



**Mutiga v Mwilaria & another (Environment & Land Case
E010 of 2021) [2024] KEELC 1831 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E010 OF 2021**

CK YANO, J

APRIL 4, 2024

BETWEEN

SALESIO MURIUKI MUTIGA PLAINTIFF

AND

JOSPHAT DAVID MWILARIA 1ST DEFENDANT

STEPHEN MUNGATHIA 2ND DEFENDANT

RULING

1. By an originating summons dated 18th January 2021, the plaintiff herein instituted the suit against the defendants claiming to be entitled to land parcels LR No Uringu II/2373 and 49 by way of adverse possession. The defendants filed a replying affidavit to the originating summons sworn by Josephat David Mwilaria, the 1st defendant on 12th July, 2022. In addition, the 1st defendant filed a counterclaim dated 12th July, 2022.
2. Pursuant to the provisions of Order 25 Rule 1 of the *Civil Procedure Rules*, the plaintiff filed a notice of withdrawal of suit dated 30th August 2023 seeking to withdraw the suit against the defendants wholly with no order as to costs. On 26th October, 2023, the plaintiff's claim was marked as withdrawn, with costs to the defendants.
3. Thereafter, the 1st defendant proceeded and fixed the counterclaim for hearing which was heard and closed on 14th February, 2024.
4. On 12th February, 2024, the plaintiff filed a defence to the counterclaim dated 9th February, 2024.
5. Mr. Carlpeters Mbaabu, learned counsel for the 1st defendant/plaintiff in the counterclaim invoked the provisions of Order 7 Rule 11 of the *Civil Procedure Rules* seeking to have the said defence to the counterclaim struck out for having been filed outside the statutory period of 15 days from the time the counterclaim was filed and served on 12th July, 2022, which was a period of over one and half years.



That no leave of court was sought to file the said defence to counterclaim which was only filed on the eve of the hearing of the counterclaim.

6. Ms Mugo, learned counsel for the plaintiff in response invoked the provisions of Article 159 and Article 50 of the Constitution and prayed that the defence filed be deemed duly filed and submitted that the mistake of counsel should not be visited upon the plaintiff. That the court should not consider issues of technicality and instead deem the defence as duly filed and served.
7. By way of rejoinder, Mr. Mbaabu submitted that Articles 159 and 50 of the Constitution are not a panacea for all ills and infractions by a party like the plaintiff (and the defendant in the counterclaim.) Learned counsel submitted that he who comes to seek justice must comply with the law. He pointed out that Order 7 Rule 11 is clear. Mr. Mbaabu further submitted that no explanation for the delay of over one and half years has been given to persuade the court to exercise its discretion in favour of the plaintiff/defendant in the counter claim.
8. I have considered the oral submissions made by the advocates for both parties and the law. The issue for determination is whether the court should strike out the defence and counterclaim dated 9th February, 2024 or whether the same should be allowed and deemed duly filed and served.
9. Order 7 Rule 11 of the Civil Procedure Rules provides as follows-;
 - “ 11. A person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.”
10. Order 7 Rule 17 (3) provides that “where a counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defence”
11. In this case, it was submitted by Mr. Carlpeters Mbaabu learned counsel for the defendant (plaintiff in the counterclaim) that the defence and counterclaim was filed and served on 12th July, 2022. Ms. Mugo, learned counsel for the plaintiff did not dispute this. The period from 12th July, 2022 up to 12th February, 2024 when the defence to the counterclaim was filed is about one and half years. No reason has been given by the plaintiff or his advocate why the defence to the counterclaim was not filed within fourteen days of service as required under Order 7 Rule 17 (3) as read with Order 7 Rule 1 of the Civil Procedure Rules. All that the plaintiff’s counsel did was to invoke the Provisions of Articles 50 and 159 of the Constitution and asked the court to deem the defence to counterclaim as duly filed, without an explanation for the delay of close to one and half years. The plaintiff did not even move the court under Section 95 of the Civil Procedure Act for enlargement of time. Section 95 is clear that the court may, in its discretion enlarge any period fixed or granted by the court for any act prescribed or allowed by the Act such as the issue herein. However, the court must be moved by an application. It is perhaps on being moved that the court can exercise substantive justice.
12. Courts have been consistent in holding that it is important for parties to follow the rules of procedure. The Supreme Court in that regard expressed itself in the case of Moses Mwicigi and 14 others v Independent Electoral and Boundaries Commission and 5 others; Supreme Court Petition No 1 of 2015 in which the Supreme Court held

“This court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is closely intertwined with the substance of a case that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion



bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

13. Further, and as I understand the law, while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the course of justice, which the plaintiff has done in the present case. The plaintiff's failure to give any explanation for not filing the said defence within time and having failed to seek leave before filing the same, can only be concluded that the plaintiff was trying to obstruct or delay the course of justice. It is imperative to note that the plaintiff has only sought the discretion of the court after the defendant had closed his case, and after the defendant applied to have the said defence struck out for being filed outside the statutory period and without leave of court. One must not forget that justice looks both ways. In this case, the plaintiff has withdrawn his case against the defendants and although the plaintiff was served with a counterclaim, he did not deem it fit to file a defence. The defence filed was only filed on the eve of the hearing of the counterclaim and after a period of one and half years and outside statutory period and without leave. To worsen it, the plaintiff and his advocate have not given any explanation for the delay which no doubt was inordinate. I will therefore not exercise my discretion in favour of the plaintiff.
14. The upshot is that the defence to counterclaim dated 9th February, 2024 and filed in court on 12th February, 2024 is incompetent and is hereby struck out.
15. It is so ordered.

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

C.K YANO

JUDGE

In the presence of

Court Assistant – Tuppet

Ms. Mugo for plaintiff

Ms. Kimathi holding brief for Carlpeters for 1st defendant

