



REPUBLIC OF KENYA



**Swift Commercial Establishment Ltd & 2 others v Inspector General of Police & another (Civil Suit 171 of 2015) [2023] KEHC 19232 (KLR) (Commercial and Tax) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19232 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 171 OF 2015  
FG MUGAMBI, J  
JUNE 23, 2023**

**BETWEEN**

**SWIFT COMMERCIAL ESTABLISHMENT LTD ..... 1<sup>ST</sup> PLAINTIFF  
EQUATOR HOLDINGS HAULIERS LTD ..... 2<sup>ND</sup> PLAINTIFF  
GODFREY SEKIWUNGA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**THE INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Brief Facts**

1. Before the court is an application dated June 21, 2021 seeking the following orders; -
  - i. That the Honourable Court be pleased to grant the plaintiffs/applicants leave to obtain judgment against the government through its legal representative the 2<sup>nd</sup> defendant.
  - ii. That costs of this application be provided for.
2. The application is supported by the grounds on the face of it, the affidavit sworn by Peter Ssajjabbi on 21<sup>st</sup> June 2021 and the written submissions of the plaintiff/applicants dated 24<sup>th</sup> June 2022.
3. The genesis of the dispute between the parties is a suit filed pursuant to the leave of the court granted on 19<sup>th</sup> March 2015. The suit was filed on 7<sup>th</sup> April 2015 by way of a plaint dated 2<sup>nd</sup> April 2015. The applicants claimed that they suffered great economic loss and damage as a result of the defendants'



negligence when their commercial transportation trucks and the goods they were transporting got burnt, stolen and extensively damaged from the post-election violence in Kenya. The applicants aver that the losses were caused by the negligence on the part of the Kenyan Government through the respondents' failure to provide adequate security to the Plaintiffs.

4. The summons to enter appearance were served upon the defendants on 6<sup>th</sup> July 2015. The defendants did not enter appearance nor did they file a defence to the suit. This culminated in the plaintiffs' application seeking leave to obtain judgement against the defendants.
5. The application is opposed by way of a replying affidavit sworn by Mary Chege on 24<sup>th</sup> November 2021 and submissions dated 20<sup>th</sup> May 2022. The respondents' position was that upon being served with the summons in the suit, it entered appearance and filed a preliminary objection dated 4<sup>th</sup> November 2019 which was filed on 25<sup>th</sup> November 2019. These were unfortunately not served on the applicants.
6. The respondent averred that failing to serve the plaintiffs with the memorandum of appearance and notice of preliminary objection was an inadvertent mistake by counsel which ought not to be visited on the defendants. It was further submitted that 1<sup>st</sup> and 2<sup>nd</sup> defendants would be highly prejudiced if not allowed to defend the suit. Accordingly, the respondent averred that a preliminary objection was a complete defence for it touched on the jurisdiction of the court.
7. In their submissions, counsel stated that the suit was time barred by virtue of section 3 of the [Public Authorities Limitation Act](#). Further, the respondents submitted that the court did not have jurisdiction to hear and determine the matter as the cause of action arose within Eldoret municipality thus making it the best place to sue.

## Analysis

8. I have considered the application, the response and rival submissions by counsel. On the submission that the suit is time barred, section 3(1) of the [Public Authorities Limitation Act](#) Cap 39 provides that

No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve (12) months from the date on which the cause of action accrued.

9. It is not disputed that the cause of action allegedly arose on 31<sup>st</sup> January 2008 and the plaint herein was filed on 7<sup>th</sup> April 2015, almost seven (7) years later. It is therefore not accurate to state that the suit before the court is time barred although the parties state that the suit was filed subsequent to leave granted by the court. The ruling granting leave is also not attached to the application although this fact has not been disputed by the respondents.
10. On jurisdiction and place of suing, the respondents submit that under section 11-15 of the [Civil Procedure Act](#), this suit should have been filed in Eldoret since that is where the alleged cause of action occurred. Further, it has been stated that the suit in itself seeks orders which are Constitutional in nature and it should therefore have been filed before the Constitutional Division. In response, the applicants aver that the cause of action having occurred along the Mombasa Uganda highway, Nairobi was the most central location.
11. Order 10 Rule 8 of the Civil Procedure Rules 2010 states as follows:

No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return date.



12. In *Omina Building Contractors Limited v Isiolo County Government [2016]* eKLR Gikonyo J stated that

“In applications as this, service of summons and plaint is critical; the court must be satisfied that summons and plaint were served properly and in accordance with the law before granting leave or entering judgment in default of appearance or defence. “
13. I have perused the record and it is evident that the summons to enter appearance were issued on 20<sup>th</sup> April 2015 and further issued on 15<sup>th</sup> August 2019. The same were served upon the defendants and this then prompted the defendants to file the notice of preliminary objection and memorandum of appearance dated 4<sup>th</sup> November 2015 and filed on 25<sup>th</sup> November 2019.
14. The law provides that where a defendant has been served with summons to enter appearance, he is required unless some other order be made by the court, to file his defence within fourteen days after he has entered appearance and serve it on the plaintiff within fourteen days of filing.
15. This court has to determine whether it shall be in the interest of justice to allow the defendant to file its defence. To do so, the court has to consider whether the defendant’s defence raises triable issues or if it is only meant to frustrate the plaintiff. Unfortunately, no draft defence has been by attached by the defendants although they state that they are keen to prosecute the defence.
16. The court in the case of *Peter Juma Kuriah T/A Scope Designs Systems v Attorney General (Sued on behalf of Ministry of Industrialization & another [2016]* eKLR observed that;

“Taking the foregoing into account and granted that the 1st defendant has evinced the intention to defend the suit, it is my considered view that this is a case in which the discretion of the court should be exercised in favour of the 1st defendant, so that the case can be heard and determined on the merits. I would in the circumstances borrow the expressions made in the case of *Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22*, thus:  
  
“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the ... process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”
17. This court is of the view that the defendants would be highly prejudiced if not granted an opportunity to be heard. With respect to the place of suing, the applicants aver that the cause of action having occurred along the Mombasa Uganda highway, Nairobi was the most central location.
18. The respondents have come to court because they desire to defend the claim. With respect to the place of suing, the applicants aver that the cause of action having occurred along the Mombasa Uganda highway, Nairobi was the most central location.
19. In line with the overriding objective for justice to be served, I am inclined to exercise my discretion to sustain this suit.
20. I am however cautious not to get into the substance of the suit, being that at this point the application was one for leave to enter judgment in default of appearance. At this stage the court would not go into



the merit of the main suit. I would therefore not wish to say more regarding the preliminary objection by the respondents as that is for a later forum.

21. For now, having found that indeed the respondent entered appearance, I am of the view that the failure to serve their pleadings, though fatal, ought not be visited on the clients. For this reason, the application cannot succeed.

#### **Determination and orders**

22. In the upshot, the application dated 21<sup>st</sup> June 2021 is dismissed. The respondents shall file and serve a statement of defence within 7 days from the date hereof. Parties shall have the matter set down for hearing after pretrial conference when the preliminary objection shall be canvassed. There shall be no order to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23<sup>rd</sup> DAY OF JUNE 2023.**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

