



Mwangeka v Kenya Ports Authority & another (Environment and Land Case Civil Suit 91 of 2018) [2022] KEELC 3479 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 91 OF 2018**

M SILA, J

MAY 4, 2022

BETWEEN

DAVIS MWALIMO MWANGEKA PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

CEMTEC ENGINEERING LIMITED 2ND DEFENDANT

RULING

(Application for review of a ruling that directed the plaintiff to file an amended plaintiff within a certain period of time; application based on the reason that the ruling was emailed to the wrong email; fact of the matter being that the ruling was sent to the email provided by counsel and no alternative email had been provided; real position being that counsel is trying to throw blame where it does not lie; no good reason provided but court in its own discretion allowing the late amended plaintiff subject to payment of thrown away costs which are assessed)

1. The application before me is that dated 21 August 2020 filed by the plaintiff. It seeks the following orders :-
 - (i) That the Honourable Court be pleased to recall, re-open, review and set aside the ruling and consequential orders delivered by this Honourable Court on 10 June 2020 on the plaintiff's application dated 21 October 2019 and the plaintiff's Amended plaintiff dated 14 August 2020 be deemed to have been filed on time.
 - (ii) That the costs of this application be provided for.The application is opposed.
2. To put matters into context, the plaintiff commenced this suit by way of a plaintiff filed on 26 November 2012. He pleaded that he had been carrying on business on the plot No. 971/972 MN Shimanzi Road,



known as the Port Police Canteen, pursuant to an agreement between himself and the OCPD, Port Police. He claimed to have been carrying on business since 1989, and that on 21 November 2012, the 1st defendant demanded that he vacates the suit premises. The 2nd defendant was sued because it was claimed that the 2nd defendant had been contracted by the 1st defendant to carry out renovations on the suit premises. Together with the plaint, the plaintiff filed an application for injunction, and interim orders were issued. Later, the plaintiff filed another application claiming that the injunctive orders were disobeyed by the defendants who allegedly demolished the plaintiff's canteen and evicted him. Arising out of that he filed an application dated 21 October 2019 seeking to amend the plaint so as to plead particulars of special damages in the sum of Kshs. 287,842,524.00/=. I heard the application and delivered ruling on 10 June 2020. I allowed the application and directed the plaintiff to file the amended plaint within 30 days, and in default, the leave granted would lapse and the plaintiff would have to proceed based on the original plaint. No amended plaint was filed within the 30 days period; instead, an amended plaint was filed on 14 August 2020, clearly outside the time given in the ruling. Perhaps realizing that the amended plaint was filed late, this application was subsequently filed on 23 August 2020.

3. The application is based on the grounds that the amended plaint was filed without undue delay and with the necessary dispatch upon hearing on 11 August 2020 that the ruling had been delivered on 10 June 2020; that the delay in filing the said amended plaint was not due to any fault on the part of the plaintiff or his counsel, but due to circumstances that were in themselves unfortunate; that the ruling had been sent to an email address which was no longer in use; that the plaintiff's counsel's clerk had been checking with the clerks at the registry, and each time he was informed that the ruling was yet to be delivered; that on 11 August 2020, the plaintiff's counsel's clerk, one Japhet Katana, insisted that he be shown the actual file or that the system be checked in his presence, which was done, and that it was then confirmed that the ruling had been delivered on 10 June 2020; that on his request, the ruling was forwarded to the proper email address; that the grant of the orders will not prejudice the defendant but will instead enable the court to fully adjudicate on all the issues between the parties herein and will perfectly meet the ends of justice; that it is necessary to review the orders of 10 June 2020 and the amended plaint filed on 14 August 2020 be deemed as having been filed on time.
4. The application is supported by the affidavit of Fredrick Mwawasi, counsel for the plaintiff, and Japhet Katana a clerk in the firm of F.M Mwawasi & Company Advocates. They more or less repeat the grounds upon which the application is based. In his affidavit, Mr. Mwawasi averred that the ruling was sent to an email he was no longer using. He deposed that he only came to know on 11 August 2020 that ruling had been delivered. He deposed further that during this time he suffered an illness that affected his eyesight and he was not able to read any email or any communication online. He averred that the failure to comply with the orders of court were entirely due to these unfortunate circumstances. He stated that it was on 11 August 2020 upon intervention of his clerk that the ruling was forwarded to his proper email. In the affidavit of Japhet Katana, it is averred that ruling was scheduled to be delivered on 4 June 2020 but was not delivered due to the Covid 19 situation in court. That he kept checking on delivery of the ruling almost on a daily basis. That on 4 August 2020 he insisted on checking on the file and it was then that he was informed that the ruling was delivered by email. That this email had some problem and he requested it to be sent to another email.
5. The 1st defendant opposed the application vide a Replying Affidavit sworn by Stephen Kyandih, the Principal Legal Officer, Litigation and Disputes. He deposed that the orders sought in the application are not known in law since it invites this court to reopen and rehear an application which the court has already heard and rendered itself conclusively and the court cannot be invited to sit on appeal over its own decision. He averred that the court is functus officio. Mr. Kyandih pointed out that the application states that it is brought under "Order 80 of the Civil Procedure Rules" which does not



exist. He added that the application is for review but does not meet the threshold for review. He further pointed out that this court used to send to counsel correspondence by email and that the ruling was sent to the email provided in the letterhead of Mr. Mwawasi's law firm. He averred that Mr. Mwawasi never provided any alternative email. He thought it unfair for Mr. Mwawasi to falsely accuse the court of improper conduct and that the depositions of Mr. Mwawasi and his clerk were not candid. He was of opinion that this application is made mala fides. He also deposed that rulings are uploaded within 48 hours to the kenyalaw.org website which was accessible to the plaintiff. On the fact that an amended plaint was already filed, he was of the view that this shows the disregard of the law on the plaintiff's part, and disregard of the orders of this court. He believed that the application is not merited and is brought with unclean hands.

6. The 2nd defendant opposed the application vide the replying affidavit sworn by M.M Nyaga, legal associate in the firm of M/s Muturi Gakuo & Kibara Advocates, law firm on record for the 2nd defendant. She deposed that for an application to qualify for review, it must meet the threshold under Order 45 Rule 1(1) of the Civil Procedure Rules, which this instant application does not satisfy. She deposed that the plaintiff has not produced any written correspondences to show that he informed the court that he changed his official email address. She deposed that equity aids the vigilant and not the indolent and deposed that Mr. Mwawasi acknowledges being aware that the ruling was to be delivered on 4 June 2020 but did not follow up on the same. She believes that this is a classic example of abuse of the court process and is a ploy to delay the matter further.
7. Mr. Mwawasi filed an supplementary affidavit. He deposed that he was sick and undergoing treatment, hence, he could not read anything online as he was awaiting to be issued with reading glasses which were finally issued on 19 September 2020. He deposed that the application is nothing more than an application for extension of time and its wording is perhaps a little unfortunate. He deposed that the application is made in utmost good faith and does not impute any improper conduct on the part of the court and its officers working in the registry. Mr. Mwawasi deposed that the plaintiff is more than anxious to have this matter concluded, and this application is only meant to enable the party to put all issues for determination before the court. He deposed that he changed his email address. He reiterated that he could not read anything online and he relied on his clerk to check the position in the registry. He deposed that filing of the amended plaint was not meant to be contemptuous but was aimed at showing diligence.
8. I directed counsel to canvass the matter by way of written submissions and I have taken note of the elaborate submissions filed.
9. At the outset, I must say that Mr. Mwawasi's application, affidavit and submissions are messy and all jumbled up. First, the application is said to be based inter alia on Order 80 of the Civil Procedure Rules, which does not even exist. The application first prays for orders of review, and later as seen from his supplementary affidavit and submissions, Mr. Mwawasi acknowledges that all he is asking for is an enlargement of time and not review. He says that this is unfortunate wording. I agree; it is truly unfortunate. There is nothing in this application that would constitute an application for review. It is simply an application for enlargement of time for compliance. It will be recalled that this court allowed the plaintiff opportunity to amend his pleadings within a certain period of time. The application to amend was heard during the peak of the Covid-19 pandemic and physical court sittings were not possible. Communication at the time was through email. The ruling was sent to the email provided by counsel which is the same email that this court was previously communicating with counsel. It is also the same email that was prominently displayed on Mr. Mwawasi's letterhead. It is preposterous, if not out rightly scandalous, for Mr. Mwawasi to assert that this court sent the ruling to the wrong email. If at all there was change of email, as Mr. Mwawasi alleges, it was the duty of counsel to provide



it. Did Mr. Mwawasi expect this court to send the ruling to an email that the court did not even know existed and which is now alleged to be the “correct email?” Surely, to what extent must counsel go to absolve themselves of blame that is squarely theirs ? Is it not simply decent to say, look I delayed and I seek indulgence of the court ? Must one blame court for faults of their own ?

10. I am not amused with all which is deposed in the affidavits of Mr. Mwawasi and his clerk. All that they are trying to do is shunt blame elsewhere, instead of taking the blame themselves and being gentlemanly enough to seek pardon and indulgence. Mr. Mwawasi is simply trying to cover up for his tardiness which cover has been blown by the responses of the defendants. I have solid basis to dismiss this application as I am not persuaded that there is any genuine reason presented for failure to abide by the court orders of 10 June 2020. But I have a soft spot for litigants. It is not in my nature to bar a litigant from fully presenting his case if I can avoid it. This to me is a classical case of a mistake of counsel and I hesitate to sacrifice the claim of the plaintiff at the altar of the mistakes that his counsel may have made. I will bend over backwards and accommodate the plaintiff. I will allow the amended plaint that he filed late to remain on record but he must pay some thrown away costs to the defendants who had every right and entitlement to oppose this application. I will assess these at Kshs. 10,000/- to each defendant and these must be paid within 30 days from the date hereof. If the monies are not so paid within the time frame provided, the amended plaint filed on 14 August 2020 will be struck out and the plaintiff will have to proceed on the basis of the original plaint.

11. Orders accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

