Ndete v Kiminza (Environment & Land Case E048 of 2021)
[2025] KEMC 87 (KLR) (28 April 2025) (Ruling)

Neutral citation: [2025] KEMC 87 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

ENVIRONMENT & LAND CASE E048 OF 2021

YA SHIKANDA, SPM

APRIL 28, 2025

BETWEEN

DANIEL KITHELYA NDETE ..... PLAINTIFF

AND

TABITHA KOKI KIMINZA ..... DEFENDANT

RULING

The Application

1. The application for determination is dated 15/11/2024 brought by the defendant pursuant to the provisions of Order 50 rule 6, Order 10 rule 11, Order 51 rule 1 and Order 22 of the Civil Procedure Rules and sections 1A, 1B and 3A of the *Civil Procedure Act*. The application initially sought the following prayers:

    1. That this application be certified as urgent and service of the same be dispensed with in the first instance;

    2. That this Honourable court does issues orders of stay of execution of the judgment herein, the resulting decree, certificate of costs and any other consequential orders issued against the defendant pending hearing of this application inter party;

    3. That this Honourable court does issue orders setting aside the interlocutory judgment entered herein against the defendant, the final judgment, resulting decree, certificate of costs and any other consequential orders issued against the defendant, pending the hearing and determination of this application;

    4. That this Honourable court be pleased to extend time and allow the defendant to file a statement of defence and counter-claim out of time;

    5. That the defendant be allowed to cross-examine the process server;

6. That the costs of this application be provided for.

2. The application is supported by affidavit sworn by the defendant/applicant and is premised on the following grounds:

   i. The interlocutory judgment was entered on 20/9/2022 against the defendant for failure to file defence;

   ii. The defendant was not served with court documents until recently when she was served with notice of entry of judgment and certificate of costs;

   iii. The defendant disputes service of summons and all other court processes in this matter;

   iv. After appointing the current Advocates, the defendant discovered from the court file that there was another firm of advocates by the name Mary Mutuku Advocates who had acted on her behalf, but without her instructions;

   v. The said firm of Advocates is unknown to the defendant;

   vi. The applicant stands to suffer great prejudice unless the interlocutory judgment herein is set aside as she will be condemned unheard contrary to the much cherished cannons of natural justice;

   vii. This being a land matter, it is only fair and just that the defendant be allowed to defend herself;

   viii. The plaintiff/respondent will suffer no real prejudice beyond the scope of costs if the interlocutory judgment is set aside and the case between the defendant and the plaintiff is admitted for full hearing and determination inter-partes;

   ix. In any event, the defendant is capable, ready and willing to pay the plaintiff thrown away costs for setting aside the ex parte proceedings and interlocutory judgment resulting;

   x. The Honourable court is espoused with wide and unfettered discretion to set aside interlocutory judgment and any proceedings and orders flowing from such proceedings in the wider interest of justice;

   xi. In the premises, it is only fair and just that the interlocutory judgment and the consequential orders herein be set aside and the matter be admitted to full inter-party hearing and determination on merits;

   xii. It is in the interest of justice that this application be heard on priority basis.

3. In the affidavit in support of the application, the defendant reiterated the grounds in support of the application and maintained that she did not know the firm of Mary Mutuku Advocates and never gave them instructions to act on her behalf. The defendant deposed that there was a high possibility that the plaintiff appointed the firm of Mary Mutuku so that the defendant is completely left in the dark concerning this case.

The Plaintiff's Response

4. The plaintiff opposed the application by filing a Replying affidavit. The plaintiff deposed that the application was fatally defective, an abuse of the court process and a delaying tactic. That no leave was sought by the Advocates herein to be properly on record. The plaintiff further deposed that the defendant was served with summons to enter appearance and a memo of appearance was filed and served by the firm of Mutuku Mary Advocates. The plaintiff gave a history of the matter and averred

that the allegations in the defendant's affidavit were slanderous, made in bad faith and actuated by malice. That the defendant was fully aware of the existence of the matter in court but ignored it. The plaintiff contended that the application was filed after undue delay. The plaintiff urged the court to dismiss the application but in the unlikely event that the court allows it, the defendant be ordered to pay the plaintiff the assessed costs of Ksh. 124,500/=.

Main Issues Or Questions For Determination

5. Having perused the application as well as the response by the Plaintiff, together with the parties' submissions, I find that the main issues or questions for determination are as follows:

    i. Whether the application is competent;

    ii. Whether there are sufficient grounds to warrant setting aside of the Judgment herein and granting the defendant leave to defend the suit;

    iii. What other orders should the court make if need be?

    iv. What orders should the court make with respect to costs of the application?

The Defendant's Submissions

6. The parties agreed to dispose of the application by way of written submissions which were duly filed. The defendant relied on her affidavits and submitted that she had a defence and counter-claim which raise triable issues. That the right to be heard before an adverse decision is taken against a party is fundamental and the defendant was condemned without notice of the allegations levelled against her. The defendant further submitted that the court had a duty to do justice between the parties and that the defendant should be allowed an opportunity to put forth her case. That any prejudice that may be suffered by the plaintiff can be remedied by payment of costs. The defendant urged the court to allow the application and relied on several authorities quoted in the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR.

The Plaintiff's Submissions

7. In his submissions, the plaintiff gave a history of the matter from inception up to when judgment was finally entered and beyond. The plaintiff relied on the provisions of Order 9 rule 9 (wrongly indicated in the submissions as Order 3 rule 9A) and submitted that the application was a nullity for failure to obtain leave. The plaintiff maintained that the defendant was properly served with summons to enter appearance and was further served with a hearing notice when her advocate ceased acting. The plaintiff contended that the defendant was fully aware of the existence of the matter but chose to ignore. That the law aids the vigilant but not the indolent.

8. The plaintiff submitted that the judgment was regular and could only be set aside at the discretion of the court and that discretion should be exercised judiciously. The plaintiff argued that the defendant had not offered a plausible explanation for failure to file her defence within the prescribed period. The plaintiff further argued that the application was an afterthought as there was undue delay to file the same. That the defendant has not come to court with clean hands but to delay and obstruct the course of justice and deny the plaintiff the fruits of his judgment. The plaintiff urged the court to dismiss the application with costs or in the unlikely event that the court allows it, to order the defendant to pay the assessed costs as per the certificate of costs.

Analysis And Determination

The Legal Provisions

9. Order 6 rule 1 of the Civil Procedure Rules stipulates that:

> Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons."

10. Order 7 rule 1 of the Civil Procedure Rules provides that:

> Where a defendant has been served with summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service".

11. Order 10, rule 9 of the Civil Procedure Rules states:

> Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing."

12. Order 10, rule 10 of the Civil Procedure Rules provides:

> The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence."

13. Order 10, rule 11 of the Civil Procedure Rules provides:

> Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

14. Section 1A of the *Civil Procedure Act* provides as follows:

    (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

    (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

    (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

15. Section 1B provides thus:

    (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

        (a) the just determination of the proceedings;

        (b) the efficient disposal of the business of the Court;

        (c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology".

16. Section 3A provides:

> Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

17. Article 159(2) (b) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall not be delayed.

Analysis

18. I have carefully considered the application as well as the plaintiff's response. I have further considered the submissions made on behalf of the parties. I will begin with the issue of competency of the application. This relates to whether the firm of A.K. Singi & Company Advocates is properly on record for the defendant. Order 9 rule 13 of the Civil Procedure Rules provides in part as follows:

(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly:

19. Provided that, unless and until the advocate has—

(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and

(b) procured the order to be entered in the appropriate court; and

(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal."

20. The record indicates that the firm of Mutuku Mary & Company Advocates entered appearance for the defendant herein on 18/11/2021. No statement of defence was filed on behalf of the defendant. On 5/7/2022, the said firm of Advocates filed an application dated 4/7/2022 seeking to cease acting for the defendant. The application was allowed on 19/9/2022. However, there is absolutely no evidence to show that the order allowing counsel to cease acting was extracted and served upon the defendant. The law provides that unless such order is extracted and served upon the client and a certificate signed by the Advocate to confirm service of such order, the Advocate will still be considered the Advocate of the party. If there is no such evidence but a notice to act in person or notice of change of Advocates is filed by the party in question, such requirement will not be necessary.

21. Despite the court allowing the firm of Mutuku Mary & Company Advocates to cease acting for the defendant, the said firm was still considered to be on record for the defendant as no order was extracted and served upon the defendant. The procedure as provided by law was incomplete. Order 9 rule 9 of the Civil Procedure Rules provides:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

22. According to Order 9, rule 10 of the Civil Procedure Rules, an application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

23. The circumstances of this case dictate that the firm of A.K.Singi & Company Advocates ought to have sought leave of court to come on record for the defendant. It does not matter that the defendant alleges that she had never instructed the firm of Mutuku Mary & Company Advocates. Even assuming that the defendant had been served with the order allowing the firm of Mutuku Mary & Company Advocates to cease acting for her, leave of court would still be required for the defendant's current Advocates to come on record. This is because no notice of change of advocates not notice of intention to act in person was filed prior to judgment. There is a litany of authorities that hold that where leave to come on record after judgment is not sought, any pleadings filed by such an advocate are incompetent.

24. In the case of Republic v Attorney General; Nzambu (Exparte); Munyogi (Interested Party) [2022] KEELC 114 (KLR), the court while faced with a similar situation held:

> As the provisions of Order 9 Rule 9 of the Civil Procedure Rules are couched in mandatory terms, the Applicant's incoming advocates and more specifically, the law firm of Mwinzi & Associates Advocates, was required to obtain an order of court allowing them to replace the outgoing advocates. As this was not done, it is my considered view that the resultant application filed by Mwinzi & Associates Advocates, is incompetent for want of leave of court to come on record. I therefore find and hold that the application dated 12th February 2021 is incompetent and the same is struck out with costs to the Interested Party."

25. Similarly, in Monica Moraa V Kenindia Assurance Co. Ltd [2012] KEHC 5510 (KLR), the court observed:

> After considering all the submissions and the affidavits filed herein, there is no doubt in my mind that the issue of representation is critical especially in cases such as this one where the applicant's advocates intend to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/s Kibichiy & Co. Advocates should have sought this courts leave to come on record as acting for the applicant.....it is mandatory after judgment has been entered for a new firm of advocates to seek leave to act for a party or file a consent to that effect after delivery of judgment. The firm of M/s Kibichiy & Co. Advocates has not complied with the rules and instead, have just gone ahead and filed a Notice of Appointment without following the laid down procedure. The issue of representation is a vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached.....In the final analysis, the preliminary objection by counsel for the respondent has merit. The firm of M/s Kibichiy & Co. Advocates is unprocedurally on record for the applicant and therefore the notice of appointment as filed does not support the filing of the Notice of Motion dated 15th February, 2012 to remedy the situation let the

said law firm follow the proper procedure. The Notice of Motion by the said firm is therefore struck out on the grounds as stated above with costs to the respondent."

26. In James Ndonyu Njogu v Muriuki Macharia [2020] KEELC 1311 (KLR), the court held that the procedure set out under Order 9 Rule 9 of the Civil Procedure Rules is mandatory and thus cannot be termed as a mere technicality. The court proceeded to strike out an application that had been filed by a firm of Advocates which had not sought leave to come on record after judgment. Similar situations prevailed in the authorities of Njagi v Mugo & another [2024] KEELC 5519 (KLR), Kooba Kenya Limited v County Government of Mombasa [2020] KEHC 6380 (KLR) and Jackline Wakesho v Aroma Cafe [2014] KEELRC 397 (KLR). As already indicated, it does not matter that the defendant maintains that she did not instruct the firm of Mutuku Mary & Company Advocates. Since the said firm of Advocates was on record for the defendant, whether instructed or not, the current firm of Advocates ought to have sought leave first before canvassing their arguments. On that ground alone, the application must of necessity fail. The defendant avoided addressing the issue in their submissions.

27. There is something else about the application. I am surprised that counsel for the plaintiff did not raise it. For purposes of clarity, I will reproduce the prayers sought in the application:

    1. That this application be certified as urgent and service of the same be dispensed with in the first instance;

    2. That this Honourable court does issues orders of stay of execution of the judgment herein, the resulting decree, certificate of costs and any other consequential orders issued against the defendant pending hearing of this application inter party;

    3. That this Honourable court does issue orders setting aside the interlocutory judgment entered herein against the defendant, the final judgment, resulting decree, certificate of costs and any other consequential orders issued against the defendant, pending the hearing and determination of this application;

    4. That this Honourable court be pleased to extend time and allow the defendant to file a statement of defence and counter-claim out of time;

    5. That the defendant be allowed to cross-examine the process server;

    6. That the costs of this application be provided for.

28. Prayers 1 and 2 were spent upon the application being canvassed. Counsel for the defendant did not pursue summons to the process server for purposes of cross-examination. Such a prayer cannot be granted upon determination of the application. This implies that the prayer was spent once the application was canvassed. The main orders sought are contained in prayers 3 and 4 of the application. Prayer 3 urges the court to set aside the interlocutory as well as the final judgment, pending the hearing and determination of this application. The order was sought in the interim and not as a final order upon determination of the application. An interpretation of the application would mean that the prayer was spent once the application was canvassed and cannot be granted as a final order upon determination of the application.

29. In the case of Blay v Pollard and Morris (1930), 1 KB 628, Scrutton, LJ said at page 634 that:

> Cases must be decided on the issues on record, and if it is desired to raise other issues they must be placed on record by amendment. In the present case, the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion he was not entitled to take such a course."

30. In Malawi Railways Ltd v Nyasulu (MSCA Civil Appeal 13 of 1992) [1998] MWSC 3 (10 November 1998), which case has been quoted with approval by the Kenyan Superior courts, the Supreme Court of Malawi cited an article from the (1960) Current Legal Problems titled "The present importance of pleadings" written by Sir Jack Jacob. The author stated as follows, at page 174:

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specified may be raised without notice."

31. In the authority of Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] KESC 32 (KLR), the Supreme Court of Kenya held that:

> In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each party is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. An issue arises only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising out of the pleadings."

32. Given the way the prayer for setting aside the judgment is crafted by the defendant, the court cannot consider such a prayer at this stage. No effort was made by the defendant to amend the application. It is not for this court to speculate on what the defendant meant and the court cannot grant what has not been prayed for. The only prayer that the court would have considered is prayer 4 which seeks an order to extend time and allow the defendant to file a statement of defence and counter-claim out of time. The prayer cannot be granted until and unless the judgment is set aside. Even if the defendant's current advocates would have been properly on record, it would be difficult to allow the application owing to the manner in which it was drafted.

33. In the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR, the Court of Appeal had this to say:

> We do not consider Article 159 (2) (d) to be a panacea, nor a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation. A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo

Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows;

'In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

34. Similarly, Kiage JA in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR stated as follows:

> ... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

35. The above holding was quoted with approval by the Supreme Court in the case of Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR, whereas in the case of Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR the Supreme Court had this to say regarding Article 159(2)(d) of *the Constitution*:

> Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 others; Petition No. 5 of 2013, [2013] e KLR)".
>
> From the above, it is clear that Article 159(2) (d) of *the Constitution* is not a saving grace for all and sundry. The key phrase is "without undue regard". In my opinion, it simply means that courts should not pay unwarranted attention to procedural technicalities. Parties must, at all times, strive to comply with the rules of procedure and where there is default, the same must be explained to the court. The nature, extent and effect of the default must also be taken into consideration. A party who blatantly and without reasonable excuse circumvents the rules of procedure or who is indolent and fails to exercise due diligence cannot confidently brandish Article 159(2) (d) of *the Constitution* and expect the court to smile at him and say, "not bad after all".

36. A party in default cannot claim as of right, but must earn the court's succor under Article 159(2) (d) of *the Constitution*. The same applies to the overriding objective captured under sections 1A and 1B of the *Civil Procedure Act*. A party who decides to sit on their rights and delay or derail the due process cannot

hide under the guise of "procedural technicality". Expeditious disposal of disputes is key to all cases and is fundamental to the administration of justice. It is a component of substantive justice as opposed to mere procedural technicalities. Having found that the application is incompetent, I do not find it necessary to consider the other issues or delve further into the merits. The defendant is represented by counsel who knew or ought to have known the procedure. Pleadings are the foundation of any litigation process.

37. A court administering justice between contending parties has to ascertain the subject of controversy first before it can decide it. Pleadings act as the roadmap for both parties and the Court throughout the legal proceedings. Pleadings must be carefully drafted. One of the reasons, inter-alia, why the litigations could drag on for years is due to defective pleadings which fail to conform to the rules laid down in the law. Any material omission in the pleading can entail serious consequences, because at the evidence and argument stages, parties are not permitted to depart from the points and issues raised in the pleadings, nor can a party be allowed to raise subsequently, except by way of amendment, any new ground of claim or any allegation of fact inconsistent with the previous pleadings of the party pleading the same. Failure to comply with pleading rules can lead to consequences like striking out the pleading.

38. In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6], an Australian court observed poetically as follows:

> In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. ... Elegance is the simplicity found on the far side of complexity.
>
> While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of the case which is sought to be advanced.
>
> ... Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.
>
> Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination." (Emphasis supplied)

39. In the authority of Kenya Commercial Bank Limited v Sheikh Osman Mohammed [2013] KECA 61 (KLR), the Court of Appeal held:

> It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."

40. Parties who are not keen on drafting pleadings should be prepared to suffer the consequences.

Disposition

41. Consequently, I proceed to make the following orders:

    a. The application dated 15/11/2024 is hereby struck out;

    b. The plaintiff is awarded costs of the application;

    c. Since the application has been struck out and not dismissed on merits, the defendant is at liberty to file a proper application;

    d. If the defendant opts to file a proper application, the application be filed and served within 7 days from today.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 28TH DAY OF APRIL, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.