



**Africa Kivulini Management Ltd v Mugambi & 5 others (Environment & Land
Case 20 of 2020) [2023] KEELC 21414 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 20 OF 2020
FM NJOROGE, J
NOVEMBER 6, 2023**

BETWEEN

AFRICA KIVULINI MANAGEMENT LTD PLAINTIFF

AND

DAVID PIUS MUGAMBI 1ST DEFENDANT

SUNPALM LTD 2ND DEFENDANT

MOHAMED SHAIBU SOSI 3RD DEFENDANT

SAID SEIF SIAKA 4TH DEFENDANT

SOUD SEIF SIAKA 5TH DEFENDANT

ALI SEIF 6TH DEFENDANT

RULING

1. This is a ruling on the motion dated 24/2/2023 filed on 27/2/2023 by Gikunda Miriti Advocates on behalf of the 1st defendant. The application seeks orders that the court be pleased to arrest the delivery of judgment scheduled to be delivered on 9/3/2023. That date is long since passed. However, the application also seeks an order setting aside the proceedings and orders of 4/8/2022. The grounds upon which the application is made, which are in at the foot of the application and in the affidavit of Gikunda Miriti David, the applicant's counsel, are that on 4/2/23 the matter came up for hearing and was adjourned and a mention date of 27/2/23 issued; that later the advocates for the 3rd and 4th defendants came and proceeded with the counterclaim in the absence of the applicant's counsel after the other counsel had logged out, which proceedings the applicant claims are prejudicial to him and it is in the interests of justice that the proceedings and order of that date be set aside.
2. The application is opposed by the 4th 5th and 6th respondents on the basis of the grounds filed on 16/3/2023 which state that the suit was not slated for delivery of justice on 9/3/2023; that no



proceedings took place on 4/8/2022; that the prayers sought are ambiguous; that the application is fatally defective and that the applicant has never filed a defence to the 4th 5th and 6th defendants' counterclaim to date. These grounds are also addressed by the replying affidavit of the 4th defendant. In that affidavit it is also stated that the plaintiff and the 3rd defendant withdrew their respective cases on 3/10/2022 and 4/8/2022 respectively; that on 23/1/2023 the court at the 4th defendant's instance directed that the counterclaim be heard on 7/2/2023 and the matter proceeded as scheduled; that the 1st defendant was in court during the issuance of those directions as to hearing; that on 7/2/2023 the applicant's counsel was present; that the 1st defendant has not filed a defence to the counterclaim and has not even annexed a draft defence to the present application to demonstrate he has a good defence to the counterclaim; that the applicant has also caused the suit property to be transferred to his name; the deponent further asserts that the 1st and 2nd defendants have litigated the claim to the court of appeal and exhausted all legal avenues and that the matter should now come to an end, and that it is fair and just that the court do issue its judgment date in the matter.

3. I have considered the application and the response. The proceedings of 7/2/23 reflect that the matter was adjourned to a mention on 27/3/2023 in the presence of Mr Gikunda for the applicant. It is not however clear whether Mr. Gikunda was in court later on when the file was recalled at 9:35 am when Mr. Michira informed court that the matter is coming up for formal proof. And prayed for time allocation whereupon the matter was slated for hearing at 11:30 am. It is also not clear whether Mr. Gikunda was present later at 11: 30 am when the matter proceeded for hearing and 4 witnesses for the counterclaimants testified without any cross examination. However, I am inclined to believe that he was absent for there is no evidence that he was ever informed that the matter would be coming up for hearing later that day after it had been adjourned to 27/3/2023 for a mention. Further, if he had been present the proceedings would have reflected that fact, and it is this court's perspective that it would be quite odd for counsel to be present in court in a session where 4 witnesses testify without cross-examination and without his presence being noted in the proceedings.
4. The present application was filed on 27/2/2023 and that was quite timely. In this court's view it matters not that no defence was ever filed by the 1st defendant, if that was indeed the true position, for a party who has filed appearance and defence in a matter is entitled to be present to cross-examine witnesses even where he has filed no defence. It is on those grounds that this court thinks that the present application is not baseless.
5. Though it is the correct position that judgment was not slated for 9/3/2023 as claimed in the present application, that is an error that may be overlooked in favour of addressing the substantive order that is sought in prayer no 3 of the application. while addressing that prayer however, it is noted that indeed no proceedings were taken on 4/8/2022 or orders issued as intimated by the applicant. This court can not therefore make presumptions as to which proceedings the applicant wanted set aside.
6. It is incumbent upon an applicant to seek the correct orders and persuade the court to grant them. as I have demonstrated above typographical errors in applications may be overlooked by the court. however, when numerous orders have been issued and proceedings recorded in the court record, and an application seeks to set aside proceedings with reference to a date on which no proceedings were taken, a court lacks any basis to presume that it is the proceedings of a certain day that were targeted for setting aside by an applicant.
7. The applicant may state that he made an application to amend through a further supporting affidavit filed on 19/4/2023. However, it would be strange to accept that as an amendment of the application as it was neither consented to by the other parties, who can with justification claim to have had no notice of the same, or sanctioned by this court. In addition, it was quite unprocedural for counsel



for the applicant to attempt an amendment by way of simply filing an affidavit. To make it worse the same was filed without leave of court. I reject those contents of the further supporting affidavit can amount to an application for amendment. Perchance it was deemed to be one, it is noteworthy that even this court never granted the same prior to the hearing of the application. Further, hearing was by way of written submissions and the 4th 5th and 6th defendants filed theirs while the applicant filed none. The application was heard without any amendment. This court has in the process of seeking to do substantive justice by way of closer scrutiny to the application agreed that errors can be forborne, but it has also observed that overlooking some errors, as that under focus in the present instance, may be tantamount to entering the arena of battle and seeming to be arguing the case for the applicant to the detriment of his adversary and it shall not condone that. It will rather call on all drafters of pleadings and applications to be scrupulously vigilant and ensure that no slapdash approach to mistakes that appear very minor, as in this case, sinks their clients' cases. It is for the foregoing reasons that I find that the application dated 24/2/2023 must be struck out, and it is hereby summarily struck out with costs, but I grant leave for the filing of a fresh application within 7 days from the date of this order.

8. This matter shall be mentioned on 29/11/2023 for further directions in the presence of all parties' counsel.

DATED, SIGNED AND ISSUED AT MALINDI ON THIS 6TH DAY OF NOVEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

