



REPUBLIC OF KENYA



**Kamau v Kinyanjui & 2 others (Commercial Miscellaneous Application E493 of 2019)  
[2023] KEHC 17563 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**COMMERCIAL MISCELLANEOUS APPLICATION E493 OF 2019**

**FG MUGAMBI, J**

**MAY 19, 2023**

**BETWEEN**

**SAMUEL KABII KAMAU ..... PLAINTIFF**

**AND**

**SAMSON MBUTHIA KINYANJUI ..... 1<sup>ST</sup> DEFENDANT**

**JAMES MUIGAI KIBATHI ..... 2<sup>ND</sup> DEFENDANT**

**TRIGENTULAR HOLDINGS LTD ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Brief Facts**

1. The respondent filed an application dated October 23, 2019 seeking leave to institute and continue a derivative claim against the defendants/applicants. On February 25, 2022 the court allowed the respondent application and leave was granted to the respondent to institute and continue the derivative suit on behalf of Yesbet Limited. The court directed that the derivative suit be set down for hearing within 120 days and the 1<sup>st</sup> and 2<sup>nd</sup> applicants were barred from conducting any proceedings on behalf of the company.
2. The 120 days lapsed leading to the present application before court, filed by the applicants. It is dated August 2, 2022 and was brought under section 1A& 3A of the [Civil Procedure Act](#) Chapter 21 of the laws of Kenya and all other enabling provisions of the law.
3. The application seeks the following orders;
  - i. THAT the Honourable court be pleased to declare the orders granted on February 25, 2022 to have automatically lapsed



- ii. THAT the Honourable court be pleased to declare that the orders granted on the February 25, 2022 as discharged for noncompliance with the terms granting the orders and the efflux of issued time
  - iii. THAT the plaintiff having failed to comply with the orders issued on February 25, 2022 this Honourable court be pleased to vary the said orders and substitute with an order dismissing the application dated October 23, 2019
  - iv. Costs of this suit be provided for.
4. The application is supported by the affidavit dated August 2, 2022, sworn by Samson Mbutia and James Muigai Kibathi. It is also premised on the grounds on the face of it and by the written submissions filed in court on March 1, 2023. The applicants confirm that the Court on February 25, 2022 granted the respondent leave to institute and continue prosecuting a derivative suit on behalf of Yesbet Limited and that the derivative suit ought to have been set down for hearing within 120 days.
  5. The applicants' contention was that the 120 days granted by the court had lapsed on June 25, 2021. The respondent had not filed any substantive suit and no summons to enter appearance had been served upon the applicants. As such, there was no forum where the applicants could enter their defence. Counsel submitted that court orders were not granted in vain and since the respondent failed to obey the orders of the Court the orders of February 25, 2022 had effectively lapsed.
  6. The application was opposed by a replying affidavit dated August 23, 2021(sic) sworn by Samuel Kabii Kamau further substantiated through the written submissions dated March 1, 2023. The respondent admitted that the court on February 25, 2022 allowed his application and ordered that the derivative suit be set down for hearing within 120 days. In the same orders, the respondent avers that the applicants were also ordered to file a defence to the action but the applicants failed to do so. On at least four occasions the Court had extended time for the applicants to file the defence and to date none had been filed. The matter could not therefore be certified ready for hearing. It was therefore the respondent's case that the delay or failure to have the matter set down for hearing was contributed by the applicants as well.
  7. The respondent avers that the applicants should not be allowed to cite and rely on the oxygen principle to come to their aid having violated the same principles. It was the respondent's case that the applicants should have complied with the directions given by the Court instead of seeking to dismiss the derivative action, having been part of the delay.

### Analysis

8. I have considered the pleadings, the rival submissions and the authorities relied upon by the parties. The main issue is whether the Court orders granted on February 25, 2022 which had since lapsed should be discharged for noncompliance and whether sufficient grounds have been provided for extension of the same. The orders granted by the Court are common ground.
9. The Court of Appeal in the case of *Fred Matiang'i, The Cabinet Secretary, Ministry of Interior and Co-ordination of National Government -vs- Miguna Miguna & 4 Others [2018] eKLR*, stated as follows with regard to compliance with orders granted by the Court: -

' When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey



and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.'

10. I have taken time to peruse the court file in this matter. There is a plaint dated October 23, 2019, which I believe is the plaint that the respondent sought and was granted leave to proceed with as a derivative action. The record shows that after the court delivered its ruling dated February 25, 2022, the parties went before the Deputy Registrar on March 15, 2022 where the respondents sought 14 days to file a defence. Further, on April 5, 2022 and April 14, 2022 the respondents had still not filed a defence and the Deputy Registrar placed the matter before this Court. The Court on July 5, 2022 noted that the respondent had failed to file a defence and advised the respondent to consider applying for judgment in default.
11. My take on this is that the applicants are as guilty as is the respondent for causing the delay in this matter. The applicant by the fact that to date there has been no compliance with the orders of the court to put in their defence. The respondent by failing to take appropriate action against the applicants. The court is of the view that the applicants should not be allowed to benefit from their own wrong doing. Likewise, the respondent has one final opportunity to decide whether he is keen on resolving this dispute.

#### **Determination and orders**

12. Consequently, I find that the application before court is devoid of merit and is accordingly dismissed. There shall be no order to costs.
13. The applicants shall have seven (7) days from the date of this ruling to put in their statement of defence and if this is not done within this time, the respondent shall be at liberty to take appropriate action.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19<sup>th</sup> DAY OF MAY 2023**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

