 4th Defendant/Respondent has contended that no basis [foundation] has been established to warrant the exercise of Judicial discretion.
57. In support of the submissions that the Applicant herein ought to have justified the failure to file the requisite witness statement and bundle of documents, Learned counsel for the 4th Defendant has cited and relied on inter-alia the case of Raila Amollo Odinga & 5 Others vs IEBC & 3 Others [2013] eKLR and Sendy Kenya Freight Ltd vs Multiple Solutions Ltd [2021] eKLR, respectively, where the courts underscored the necessity to tender and provide necessary explanation for the failure to file the witness statement and bundle of documents, if any, in accordance with the provisions of Order 11 of the Civil Procedure Rules, 2010.
58. Secondly, Learned counsel for the 4th Defendant/Respondent has submitted that the impugned documents which are now sought to be tendered before the court, have been in the custody and possession of the Applicant herein and thus same ought to have been filed at the onset.
59. Insofar as no explanation has been given, Learned Counsel for the 4th Defendant has submitted that the Honourable Court should not proceed to invoke and exercise its discretion albeit in vacuum.
60. Lastly, Learned counsel for the 4th Defendant has submitted that the various documents which the Applicant desires to tender and produce before the court at the foot of the documents beforehand, are documents which are not legally admissible by dint of the provisions of Section 35 of the [Evidence Act](#), Chapter 80 Laws of Kenya.
61. Furthermore, Learned counsel has submitted that various/assorted documents which the Applicant seeks to tender before the court, inter-alia, the Certificate of Title, were generated during the pendency of the suit and in contravention of the Doctrine of lis pendense.
62. Further, and in any event, Learned counsel has submitted that any document and/or evidence which is generated and/or manufactured during a pendency of a suit is not admissible in evidence. For good measure, learned counsel for the 4th Defendant/Respondent has cited and relied on the provisions of Section 35(2) of the [Evidence Act](#), Chapter 80 Laws of Kenya.
63. In support of the foregoing submissions, namely, that the assorted document that are sought to be introduced are not admissible and hence ought not to be allowed, Learned counsel for the 4th Defendant has cited and relied on inter-alia the holding in the case of Mugo Mungai & 4 Others vs Official Receivers & Provisional Liquidated [Capital Finance Ltd & Pioneer] & 2 Others [2019] eKLR and Ezekia Oira vs Patrick Quarcoo [2017] eKLR, respectively.



64. Premised on the foregoing, Learned counsel for the 4th Defendant has therefore invited the court to find and hold that the impugned Application is not only informed by mala fides, but same is devoid of merits and hence same ought not to be allowed.
65. Pertinently, Learned Counsel has therefore implored the court to dismiss the Application.

Issues For Determination

66. Having appraised and reviewed the Application beforehand and the responses thereto and upon taking into consideration the written submissions filed by and on behalf of the respective parties, the following issues do crystalize and are thus worthy of determination:
 - i. Whether the Application beforehand has been made timeously and with due promptitude, and if not, whether the Applicant has tendered plausible explanation for the delay in filing the Application beforehand.
 - ii. Whether the instant Application has been made in good faith [bona fide] or otherwise.
 - iii. Whether the intended Witness Statement and the Bundle of documents sought to be tendered at the foot of the current Application will prejudice and/or occasion grave injustice to the Defendants/Respondents or otherwise.
 - iv. Whether the Honorable Court is seized of the jurisdiction to admit and adopt the impugned Witness Statement and Bundle of documents, which have been filed beforehand albeit prior to leave being granted or otherwise.

Analysis And Determination

Issue Number 1 Whether the Application beforehand has been made timeously and with due promptitude, and if not, whether the Applicant has tendered plausible explanation for the delay in filing the Application beforehand.

67. It is common ground that the Application beforehand seeks to file a Witness Statement and Bundle of documents by and on behalf of the Interested Party, who is also the 3rd Defendant to the Counterclaim. Consequently, and in this regard, it is imperative to underscore that such an Application is underpinned by the provisions of inter-alia Order 7 Rule 5 and Order 11 of the Civil Procedure Rules, 2010 which primarily anchor the filing and exchange of documents on behalf of a Defendant.
68. Furthermore, it is also important to highlight that the provisions of the law which have been cited in the preceding paragraph, namely Order 7 Rule 5 and Order 11 of the Civil Procedure Rules, 2010, articulate the timelines within which a Defendant desirous to file a witness statement and bundle of documents, is obligated to do so.
69. Be that as it may, whenever a Defendant and in this case a Defendant to the Counterclaim, for any reason fails and/or omits to file a witness statement and/or bundle of documents, then it behooves the defaulting Defendant to approach the court with the requisite application timeously and with due promptitude.
70. Furthermore, in an endeavor to discern and/or decipher whether an application for leave to file witness statement and bundle of documents out of time has been made timeously, the court is obliged to compute and reckon time from the timelines stipulated and espoused vide the provisions of Order 7 Rule 5 as read together with Order 11 of the Civil Procedure Rules, 2010.



71. Given the significance of the provisions of Order 7 Rule 5 of the Civil Procedure Rules and Order 11 of the Civil Procedure Rules 2010, it is imperative to reproduce same so as to underscore the peremptory requirements alluded to and espoused thereunder.
72. To this end, I beg to reproduce the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010 which stipulates as hereunder:
5. Documents to accompany defence or counterclaim [Order 7, rule 5]
- The defence and counterclaim filed under rule 1 and 2 shall be accompanied by:
- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
 - (b) a list of witnesses to be called at the trial;
 - (c) written statements signed by the witnesses except expert witnesses; and
 - (d) copies of documents to be relied on at the trial.
73. Additionally, it is also worthy to reproduce Order 11 Rule 3 and 5 of the Civil Procedure Rules, 2010. For brevity, same are reproduced as hereunder:
- (3) Parties to a suit shall sign the completed case management checklist which shall be certified by the judge or deputy registrar or magistrate or case management officer who shall also set out the issues for determination at the hearing.
- (5) Where orders or directions are given at a case management conference:
- (a) The judge or deputy registrar or magistrate or case management officer shall record the orders or directions and inform the parties thereof; and
 - (b) where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.
74. From the contents of the provisions which have been highlighted and reproduced in the preceding paragraphs, it is evident and apparent that certain timelines have been set for the parties and in particular a Defendant, as well as a Defendant to the counterclaim.
75. For coherence, there is no gainsaying that a party to a dispute, the Applicant herein not excepted, is indeed obligated to file and serve all the witness statements and bundle of documents prior to and before the trial conference [see Order 11 Rule 5 of the Civil Procedure Rules 2010].
76. Consequently, where there is a default to file and serve the witness statement and/or bundle of documents [for whatever reason], then the defaulting party is enjoined to approach the court without any unreasonable and inordinate delay.
77. However, in respect of the instant matter, there is no gainsaying that the trial conference was held and/or undertaken on the 23rd of January 2023 and thereafter on the 23rd of March 2023, both days inclusive, whereupon the court issued clear and explicit directions.
78. Notwithstanding the foregoing, it appears that the Interested Party/3rd Defendant to the Counterclaim, did not comply with and/or abide by the directions which were issued during the trial



conference and hence same has now filed the current application with a view to procuring extension of time.

79. To the extent that the Applicant now seeks liberty to file and serve documents out of time, it was incumbent upon the Applicant herein to account for the delay or better still, to tender plausible explanation attendant to the delay in the filing of the Application beforehand.
80. Quite clearly, one would have expected the Applicant to articulate and espouse the reasons why same was unable to file a witness statement and the bundle of documents, which were under her custody from the onset.
81. Additionally, one would also expected the Applicant herein to document the reasons, if any, that made same to take so much time, which ex-facie, is inordinate, prior to filing the current application.
82. Nevertheless, it is not lost on this court that despite the elaborate time lapse, the Applicant herein has neither found it appropriate and/or expedient to provide and/or supply any scintilla of explanation for the delay in filing the subject application.
83. To my mind, whenever one, the Applicant not excepted, seeks to partake of and benefit from equitable discretion [including extension of time], then it behooves the Applicant to account for every bit of the delay and not otherwise. Instructively, it is the explanation, if any, that would operate as the key towards opening the door of discretion.
84. Put differently, where an Applicant seeks to partake of and/or benefit from the equitable discretion of the court but fails to avail an explanation for the delay, then the court is enjoined to make an adverse inference and by extension, to hold that the delay was either deliberate or negligent on the part of the Applicant.
85. Furthermore, it is also important to underscore that where the failure to undertake a particular step espoused by the law is informed by deliberate inaction or negligence, then the court must refuse to dignify the Applicant with discretion.
86. Be that as it may, the parameters to be satisfied before a court of law can grant extension of time and/or liberty to file documents [witness statement or list of documents] out of time, were highlighted and elaborated by the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the court held thus:

From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

87. Additionally, the Supreme Court of Kenya also revisited the necessity for an Applicant seeking extension of time to account for the delay in the case of Nairobi Bottlers versus Mark Ndumia & Another, [Supreme Court 2023] [Ruling] delivered on the 28/12/2023]; where the court held thus:

(27) Having so found, we also hold that the applicant has not offered any explanation for the delay between 17th August, 2023 and 2nd October 2023 when it filed its Motion for extension of time. In *Marvin Opiyo Ambala & another v. Oduor Hawi Ambala & Another*, SC Application No. 1 of 2021; [2021] eKLR, this Court pronounced that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. In the circumstances, the Motion for extension of time lacks merit.

(28) Furthermore, even assuming that the applicant had offered satisfactory explanation for the entire period of delay, which it hasn't, its Motion for extension of time would still be subject to the same fate. This is because, the applicant has urged this Court that upon extending time to deem the appeal as being properly filed. Time and time again, we have reiterated that filing an appeal out of time without leave and then seeking this Court's discretion to extend time is presumptive and in-appropriate.

88. Other than the foregoing, it is also instructive to take cognizance of the holding in the case of *Njoroge versus Kimani* (Civil Application No. E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court stated and held thus:

12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking.

An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.



89. In my humble view, where an Applicant seeking for condonation, like in the instance case, fails to account for the delay, then such an Applicant cannot therefore expect any favorable order or at all. For clarity, discretion by a court of law can only be exercised on the basis of an explanation and/or reason and not in vacuum.
90. Arising from the foregoing, my answer to issue number one is threefold. Firstly, the Application beforehand has been made and mounted with unreasonable and inordinate delay, taking into account the benchmark provided for by dint of Order 11 of the Civil Procedure Rules, 2010.
91. Secondly, despite the length of delay [which is evidently inordinate], the Applicant herein did not find it expedient and mete to account for the delay.
92. Thirdly, in the absence of any reason and/or explanation to justify the delay, the Application beforehand is ipso facto defeated by the Doctrine of Laches.

Issue Number 2 Whether the instant Application has been made in good faith [bona fide] or otherwise.

93. To start with, it is not lost on the court that the suit beforehand was filed and/or commenced in the year 2019 and thereafter the Applicant herein filed an application wherein same sought to be admitted and joined as an Interested Party. For good measure, the Applicant herein was indeed admitted and constituted as an Interested Party on the 15th of July 2019.
94. Subsequently, the 4th Defendant filed a Counterclaim and wherein the Applicant herein, who was hitherto an Interested Party, was impleaded as the 3rd Defendant to the Counterclaim. Consequently, the Applicant herein became a substantive party to the suit and essentially to the Counterclaim filed by the 4th Defendant herein.
95. Suffice it to point out that following the filing and service of the Counterclaim by the 4th Defendant, the Defendants to the Counterclaim were obliged to file and serve their Reply to Statement to Defense and Defense to Counterclaim in accordance with the provisions of Order 7 of the Civil Procedure Rules, 2010.
96. Other than the foregoing, the Defendants to the Counterclaim were also enjoined to file and serve their witness statement and bundle of documents, if any, in the manner prescribed.
97. Nevertheless, in respect of the instant matter, it is important to point out that the court made certain orders and directions on the 23rd of January 2023, whereupon the 3rd Defendant to the Counterclaim, who is the Applicant herein, was directed to file and serve inter-alia, the Statement of Defense and the List and Bundle of documents within a circumscribed timeline. For coherence, the courts stipulated that the Applicant was to file the designated documents within 14 days of service of the Counterclaim.
98. Be that as it may, it is not lost on the court that the 3rd Defendant to the Counterclaim [the Applicant herein], failed to file and serve inter-alia the witness statement and the list and bundle of documents in the manner directed by the court. Consequently, the court was constrained to and indeed granted further indulgence to the 3rd Defendant to the Counterclaim on the 23rd of March 2023.
99. For good measure, it is imperative to reproduce the terms of the orders that were made by the court on the 23rd of March 2023. Same are reproduced as hereunder:
 - i. The counsel for the 1st Defendant to the Counterclaim and the 3rd Defendant to the Counterclaim be and are hereby granted a final window of 21 days to file and serve the list and bundle of documents and additional witness statement, if any.



- ii. The 3rd Defendant to the Counterclaim shall also be at liberty to file and serve a Statement of Defense to the Counterclaim and the same to be filed and served within 21 days from the date hereof.
 - iii. Thereafter the named parties, in terms of clauses [i] and [ii] hereof, shall avail hard copies to court once duly filed in the usual manner.
 - iv. In default to file and serve the documents within the set timelines herein, the defaulting party shall be deemed to have forfeited the leave/liberty, and the same shall be deemed to have no documents.
 - v. In any event, the default to comply with the timelines herein shall not be used to procure and/or obtain an adjournment, in any manner whatsoever.
100. From the terms of the orders which have been reproduced in the preceding paragraphs, it is evident that the 3rd Defendant to the Counterclaim [the Applicant herein], was granted a final window to file inter-alia the witness statement and bundle of documents. Furthermore, it is also explicit that the court decreed that in the event of default, the window was to close.
101. Suffice it to point out that the 3rd Defendant to the Counterclaim [who is the Applicant beforehand], is privy to and knowledgeable of the terms and tenor of the said court order, which was made on the 23rd of March 2023.
102. Nevertheless, the 3rd Defendant to the Counterclaim has neither sought for extension of time nor review of the said orders or at all. To the contrary, the 3rd Defendant to the Counterclaim is now seeking to be allowed to file documents out of time despite the clear terms of the said orders which remain in situ.
103. To my mind, three sub-issues do arise which deserve mention and a short address. To start with, this is a court of record and hence if the court has hitherto made certain orders which are adverse to a party, in this case the 3rd Defendant to the Counterclaim, then it behooves such a party to seek to review the orders before seeking to procure any fresh orders which may be contradictory to and at variance with the prior orders of the court.
104. Simply put, the orders that the Applicant [3rd Defendant to the counterclaim] is seeking to procure at the foot of the current application are actually at variance with and/or contradictory to the orders which were made on the 23rd of March 2023, which have neither been reviewed nor set aside.
105. Consequently, and in this respect, it is instructive to point out and underscore that the invitation by the 3rd Defendant to the counterclaim [the Applicant herein] is calculated to create an absurdity, which cannot be countenanced by a court of law.
106. To this end, it is appropriate to take cognizance of the holding of the Supreme Court of Kenya in the case of Dari Limited & 5 others vs East African Development Bank (Petition E012 of 2023) [2023] KESC 94 (KLR) (7 November 2023) (Ruling), where the court stated and held as hereunder:
- vi. On the further alternative prayer for opportunity to file a rejoinder to the respondent's response, rule 42(2) mandates the petitioner to file and serve a rejoinder within seven days of being served with the response. We understand that the honourable Deputy Registrar issued directions on the filing of rejoinder which directions the petitioners did not heed. The petitioners have neither sought to extend time within which to file the rejoinder nor explained the reasons for non-compliance. We are not persuaded that the supplementary affidavits struck out in our ruling of October 6, 2023 were intended to be the rejoinder. Those affidavits



were filed specifically in response to the replying affidavit in respect of the application for conservatory orders and to strike out supplementary affidavits. At no point was the court dealing with the substantive petition. This points to the inexorable conclusion that the prayer to file a rejoinder is disallowed.[emphasis supplied]

107. Secondly, the Applicant [3rd Defendant to the counterclaim] had previously sought for and obtained indulgence from the court to file the witness statement and bundle of documents, but despite being accommodated, same [Applicant beforehand] never found it fit and expedient to abide by the orders given.
108. Surely, where a party has been granted latitude and indulgence but failed to appropriate same, such a party cannot revisit the seat of justice with a view to partaking of similar orders, like the ones which had hitherto been granted.
109. In my humble view, where one approaches the court several times seeking to procure and obtain the same set of orders, [which have hitherto been granted], such conduct reeks of mala fides and abuse of the due process of the court.
110. Thirdly, the Applicant herein has not tendered any explanation as to why the previous orders were not complied with, yet same still has the audacity to seek for the same orders before the court. Quite clearly, where one does not proffer explanation, an adverse inference of bad faith [mala fides] suffices.
111. Fourthly, the Applicant herein evidently does not have regard and/or respect for timelines set by the court and by extension the Rules of Procedure. Consequently, where a litigant pays scant respect for timelines and procedural rules, such conduct similarly espouses bad faith and slovenliness. [See the holding in the case of Nicholas Kiptoo Korir Arap Salat vs IEBC & Others [2013] eKLR, as per Kiage, JA]
112. In a nutshell, my answer to issue number two herein before is to the effect that the Application beforehand reeks and/or is wrought with mala fides [want of good faith] and thus same is vitiated.

Issue Number 3 Whether the intended Witness Statement and the Bundle of documents sought to be tendered at the foot of the current Application will prejudice and/or occasion grave injustice to the Defendants/Respondents or otherwise.

113. It is common ground that following the pre-trial conference and directions by the court, the instant matter was indeed scheduled for Hearing and subsequently same proceeded, culminating into the Plaintiff's case being heard and closed.
114. Pertinently, it is worth pointing out that the Plaintiff's case, which is underpinned on the basis of the evidence of one witness, was heard on more than three occasions with substantial proceedings being taken by the court.
115. In any event, the witness who testified on behalf of the Plaintiff was cross-examined on a plethora of issues and documents, inter-alia the legality of the sale of the suit property by the 4th Defendant [sic] during the subsistence of court orders prohibiting dealings with the suit property.
116. Suffice it to state and observe that by the time PW1 was being cross-examined, the intended witness statement by and on behalf of the 3rd Defendant to the Counterclaim [the Applicant herein], who contends to have purchased the suit property from the Plaintiff was not on board. Consequently, the contents of the said witness statement could not have been deployed for purposes of cross examination.



117. Similarly, the documents which are intended to be brought forth by and on behalf of the 3rd Defendant to the Counterclaim, inter-alia the sale agreement, which no doubt was under the custody of the 3rd Defendant to the Counterclaim from the onset, were also not deployed during cross-examination.
118. Moreover, the 3rd Defendant to the Counterclaim [the Applicant beforehand], also seeks to tender documents, namely copies of Certificate of Titles, which evidently were procured during the subsistence of the suit. Instructively, the said Certificates of Title which the 3rd Defendant is seeking to introduce, subject to leave of the court, were obtained contrary to the Doctrine of Lis Pendense.
119. Notwithstanding the foregoing, it is also not lost on this court that where documents are generated and/or manufactured during the pendency of a suit, such documents are not admissible. For coherence, the provisions of Section 35 (2) of the Evidence Act, Chapter 80 Laws of Kenya are instructive.
120. Arising from the foregoing, the question that needs to be addressed and answered is whether the intended witness statement, which no doubt, ought to have been prepared and filed at the onset and the attendant documents [some of which are legally inadmissible], will prejudice and/or occasion grave injustice to the Defendants/Respondents and more particularly the 4th Defendant/Counter-claimer.
121. To start with, the intended witness statement and documents which are sought to be introduced, will introduce a completely new cause of action and thus distort the character of the suit beforehand. In this regard, there is no gainsaying that the impugned witness statement and documents if allowed, may have a ripple effect which may culminate into further amendment of pleadings by inter-alia the 1st, 3rd and 4th Defendants.
122. Additionally, the introduction of [sic] the documents [some of which were procured contrary to the doctrine of lis pendense may also culminate into several applications for joinder by [sic] the parties whose names are alluded to at the foot of the documents intended to be produced.
123. Furthermore, there is also the likelihood of the instant matter, and in particular PW1, being recalled for purposes of examination in chief and extensive cross-examination, which would thus defeat the import and tenor of the provisions of Section 1A and 1B of the Civil Procedure Act as read together with the provisions of Article 159(2) (b) of the Constitution 2010.
124. Other than the foregoing, there is also the question of fair hearing as espoused and entrenched in Article 50(1) and (2) of the Constitution 2010, which inter-alia underpins fairness, a level playing field and equality of arms.
125. Quite clearly, where a party, in this case the 3rd Defendant to the Counterclaim, is privy to and knowledgeable of various documents which ought to be filed but by reasons known to himself, withholds such documents, then such a party cannot be allowed to bring forth the impugned documents midstream after testing the strength or otherwise of the evidence so far tendered by the Adverse Parties.
126. In respect of the instant matter, there is a contention that the witness statement and the documents sought to be introduced at the instance of the 3rd Defendant to the Counterclaim [who evidently sides with the Plaintiff], are calculated to plug the deficiencies in the Plaintiff's case. Looking at the totality of the issues beforehand, the contention by and on behalf of the 1st, 3rd and 4th Defendants/ Respondents that the instant Application constitutes a subtle attempt to plug the Plaintiff's case, is not an idle argument. Simply put, same has some merits therein.



127. Finally, there is the question of the volume of documents which are sought to be tendered by and on behalf of the 3rd Defendant to the Counterclaim at this juncture. Notably, learned counsel for the 3rd Defendant to the Counterclaim contends that the said documents are voluminous and comprise of more than 1000 pages. To my mind, such amount of documents will indeed have and cause great impact in the matter beforehand.
128. In my humble view, the number and size of documents which are sought to be produced, impact on the exercise of discretion by a court of law. For coherence, where the documents sought to be tendered and/or produced are voluminous and massive, then the court must be reluctant to grant the indulgence.
129. To this end, it suffices to take cognizance of the holding by the Supreme Court of Kenya in the case of Raila Amollo Odinga & 5 Others vs IEBC & 3 Others [2013] eKLR, where the court stated and held thus;
28. The parties have a duty to ensure they comply with their respective time – lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.
29. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter . However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.
130. Remarkably, the Supreme Court of Kenya has also revisited the question on the circumstances and/or ingredients to be met before additional [further evidence] can be tendered and/or adduced before a court of law.
131. In this regard, it suffices to take cognizance of the holding in the case of Attorney General vs Zinj Limited [2021] eKLR where the Supreme Court [the apex Court] held thus:
- (12) The divergence of the findings by both Courts is now the subject of the appeal before us and the question that we must ask is whether the alleged additional evidence would run afoul of the principles we established in Hon. Mohamed Abdi Mohamad. Those principles, flowing from an interpretation of Rule 18 of the Supreme Court Rules 2012 (now Rule 26 of the Supreme Court Rules 2020 are as follows:
- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;



- (d) where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;
- (j) a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;
- (k) the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

132. Simply put, I come to the conclusion that the volume of documents which are sought to be introduced by and on behalf of the 3rd Defendant to the Counterclaim, albeit midstream of the subject matter, shall indeed occasion prejudice and grave injustice to the Defendants/Respondents. Consequently, on this account, I would be reluctant to exercise discretion in favor of the Applicant [3rd Defendant to the Counterclaim].

Issue Number 4 Whether the Honorable Court is seized of the jurisdiction to admit and adopt the impugned witness statement and bundle of documents, which have been filed beforehand albeit prior to leave being granted or otherwise.

133. The 3rd Defendant to the Counterclaim, who is the Applicant beforehand, is privy to and/or aware of the fact that the timelines for filing witness statements and bundle of documents had long lapsed and/or extinguished. Furthermore, the same Applicant is privy to and conversant with the position that where one [same included], is desirous to file and serve any witness statement and bundle of documents, albeit out of time, then Leave must be sought for and obtained beforehand.
134. Nevertheless, in respect of the instant matter, what the Applicant [3rd Defendant to the Counterclaim] has done is to file witness statement and bundle of documents before the court, albeit before procuring and obtaining Leave of the court.
135. Notably, what the 3rd Defendant to the Counterclaim seeks the court to do is to proceed and grant leave ex-post-facto and thereafter deem the witness statement and bundle of documents, filed out of time, as though same were duly filed.



136. In my humble view, where a party is privy to and knowledgeable of the need to procure and obtain leave beforehand, then it behooves the designated party to file the requisite Application and thereafter obtain the Leave before venturing to file the impugned/designated documents and not otherwise.
137. Instructively, where the documents, in this case the witness statement and bundle of documents, are filed prior to and before the issuance of leave, same [documents] are a nullity and the court cannot be poised to adopt, ratify and/or deem same as validly filed.
138. To this end, it suffices to adopt, restate and reiterate the dictum of the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the court held thus:

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.

139. Additionally, the Supreme Court of Kenya also revisited the same issue in the case of *County Executive of Kisumu vs County Government of Kisumu & 8 Others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, where the court stated and held as hereunder:

(34) It is on record that the applicant had prayed that as a corollary to the prayer for grant of extension, the petition of appeal already filed in this Court be deemed to have been filed within time. The respondents opposed this prayer and line of submission and relying on this Court's jurisprudence in *Nicholas Salat* case, prayed that that petition of appeal be struck out. In its written submissions, however, the applicant sought to correct the record and stated that the petition was annexed as a draft to demonstrate the urgency of the matter.

(35) We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not invoke such 'novel' principles as urged by applicant so as to validate that petition and deem it as properly filed.

140. Suffice it to point out that the Supreme Court of Kenya [the Apex Court] was considering the import and tenor of an Appeal filed out of time albeit without Leave and thereafter an Application being mounted to validate same ex-post-facto. However, the principle of law enunciated in the decision [supra], applies mutatis mutandis.
141. To my mind, what I discern in the ratio espoused in the foregoing decision, is to the effect that an Applicant cannot file a document, whether same be an Appeal or otherwise, without the requisite Leave beforehand and thereafter seek to have the court ratify the illegality ex-post-facto.



142. In a nutshell, I find and hold that the prayer by and on behalf of the Applicant herein to deem [sic] the witness statement and the bundle of documents filed out of time without Leave as duly filed, is not legally tenable.

Final Disposition:

143. Having considered the various thematic issues [enumerated in the body of the Ruling herein], it must have become crystal clear that the Application beforehand is not only premature and misconceived, but same is bad in law and legally untenable.

144. Consequently, and in the premises, I find and hold that the Application dated the 16th of February 2024, is devoid and bereft of merits and hence same be and is hereby dismissed with costs to the 1st, 3rd and 4th Defendants/Respondents only.

145. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant

Mr. Guandaru Thita for the Interested Party/3rd Defendant to the counterclaim [Applicant]

Mrs. Wangui Koech for the Defendants/Respondents

Ms. Kiunga h/b for Mr. Eric Theuri for the 1st Defendant/Respondent

Mr. Ruiru Njoroge for the 3rd Defendant/Respondent.

Mrs. Akedi for the 4th Defendant/Respondent.

Mr. O.M.T Adala for the 1st Defendant to the Counterclaim

Mr. Allan Kamau [Principal Litigation Counsel] for the 3rd and 4th Defendants to the counterclaim.

N/A for the 2nd Defendant/Respondent.

