



REPUBLIC OF KENYA



Prime Bank Ltd v D. J. Lowe & Company Ltd & another (Environment & Land Case 142 of 2018) [2025] KEELC 4498 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 142 OF 2018**

**YM ANGIMA, J
JUNE 16, 2025**

BETWEEN

PRIME BANK LTD PLAINTIFF

AND

D. J. LOWE & COMPANY LTD 1ST DEFENDANT

GUARDFORCE SECURITY (K) LTD 2ND DEFENDANT

RULING

1. By a notice of motion dated 14.04.2025 expressed to be filed pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Article 159 of the Constitution and all enabling provisions of the law, the Attorney General sought 2 main orders, namely;
 - a. That leave be granted to the 2nd defendant to file a defence to counter-claim, list of documents and list of witnesses.
 - b. That the suit be re-opened for hearing to enable the 2nd defendant to call a witness and tender documentary evidence.
2. The motion was supported by the supporting affidavit sworn by Nimwaka Kiti on even date. The gist of the application was that the 2nd defendant by counter-claim was not aware of the counter-claim until recently when the Attorney General was served with a trial bundle. It was further stated that no mention notices and hearing notices were served upon the Attorney General's office before the suit proceeded for hearing. It was also contended that in the absence of the counter-claim being defended there was a risk of damages being awarded against the Government of Kenya with the consequent= loss of tax payers money.
3. The defendant in the main suit filed grounds of opposition dated 09.05.2025 in opposition to the application. It was contended, inter alia, that the application was made in bad faith and was merely



intended to delay conclusion of the suit. The defendant, however, entertained the possibility of conceding the application if that would not necessitate the recalling of witness who had testified earlier. On its part, the plaintiff did not file any response to the application.

4. Pursuant to the directions given on 15.04.2025 the Attorney General filed written submissions dated 29.05.2025 in support of the application. It was submitted that there were several procedural lapses in the matter which prevented the Attorney General from filing a defence to counter-claim and other documents in preparation for trial. It was submitted that although the suit was pending judgment the 2nd defendant had not been accorded a fair chance of being heard in violation of its constitutional right to a fair hearing. As a result, the court was urged to allow the application as prayed.
5. The court has considered the material and submissions on record. The court is of the view that the main question for determination is whether or not the 2nd defendant by counter-claim has made out a case for re-opening of the hearing and late admission of pleadings and documents. It is clear from the application that the Attorney General's case is that it was not aware of the counter-claim until just recently when a trial bundle was served.
6. The material on record shows that when the suit came up for hearing on 07.04.2025 a state counsel from the Attorney General's office appeared virtually and sought an adjournment on the same grounds advanced in the motion. The defendant in the main suit opposed the application for adjournment on the basis that the Attorney General was served with the amended defence and counter-claim on 06.07.2024 via his email address agmombasa@gmail.com and an affidavit of service to that effect filed. It was further argued that a reminder was sent via email to the Attorney General's office on 30.01.2025 but there was no response at all.
7. The record shows that upon consideration of the application the court was satisfied that the Attorney General was properly served as per the affidavit of service sworn by Advocate George Kabebe on 10.03.2025. The court found that the lengthy inaction by the Attorney General had not been explained hence the court was not satisfied that there was a good reason to adjourn the suit. As a consequence, the Attorney General's application for adjournment was dismissed and the suit proceeded for hearing. The record shows that the suit is now pending judgment.
8. The court has noted that the Attorney General's office has not disputed that the email address agmombasa@gmail.com indicated in the affidavit of service belongs to their office. The Attorney General has not even sought to cross-examine the advocate who served the amended defence and counter-claim. The court has noted that even though the Attorney General admitted service of a copy of a trial bundle on 18.03.2025 he did not file his pleadings or any relevant application until 07.04.2025 and the additional delay has not been explained in any plausible manner. The court is of the view that the application is merely a continuation of the Attorney General's delaying tactics hence the application was made in bad faith.
9. The court is of the view that the Attorney General's complaint that he was not served with mention notices and hearing notices is merely a red-herring and a continuation of the delaying tactics referred to above. There is no evidence on record to show that the Attorney General ever served a memorandum of appearance upon either the plaintiff or the defendant in the original action. Be that as it may, the material on record shows that the defendant's advocates took the initiative to serve mention notices upon the Attorney General's office and they filed affidavit of service. Moreover, it should be noted that there is no direct correlation between the Attorney General's failure to file a defence and the alleged default in service of mention or hearing notices. A party cannot be heard to say that it did not file a defence within the prescribed period or at all because it was waiting for service of a mention notice or hearing notice.



10. The upshot of the foregoing is that the court finds absolutely no merit in the Attorney General's application to re-open the hearing of the suit which is pending judgment. As a result, the notice of motion dated 07.04.2025 is hereby dismissed in its entirety with no order as to costs. The plaintiff and the defendant in the main suit shall not be awarded costs since they did not file any submissions in the matter.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 16TH DAY OF JUNE, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mrs. Kibe for the plaintiff

Mr. Eliud Otieno for the 1st defendant

Mr. Penda for the AG for the 2nd plaintiff

