



**Maestro Connections Health Systems Ltd & 2 others v Riley Services
& 14 others (Environment & Land Case 771, 840 & 1040 of 2016
(Consolidated)) [2020] KEELC 2559 (KLR) (5 May 2020) (Ruling)**

Maestro Connections Health Systems Ltd & Another v Riley Services & 13 Others [2020] eKLR

Neutral citation: [2020] KEELC 2559 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 771, 840 & 1040 OF 2016 (CONSOLIDATED)

SO OKONG'O, J

MAY 5, 2020

BETWEEN

MAESTRO CONNECTIONS HEALTH SYSTEMS LTD PLAINTIFF

AND

RILEY SERVICES 1ST DEFENDANT

UNITED STATES INTERNATIONAL UNIVERSITY 2ND DEFENDANT

DPS INTERNATIONAL LIMITED 3RD DEFENDANT

NDUNGU NJOROGE & KWACH ADVOCATES 4TH DEFENDANT

NDUNGU PAUL NDERITU 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

DIRECTOR OF SURVEY 7TH DEFENDANT

H.E.DANIEL TOROITICH ARAP MOI 8TH DEFENDANT

TRIPLE OKLAW ADVOCATES LLP 9TH DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 840 OF 2016

BETWEEN

UNITED STATES INTERNATIONAL UNIVERSITY PLAINTIFF

AND



MAESTRO CONNECTIONS HEALTH SYSTEMS LTD 1ST DEFENDANT
HE DANIEL TOROITICH ARAP MOI 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
THE HON ATTORNEY GENERAL 4TH DEFENDANT
ICEA LION LIFE ASSURANCE COMPANY LIMITED 5TH DEFENDANT
BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED 6TH DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 1040 OF 2016

BETWEEN

MUTHAIGA LUXURY HOMES LIMITED PLAINTIFF

AND

UNITED STATES INTERNATIONAL UNIVERSITY 1ST DEFENDANT
MAESTRO CONNECTIONS HEALTH SYSTEMS LTD 2ND DEFENDANT
HE DANIEL TOROITICH ARAP MOI 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT
DIRECTOR OF SURVEY 5TH DEFENDANT
THE HON ATTORNEY GENERAL 6TH DEFENDANT
OMWANZA OMBATI 7TH DEFENDANT
ANDREW SUNKULI 8TH DEFENDANT

RULING

1. This is one of the many rulings that I have been called upon to make in the above mentioned cases. The three (3) cases are related in that they concern the same subject matter. ELC No. 771 of 2016 and ELC No. 840 of 2016 were consolidated on 2nd August, 2016 with ELC No. 840 of 2016 as the lead file. On 5th October, 2016, the court ordered that ELC No. 1040 of 2016 which was filed last be heard together with ELC No. 771 of 2016 and ELC No. 840 of 2016. What is now before the court are two (2) applications. The first application has been brought by H.E. Daniel Toroitich Arap Moi who is the 8th defendant in ELC No. 771 of 2016, the 2nd defendant in ELC No. 840 of 2016 and the 3rd defendant in ELC No. 1040 of 2016. I wish to mention at the onset that H.E. Daniel Toroitich Arap Moi died on 4th February, 2020 while this ruling was pending. The second application has been brought by Maestro Connections Health Systems Limited which is the plaintiff in ELC No. 771 of 2016, the 1st defendant in ELC No. 840 of 2016 and the 2nd defendant in ELC No. 1040 of 2016.
2. For ease of reference, I will refer to the parties with their names rather than the way they have been described in the pleadings. The application by H.E. Daniel Toroitich Arap Moi (hereinafter referred



to only as “Arap Moi”) was brought by way of Notice of Motion dated 9th August, 2019. In the application, Arap Moi sought the following orders;

1. That the Further Amended Plaintiff by Maestro dated 26th July, 2019 filed on 1st August, 2019 be struck out.
2. That the costs of the application be provided for.
3. The application was also brought on the grounds set out on the face thereof and on the affidavit of Arap Moi’s advocate, Ms. Carolyn Nyaga sworn on 9th August, 2019. The application was brought on the grounds that Maestro’s Further Amended Plaintiff was filed out of the time that was given by the court for amending the Amended Plaintiff. Arap Moi contended that since the time that was given by the court for amending the Amended Plaintiff lapsed without the Further Amended Plaintiff being filed by Maestro, any party who was aggrieved by the order granting leave to amend the Amended Plaintiff could not take step to appeal against the same. In her affidavit in support of the application, Ms. Carolyn Nyaga reiterated the grounds set out on the face of the application which I have already highlighted. She added that the Further Amended Plaintiff by Maestro that was supposed to be filed within 24 hours of the delivery of the ruling on 20th June, 2019 was filed on 1st August, 2019. Ms. Nyaga stated that Maestro’s Further Amended Plaintiff was filed out of time without leave of the court.
4. The application by Arap Moi was opposed by Maestro through replying affidavits sworn by Dr. George Kiongera and Maestro’s advocate Mr. Duncan Okatch on 11th November, 2019. In his affidavit, Dr. George Kiongera gave a detailed explanation why Maestro did not file the Further Amended Plaintiff within 24 hours as had been ordered by the court. He admitted that the Further Amended Plaintiff was filed out of time. He stated however that it was nevertheless filed and served upon the parties. Dr. George Kiongera stated that Maestro was not the first party in these proceedings to file its pleadings late. He stated that other parties had done so and that no objection had been raised. He stated that gone are the days when justice was rendered on technicalities rather than substantive justice. He stated that Arap Moi stood to suffer no injustice if the orders sought were not granted. On the issue of Arap Moi not being able to appeal against the order granting Maestro leave to file a Further Amended Plaintiff, he stated that Arap Moi had not filed a Notice of Appeal and as such could not use his alleged inability to appeal as a basis for his application.
5. Dr. George Kiongera stated that it was not necessary for Arap Moi to wait for the Further Amended Plaintiff to be filed before taking steps to lodge an appeal if he intended to appeal and that the 9th defendant filed a Notice of Appeal before Further Amended Plaintiff was filed. He stated that Arap Moi was still within his right to seek leave of the Court of Appeal to file a Notice of Appeal out of time. He stated that the court ought to insist that Arap Moi remains a party to the three suits having made a finding that his joinder to the suits was necessary. Dr. George Kiongera contended that the court should strive to sustain pleadings rather than striking them out purely on technical grounds. He urged the court to dismiss Arap Moi’s application.
6. In his affidavit, Duncan Okatch reiterated the contents of Dr. George Kiongera’s affidavit as to the reasons why Maestro’s affidavit was not filed within the time set by the court and why the orders sought by Arap Moi should not be granted. He stated that the only prejudice that had been identified by Arap Moi was that the late filing of the Further Amended Plaintiff had taken away his right of appeal. He reiterated what was stated in Dr. George Kiongera’s affidavit that Arap Moi had not filed a Notice of Appeal and as such he could not use failure to appeal as a basis for his application. He stated that Arap Moi could still move the Court of Appeal for leave to file a Notice of Appeal out of time. He urged the court in the spirit of sections 1A and 1B of the Civil Procedure Act, sections 3A and 3B of the Appellate



Jurisdiction Act and Article 159 of the Constitution to sustain the Further Amended Plaintiff rather than striking it out on purely technical grounds.

7. Maestro Connections Health Systems Limited's application was brought by way of Notice of Motion dated 21st August, 2019. In the application, Maestro Connections Health Systems Limited (hereafter referred to only as "Maestro") sought the following orders;
 1. That the honourable court be pleased to summon Arap Moi to attend court on a date and at a time to be agreed upon by the parties in ELC No. 771 of 2016, ELC No. 840 of 2016 and ELC No. 1040 of 2016 ("the three suits") to give evidence and produce documents in support of that evidence and to be cross-examined on that evidence.
 2. That the hounourable court be pleased to order that the evidence of Arap Moi be taken urgently and in priority to the evidence of any other witnesses in respect of the three suits.
 3. That in the event that Arap Moi fails to honour the summons, judgment be entered against him in ELC No. 771 of 2016 in favour of Maestro as prayed in the amended plaint dated 26th July, 2019.
 4. That in the alternative, the honourable court be pleased to issue a Commission for the examination of Arap Moi to the Chief Magistrate at Milimani Law Court to attend to Arap Moi on a date and time to be agreed upon by the parties for the purposes of taking both written and audio-visual record of his evidence in chief and in cross-examination.
 5. That the honourable court be pleased to admit duly executed Commission together with the audio-visual and written record of the evidence of Arap Moi and order that the same do form part of the record.
 6. That the honourable court be pleased to make an order that the audio-visual and written record of the evidence of Arap Moi be deemed as his evidence in the three suits.
 7. That the honourable court be pleased to grant any further orders as it may deem fit to further the ends of justice.
 8. That the costs of the application be in the cause.
8. The application was brought on the grounds set out on the face thereof and on the affidavit of Dr. George Kiongera. The application was brought on the grounds that Arap Moi was of advanced age and that according to newspaper articles he had been unwell and had been admitted in hospital and that his evidence was critical to the case of Maestro in ELC No. 771 of 2016 and the cases of the other parties in the three suits. Maestro contended that on account of the infirmity of Arap Moi and his advanced age, it was critical that his evidence be taken at the earliest opportunity and in priority to the evidence of the other witnesses in the three suits so that the same is in the court record in the event that something happened to him. In his affidavit in support of the application sworn on 20th July, 2019, Maestro's Managing Director, Dr. George Kiongera reiterated the grounds set out on the face of the application that I have highlighted. Maestro's application was supported by Andrew Sunkuli who is the 8th defendant in ELC No. 1040 of 2016 through his response to the application dated 11th September, 2019.
9. Maestro's application was opposed by Arap Moi through a replying affidavit sworn by Prof. Henry Kiptiony Kiplangat sworn on 2nd October, 2019. Prof. Henry Kiptiony Kiplangat stated that he was the one who had sworn the affidavits and signed witness statements and other documents that were filed in the three suits on behalf of Arap Moi. He stated that he had been authorised by Arap Moi to attend



court and adduce evidence on his behalf in the three cases when he is called upon to do so. He stated that he was young and had no intention of leaving the jurisdiction of the court. Prof. Henry Kiptiony Kiplangat stated that Maestro's application was purely intended to vex and annoy Arap Moi. He stated that the application was brought by a firm of advocates that was not on record in the matter and on the assumption that Arap Moi was a party to ELC No. 771 of 2016 which was not the case since Maestro did not amend its Amended Plaintiff to join him in the suit within the time that was set by the court.

10. Prof. Henry Kiptiony Kiplangat stated further that the orders sought by Maestro offended section 107(1) and (2) of the Evidence Act which places the burden of proof on he who asserts. He stated that in his capacity as a defendant in the three cases, Arap Moi was not obliged to produce evidence as he had an option of saying that he did not wish to produce evidence. He stated that the orders sought by Maestro purported to limit and were a threat to Arap Moi's non-derogable right to a fair trial. Prof. Henry Kiptiony Kiplangat stated that the application was brought in the erroneous assumption that a party to a suit must be a witness in the suit. He stated that at no time did Arap Moi indicate that he will be a witness for Maestro or at all and as such the issue of his evidence being critical for Maestro could not arise.
11. Maestro's application was also opposed by the 5th defendant in ELC No. 840 of 2016, ICEA Lion Life Assurance Company Limited (hereinafter referred to only as "ICEA") through grounds of opposition dated 11th November, 2019. ICEA contended that if Maestro was allowed to call Arap Moi as a witness, the evidence should be given in court and not to a commissioner through a commission. ICEA also objected to judgment being made in favour Maestro in the event that Arap Moi fails to give evidence contending that such judgment could only be given where a party required to give evidence was in court and had refused to give evidence. ICEA contended further that there was no way the court could give judgment in favour of Maestro in the three cases before the court had heard the evidence and submissions from the other parties. ICEA contended that it would amount to a great injustice if judgment could be entered in favour of Maestro solely on account of the failure of Arap Moi to give evidence.
12. The two applications were argued together. In his submissions in support of Arap Moi's application, Mr. Ngatia submitted that Maestro's Further Amended Plaintiff was filed one month out of time and without an order of the court or consent of the other parties. He submitted that since no Further Amended Plaintiff had been filed by Maestro following the leave that was granted by the court, he was advised by his client not to file an appeal against the order that granted leave. He submitted that since the order that was granted by the court had expired, the same could not be complied with save with the consent of the parties. Mr. Ngatia submitted further that once the order that granted leave to Maestro to file Further Amended Plaintiff expired, it ceased to exist. He submitted that a non-existent order cannot be extended. In support of his submissions, Mr. Ngatia cited the cases of Mohamed Abdulrehman Mohamed Hatimy v Kalidas Kanji(Africa) Limited & Kalidas Kanji & Company Limited [2001]eKLR, National Social Security Fund v John Ochieng Opiyo[2006]eKLR and Karachiwala Nairobi Limited v Sanjivan Mukherjee[2015]eKLR.
13. With regard to Maestro's application, Mr. Ngatia submitted that the application was incomprehensible. He submitted that Maestro had not come out clearly as to the capacity it wanted Arap Moi to be summoned to appear in court. Mr. Ngatia submitted that it was not clear in the application whether Maestro wanted Arap Moi to give evidence as its witness or otherwise. He submitted that the burden was upon Maestro to prove its case. He submitted that Arap Moi had filed a witness statement of a witness who will give evidence on his behalf in the three cases and it was not for Maestro to tell him who to call as a witness. Mr. Ngatia submitted further that it was not lawful for judgment to be entered for Maestro in the three cases on the failure of Arap Moi to testify. He



reiterated that the burden of proof is on Maestro to prove its case and as such failure by a defendant to testify cannot entitle Maestro to a judgment.

14. Mr. Ngatia submitted further that the application by Maestro was filed by a firm of advocates which was not on record. He submitted that costs of the application should be ordered against the advocate personally. He submitted that the application was meant to ridicule Arap Moi who was not a party to the suit by Maestro since the Further Amended Complaint through which he was to be joined in the suit was filed out of time. In support of these submissions Mr. Ngatia cited authorities number 4, 5, 6, 7 and 8 in Arap Moi's list of authorities dated 14th November, 2019. Ms. Leila who appeared for TripleOKLAW Advocates LLP, the 9th defendant in ELC No. 771 of 2016 supported the submissions by Mr. Ngatia. She urged the court to allow the application by Arap Moi.
15. In his submissions in reply and in support of Maestro's application, Mr. Kanjama referred the court to the authorities in Maestro's list of authorities dated 20th November, 2019. He submitted that in the first case in the list, *Murai v Wainaina (No.4) (1982) KLR*, the court (Madan J.) had stated among others that a mistake is a mistake and that the door of justice is not closed because a mistake has been committed and that without forgiving or condoning the mistake the court has to do whatever is necessary to rectify it if the interests of justice so dictate. In the second case in the list, *Joseph Gikonyo t/a Garam Investments v National Social Security Fund Board of Trustees [2014] eKLR*, the court (J.B.Havelock J.) agreed with the reasoning in *Murai v Wainaina (supra)* and stated that in line with the provisions of Article 159(2)(d) of *the Constitution* as read with sections 1A and 1B of the *Civil Procedure Act*, the courts had been more liberal in allowing breaches of procedural technicalities in order to determine substantive issues. With regard to Maestro's application, Mr. Kanjama referred to *Martha Thairora Gikundi v Elizabeth Kananu & Another [2014] eKLR*, in which the court (P.M.Njoroge J.) stated that the taking of evidence de bene esse is governed by Order 18 of the Civil Procedure Rules and that such evidence is allowed to be heard on a priority basis in two circumstances namely, where a witness is about to leave the jurisdiction of the court and secondly, where sufficient cause is shown to the satisfaction of the court. He submitted that in that case, the application was allowed on account of ill health.
16. Mr. Kanjama cited authorities number 4 and 5 in Maestro's list of authorities and submitted that striking out of pleadings is a drastic measure and that justice should not be sacrificed in the altar of strict adherence to the provisions of procedural law. He submitted that the affidavits filed by Maestro in response to Arap Moi's application are elaborate and answer fully the application by Arap Moi. In response to Mr. Ngatia's submission that the order granting leave to amend the Amended Complaint was a conditional order that lapsed once it was not complied with, Mr. Kanjama submitted that the order was not conditional. He submitted that most of the authorities cited by Mr. Ngatia were distinguishable in that the cases were decided before the overriding objectives and Article 159 of *the Constitution* were introduced in our law. He submitted that under section 125 of the *Evidence Act*, all persons are competent to testify and that under section 127(2) of the *Evidence Act*, it was only an accused person in a criminal case that cannot be called upon to testify for the prosecution and that that is the only instance when a party can decline to testify. Mr. Kanjama submitted that in Maestro's application, it was seeking to have Arap Moi testify on its behalf and that Dr. Kiplangat who has given a witness statement on behalf of Arap Moi would only give evidence as an agent as such his evidence would be hearsay. Mr. Kanjama submitted that Maestro was entitled to call Arap Moi as a witness and that it had laid a basis for that request.
17. On behalf of ICEA, Mr. Fraser S.C relied entirely on ICEA's grounds of opposition dated 13th November, 2019 and submitted that ICEA's concern was only with regard to Maestro's prayer for judgment in the event that Arap Moi fails to give evidence. He submitted that Maestro is not



- entitled to a judgment before the three suits are heard and the interests of all the parties in the suit property determined. Mr. Ashitwa for United States International University (USIU) agreed with the submissions by Mr. Fraser S.C and reiterated that if the application by Maestro was allowed, it would amount to judgment being given in its favour without a hearing.
18. Mr. Kamau who appeared for the Attorney General supported the application by Arap Moi. He submitted that Maestro was given a limited time within which to file Further Amended Plaintiff and that the same was filed outside that time without leave of the court. Mr. Kamau submitted that there was no mistake that the court could be called upon to overlook or to forgive for the sake of substantive justice. Mr. Kamau opposed the application by Maestro. He submitted that it is the duty of the plaintiff under Order 18 of the Civil Procedure Rules to open his case and that the defendant has a choice to call or not to call evidence. Mr. Kamau submitted that for the reasons given by Maestro, it should have been Arap Moi seeking leave to adduce evidence de bene esse. He reiterated Mr. Ngatia's submission that Arap Moi had a witness he intends to call and that the court cannot be called upon to shift the burden of proof from Maestro to Arap Moi. He submitted that Arap Moi should be allowed to defend the cases against him as he wished.
 19. Mr. Githara for Muthaiga Luxury Homes Limited (hereinafter referred to only as "Muthaiga Homes") left the application by Arap Moi to the court's discretion. Mr. Githara however supported the application by Maestro save for the limb seeking judgment. Mr. Elkington who appeared for Andrew Sunkuli, the 8th defendant in ELC No. 1040 of 2016 also supported the application by Maestro save for the limb seeking judgment. Mr. Thiga who appeared for Balozi Housing Co-operative Society Limited (hereinafter referred to only as "Balozi") the 6th defendant in ELC No. 840 of 2016 left the two applications to the court's discretion.
 20. In his response to Mr. Kanjama's submissions, Mr. Ngatia distinguished the authorities that were cited by Mr. Kanjama. He reiterated that Arap Moi was a defendant and could not be compelled to come to court to defend himself. Mr. Ngatia submitted that Arap Moi was not a witness and had not requested to give evidence. He reiterated that the application by Maestro lacked legal basis and was merely intended to ridicule Arap Moi. He submitted that under Article 50 of *the Constitution*, Arap Moi was entitled to equal treatment under the law.
 21. In response to Mr. Ngatia's submission that Maestro's application was filed by a firm of advocates not on record, Mr. Kanjama submitted that his firm filed a Notice of Appointment of Advocates on 20th December, 2018 as lead counsel for Maestro. He submitted that his law firm was properly on record. On the contention that Maestro was shifting the burden of proof, Mr. Kanjama submitted that that was not the case. He contended that Maestro was simply exercising its right to compel a witness to give evidence on its behalf. Mr. Kanjama submitted that a defendant can be compelled to give evidence for the plaintiff. He distinguished authority number 5 in Arap Moi's list of authorities saying that Maestro's application was based on Arap Moi's frailty and not on his status as former president.
 22. On his part, Mr. Okatch also distinguished authorities number 1 and 2 in Arap Moi's list of authorities. He submitted that the court has power to extend time for filing pleadings which have not been filed within the set timelines. Mr. Okatch reiterated that Arap Moi would not be prejudiced if his application was not allowed. He stated that no prejudice is disclosed in the affidavit in support of the application which is not even signed by Arap Moi. He urged the court to admit the Further Amended Plaintiff.
 23. I will consider the application by Arap Moi first. This is because it was the first to be filed and also due to the fact that its determination would have some bearing on Maestro's application. The application seeks only one prayer namely, the striking out of Maestro's Further Amended Plaintiff dated 26th July,



2019 filed in court on 1st August, 2019 on the ground that the same was filed out of time thereby depriving Arap Moi of his right to appeal against the order that granted leave for the amendment to be effected. The following facts are not disputed. On 28th January, 2019, Maestro filed an application in ELC No. 771 of 2016 seeking leave to amend its Amended Plaintiff and for the Further Amended Plaintiff to be filed and served within 24 hours of the order granting leave. The purpose of the amendment was to join Arap Moi and TripleOKLaw Advocates LLP as parties to the suit. The application was strenuously opposed. In a ruling delivered on 20th June, 2019, the court allowed Maestro's application for leave to amend the Amended Plaintiff as prayed. The effect of the court's order was that Maestro was to file its Further Amended Plaintiff within 24 hours from 20th June, 2019 as it had sought in the application.

24. Maestro did not file the Further Amended Plaintiff until 1st August, 2019; that is more than one month after leave was granted to them to file the Further Amended Plaintiff. Maestro neither sought the consent of the other parties in ELC No. 771 of 2016 nor leave of the court to file its Further Amended Plaintiff out of the time that was set by the court. Maestro has admitted having filed the Further Amended Plaintiff out of time and without leave of the court. It has however contended that that was a mistake that the court can overlook pursuant to sections 1A and 1B of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution* for the sake of substantive justice. Arap Moi has contended that the late filing of the Further Amended Plaintiff prejudiced his right of appeal in that since the same was not filed within the time set by the court the order granting leave stood extinguished and non-existent, and as such could not form a basis of an appeal.
25. Amendments of pleadings and the consequences of failure to amend after leave has been granted are provided for in Order 8 of the Civil Procedure Rules. Order 8 rules 5 and 6 of the Civil Procedure Rules provides as follows:
- 5.
- (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
 - (2) This rule shall not have effect in relation to a judgment or order.
6. Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”
26. Order 8 rule 6 of the Civil Procedure Rules is clear that where a party is granted leave to amend his pleadings and fails to do so within the time set by the court, the order granting leave ceases to have effect but the court has power to extend the time within which a party in default can effect the amendment. I am in agreement with Arap Moi that if a party fails to amend his pleading within the period specified by the court, the order granting leave ceases to have any effect. This to me means that the order ceases to have any force of law. An order that has ceased to have effect or force cannot be acted upon. Any act done pursuant to such order will equally have no effect in law. It follows therefore that once Maestro failed to file its Further Amended Plaintiff within the period that was set by the court, the leave that was granted by the court for that purpose stood terminated. That rendered the Further Amended Plaintiff filed on 1st August, 2019 irregular as it was filed without leave. Order 8 rule 6 of the Civil Procedure Rules gives the court power to extend time within which a party who has failed to amend a pleading can do so. Maestro has given various reasons for its failure to file Further Amended Plaintiff within time.



Whether the reasons provide valid excuse for the failure can only be considered in an application for extension of time. I do not have before me an application by Maestro for extension of time within which to file Further Amended Plaintiff or to deem the Further Amended plaintiff as having been duly filed with leave. An application for extension of time is supposed to be made under Order 50 rule 6 of the Civil Procedure Rules. There is no indication under that rule that an application for extension of time can be made orally. Maestro had to file a formal application for that purpose.

27. I am in agreement with Arap Moi that the filing of the Further Amended Plaintiff over one month after the due date prejudiced his right of appeal against the order that granted Maestro leave to amend its Amended Plaintiff. As I have stated above, the order granting leave to Maestro to amend its Amended Plaintiff lapsed after the expiry of 24 hours from the date it was given when Maestro failed to amend. If Arap Moi was to appeal against the order, he had to file a notice of appeal within 14 days from the date of the order. Since his grievance was against the order that had lapsed before it was acted upon, I am in agreement that it would have been unnecessary to appeal against the order.
28. In the final analysis, I am in agreement with Arap Moi that the Further Amended Plaintiff was filed irregularly without leave of the court or consent of the other parties. I am also in agreement that the irregular filing of the Further Amended Plaintiff prejudiced Arap Moi. Having come to that conclusion, the next question that I have to answer is whether in the circumstances of this case, it would serve the interest of justice to strike out the Further Amended Plaintiff the effect of which would be to remove Arap Moi and TripleOKLaw Advocates LLP from being parties to ELC No. 771 of 2016. In the ruling dated 20th June, 2019 through which I granted Maestro leave to amend its amended plaintiff to join Arap Moi and TripleOKLaw Advocates LLP in ELC No. 771 of 2016, I stated as follows:
29. Upon careful analysis of the material before me, I am satisfied that a case has been made out for the leave sought in ELC No. 771/2016. As I have mentioned earlier in this ruling, ELC No. 840/2016 was consolidated with ELC No. 771/2016 and the two cases shall be heard together. It was not contested by Arap Moi that in ELC No. 840/2016 he had disowned the alleged transaction between him and Maestro in respect of the suit property. Arap moi stated in his amended defence and counter-claim in that case that he had not sold the said property to any person since 1982 when he acquired the same. Arap Moi termed those claiming the suit property such as Maestro pretenders and/or interlopers. In his submission, Mr. Ngatia S.C. who appeared for Arap Moi did not deny that Arap Moi had disowned the transaction through which Maestro was said to have acquired title to the suit property. In his submission, Mr. Ohaga submitted that Triple OKlaw acted for Arap Moi in the transaction between him and Maestro. He did not however comment on Arap Moi's denial of the transaction. He claimed that although Triple OKLaw acted in the transaction, the communication between it and Arap Moi regarding the transaction was privileged. I am satisfied that there are issues to be determined by the court as between Arap Moi and Maestro as to whether or not they entered into the contentious agreement for sale, whether he transferred the property to Maestro and whether he received the purchase price. Now that Arap Moi has denied the transaction, an issue has also arisen as to whether the firm of Triple OKLaw which is alleged to have acted for him in the transaction actually had instructions from him and whether the money paid to the said firm was received on his behalf. Furthermore, if the court was to agree with Arap Moi that he was not a party to the contentious transaction, an issue would arise as to who should refund the purchase price that was paid by Maestro for the suit property. It is only the firm of Triple OKLaw which knows to whom the purchase price was paid and from whom it should be recovered. I am satisfied from the foregoing that the presence of Arap Moi and Triple OKLaw as defendants in ELC No. 771/2016 is necessary to enable the court to determine all the issues that I have flagged out above."



30. In *Mawji v Arusha General Store* [1970] E. A 137 it was held that irregularity in relation to the rules of procedure does not vitiate proceedings if no injustice has been done to the parties. Sir Charles Newbold P. expressed himself on the issue as follows at page 138;
31. We have repeatedly said that the rules of procedure are designed to give effect to the rights of the parties and that once the parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in the vitiation of proceedings.”
32. Article 159(2)(d) of *the Constitution* enjoins the court to do substantive justice without undue regard to procedural technicalities. As can be seen from the passage from my ruling of 20th June, 2019 reproduced above, Arap Moi and TripleOKLaw Advocates LLP were joined in ELC No. 771 of 2016 for good cause. The Further Amended Plaintiff that was filed on 1st August, 2019 is only irregular but not void the same having been filed outside the time that was set by the court for the filing of the same. Order 8 rule 6 of the Civil Procedure gives this court power to enlarge time so that a pleading that has been filed out of time is regularised. I am of the view that the only prejudice that has been cited by Arap Moi namely, the lapse of time within which to file a notice of appeal can be remedied without necessarily striking out the Further Amended Plaintiff. As I have mentioned earlier, Maestro has not filed an application for extension of time. I am of the view that in the circumstances of this case, it would serve the interest of justice if I give Maestro an opportunity to regularise its Further Amended Plaintiff instead of striking it out. To ensure that Arap Moi is not prejudiced, I will exercise my discretion under section 7 of the *Appellate Jurisdiction Act*, Chapter 9 Laws of Kenya and extend the time within which Arap Moi was to file a notice of appeal against the ruling of the court made on 20th June, 2019. I will make final orders later in the ruling.
33. Arap Moi had also taken issue with the firm of Muma & Kanjama Advocates. He had contended that the firm was not on record and as such was not competent to file the application before the court on behalf of Maestro. I have seen on record a notice dated 18th December, 2018 appointing firm of Muma & Kanjama Advocates to act in the matter as lead counsels for Maestro. The notice was filed on 20th December, 2018. In the circumstances, I am satisfied that the firm of Muma & Kanjama Advocates are properly on record.
34. I will now consider the application by Maestro. As I have stated earlier, the application seeks an order summoning Arap Moi to appear in court to give evidence. In their submissions, the advocates for Maestro clarified that Maestro wanted Arap Moi to come to court to give evidence on its behalf. The application was brought under Orders 16, 18 and 28 of the Civil Procedure Rules. Order 16 deals with summoning and attendance of witnesses while Order 18 deals with hearing and examination of witnesses. Order 28 of the Civil Procedure Rules deals with commission and reference. I am in agreement with Maestro that under section 125 of the *Evidence Act*, Chapter 80 Laws of Kenya all persons are competent witnesses unless they are unable for any reason to understand questions that are to be put to them and all competent witnesses are compellable unless their evidence is privileged. I am also in agreement with Maestro that there is no law preventing a defendant from giving evidence for a plaintiff or being summoned to do so and vice versa. In *Hirji v Modessa*[1967] E.A. 724 the court stated among others that:
35. It was conceded by counsel for the respondent, that the respondent was both a competent and compellable witness, he submitted that as the appellant had taken no steps to summon him, under O. 16, r.1 of the Civil Procedure Code, the judge had a discretion under O.16, r.7 whether or not to require him to give evidence. I agree that this is so, but with respect to the learned judge I do not consider that in this regard he exercised his discretion judicially. His reason for not requiring the respondent to



give evidence for the other side was, apparently, that there was something improper or irregular in one party calling the other party as a witness in civil proceedings. I think that the learned judge erred in this respect. Although it may be unusual, there is nothing wrong in a plaintiff calling the defendant as a witness, especially (as in this case) when counsel for the defendant has indicated that he will not be calling his client. I am of the opinion that the learned judge erred in not allowing the respondent to be called as a witness for the appellant, in the circumstances of this case; but this is not by itself a sufficient reason for allowing the appeal or ordering a new trial.”

36. I am not in agreement with the submissions by Arap Moi that summoning him to give evidence would violate his right to a fair hearing guaranteed under Article 50 of *the Constitution*. That said, under Order 16 rule 1 of the Civil Procedure Rules, the court has a discretion whether or not to summon a person as a witness. I am of the view that where a person to be summoned is the opposite party and he is not willing to attend court to give evidence a proper basis must be laid before he is compelled to come to court. Under Order 16 rule 1 of the Civil Procedure Rules, a witness can be summoned to give evidence or to produce a document or both. Under Order 16 rule 10(2) of the Civil Procedure Rules, the court will only compel a person to attend court to give evidence or to produce a document if the person is not willing to do so if the court is satisfied that such evidence or document sought to be produced through the witness is material.

37. In ground (c) of the grounds upon which Maestro’s application was brought, it has set out the facts that it wishes to establish through the evidence of Arap Moi. Looking at those facts, the contention by Arap Moi that Maestro is trying to shift the burden of proof from it to Arap Moi cannot be resisted. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows on the burden of proof:

(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)

(17) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rests upon the claimant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”



38. Maestro's case as set out in the Further Amended Plaintiff filed on 1st August, 2019 that was the basis of its application before the court was that it purchased all that parcel of land known as L.R No. 12422/19(I.R 36415) ("the suit property") from Arap Moi and that TripleOKLaw Advocates LLP acted for Arap Moi in the transaction. Maestro has contended that it came to discover that USIU was also claiming the suit property which USIU claimed to be forming part of its parcel of land known as L.R No. 12597/2. Maestro denied USIU's claim over the suit property which it contended was fraudulent. The burden is on Maestro to prove all the foregoing allegations. From the facts that it wishes to establish through the evidence of Arap Moi that I have referred to above, there is no doubt that the intention of Maestro is to have Arap Moi establish certain facts that would assist Maestro in proof of its case. I do not think that Arap Moi being a defendant has such obligation. The court cannot also compel him to come to court for the purposes of giving such evidence. In the circumstances, I find no merit in Maestro's application. Maestro's application also fails on another ground. The application is based on Maestro's Further Amended Plaintiff dated 26th July, 2019 in which both Arap Moi and TripleOKLaw Advocates LLP are parties. I have held above that the said Further Amended Plaintiff is irregular the same having been filed out of time without leave of the court. In my view the same could not form a basis for the present application. Arap Moi cannot be compelled to appear in court to give evidence in a suit in which he has been irregularly joined. In the final analysis, I find Maestro's application to be without basis.

39. In conclusion, I hereby make the following orders;

1. I decline to strike out Maestro's Further Amended plaintiff dated 26th July, 2019. Instead, I grant Maestro 14 days from the date hereof within which it shall apply to the court to regularise its said Further Amended Plaintiff failure to which the said Further Amended Plaintiff shall stand dismissed with costs to Arap Moi.
2. The time within which Arap Moi was to file a Notice of Appeal against the order made on 20th June, 2019 granting leave to Maestro to amend its Amended Plaintiff is extended by 60 days from the date hereof.
3. Arap Moi shall have the costs of the application dated 9th August, 2019.
4. Maestro's application dated 21st August, 2019 is dismissed with costs to be in the course.

DELIVERED AND DATED AT NAIROBI THIS 5TH DAY OF MAY, 2020

S. OKONG'O

JUDGE

**JUDGMENT READ THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM
IN THE PRESENCE OF;**

Mr. Okatch for Maestro

Ms. Nyaga for Arap Moi

Ms. Leila for Triple OKLaw

Mr. Ashitiva and Ms. Katana for USIU

Mr. Kamau for the A.G

Mr. Ondieki h/b for Mr. Fraser for the ICEA

N/A for Balози



Mr. Githara for Muthaiga Homes

N/A for Andrew Sunkuli

Mr. Kamau for the A.G

Ms. C. Nyokabi-Court Assistant

