

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. 703 OF 2011

**TEJPRAKASH
SEHMI.....PLAINTIFF/RESPONDENT**

VERSUS

**PETROAFRIC COMPANY LIMITED.....1ST
DEFENDANT**
**CITY COUNCIL OF NAIROBI.....2ND
DEFENDANT**
**LAND REGISTRAR, NAIROBI.....3RD
DEFENDANT**
**GULF AFRICAN BANK LIMITED.....4TH
DEFENDANT/APPLICANT**

RULING

1. Before me is the notice of motion dated 23rd June, 2025 filed by the 4th defendant/applicant, and it is expressed to be brought under **Articles 50 and 159 of the Constitution**, and **Sections 1A, B, 3A and 34 of the Civil Procedure Act** seeking the following orders: -

1. Spent.

2. The court order of 19th June, 2025 directing the 4th defendant to file its defence be stayed pending the determination of the application and the plaintiff be restrained from applying for default judgment against the 4th defendant.

3. The court do set aside its order or directions of 7th April, 2025 and the amended plaint dated 4th

April, 2025, bundle of documents and witness statement(s) be struck out with costs.

4. Costs of the application be paid by the plaintiff in any event.

2. The application is premised on the grounds on its face. The application is further supported by the affidavit of Lawi Sato, the legal officer of the 4th defendant/applicant which was sworn on even date. The 4th defendant/applicant deposed that the plaintiff/respondent failed to comply with the order dated 30th January, 2025 which directed compliance within 14 days of service. Further, that the said application was served on 21st February, 2025 which expired on 6th March, 2025. It was further deposed that the suit was automatically struck out on 6th March, 2025 with costs and the amended plaint dated 4th April, 2025 was unlawfully filed and does not exist. The 4th defendant/applicant further deposed that the order validating the filing of a time barred plaint was a nullity as the court cannot sit on an appeal of its own order of 30th January, 2025.
3. The application was opposed vide the replying affidavit of the plaintiff/respondent sworn on 11th July, 2025. The plaintiff/respondent deposed that the firm of Lumumba & Co Advocates ceased acting for him, and that the court allowed the same on 30th January, 2025. Further, that the said law firm was

present when the orders were issued and that he was not aware of the same until 19th February, 2025. He deposed that the said law firm released the client file to him on 18th February, 2025 after the lapse of the said orders and it would be unfair to now blame the law firm on record.

4. The plaintiff/respondent deposed that the law firm of Bansbury Associates Advocates LLP was able to come on record on 19th February, 2025 having extracted the order on 14th February, 2025 when the 4th defendant/applicant served the order via email. He also deposed that these particulars were raised in court and the defendants did not object to the same. He went on to depose that the court by allowing the amended plaint to be filed out of time did not prejudice the 4th defendant/applicant in any manner, and that if there was any delay, the same was occasioned by the firm of Lumumba & Co. Advocates.
5. The 1st defendant filed its replying affidavit sworn on 21st July, 2025 by Kennedy Ochieng'- the learned counsel. He deposed that he is aware that the orders issued on 30th January, 2025 had a default clause to the effect that non-compliance in filing the amended plaint within 14 days would automatically infer that the suit is struck out. Further, he deposed that the plaintiff/respondent never complied with the orders of 30th

January, 2025 within the set timelines and that the suit stood struck out as it was self executing.

6. The application was canvassed by way of written submissions. The 4th defendant/applicant filed its written submissions dated 15th July, 2025 where it raised three issues for determination as listed below: -

i. Whether the suit was automatically struck out with costs on 6th March, 2025.

ii. Whether the court can sit in appeal of its own order.

iii. Who bears the costs of the suit and application.

7. On the first issue, the 4th defendant/applicant submitted that the suit stood struck out on 6th March, 2025, the court having stated so on 30th January, 2025. To buttress on this submission, reliance was placed in the cases of **Siambe v CFC Stanbic Bank & another [2024] KEHC 13776 (KLR), Mumbi & 2 others (Suing in their capacity as Trustees of Happy Mothers Self Help Group) v Kiarie & 2 others (Suing in their capacities as the administrators of the estate of Jacinta Njeri Kiarie) [2022] KEELC 13275 (KLR) and B v Attorney General [2004] KEHC 2605 (KLR).**

8. On the second and third issues, the 4th defendant/applicant submitted that the court in validating the filing of the time barred plaint was a nullity as this court cannot sit on an appeal of its own order. Reliance was placed on the case of **Ogwari v Ibrahim; Akinyi (Applicant) [2024] KEHC 4965 (KLR)**. The 4th defendant/applicant urged the court to strike out the amended plaint dated 4th April, 2025 with costs.
9. The 1st defendant associated itself with the written submissions filed by the 4th defendant/applicant.
10. The plaintiff/respondent did not file his written submissions. Be that as it may, I have carefully analyzed and considered the application, the replies thereof, and the written submissions filed by the 4th defendant/applicant. In my view, the issue for determination is *whether the court ought to set aside its orders of 7th April, 2025.*
11. From the record, on 30th January, 2025 this court directed as follows: -
1. ***The plaintiff's application dated 5th December, 2024 is allowed as prayed.***
 2. ***Having noted that the application dated 8th January, 2025 by the 4th defendant has been***

served on all the parties who also include the plaintiff herein and the same remains unopposed, the aforementioned application is allowed as prayed.

- 3. Mention on 18th February, 2025 for further directions.*
- 4. The 4th defendant to serve the plaintiff in person with a mention notice.*
- 5. The order to be extracted and served upon the plaintiff.*

12. The chamber summons dated 5th December, 2024 was filed by the law firm of Lumumba & Lumumba Advocates seeking to be granted leave to cease acting for the plaintiff in this matter. The same was allowed by the court on 30th January, 2025. The notice of motion dated 8th January, 2025 was also allowed as prayed including the order for striking out the suit for non-compliance within 14 days.

13. On 18th February, 2025 Mr. Wawire for the 4th defendant/applicant informed the court that he was not able to serve the plaintiff in person but served the order upon the law firm of Lumumba & Lumumba Advocates and pursuant to **Order**

9 Rule 13 of the **Civil Procedure Rules**, the said law firm ought to have extracted the order and served the same upon the plaintiff. Further, and as per his instructions, they did not have the address of the plaintiff. They sought for another 30 days to enable the plaintiff's counsel to extract the orders and serve the same upon all the parties.

- 14.** On 7th April, 2025, the plaintiff was represented by Mr. Tony Odera who apologized to the court and stated that he was able to file the amended plaint and the accompanying documents on 4th April, 2025. He prayed that the same be deemed as properly filed. Ms Nakel for the 1st defendant sought for the court's direction on the same. There was no appearance by the 4th defendant/applicant and the rest of the defendants. To that extent, the pleadings filed by the plaintiff were deemed as properly filed.
- 15.** On 19th June, 2025 Mr. Otieno for the 4th defendant/applicant raised the issues in the instant application, and further requested for 14 days to file an amended defence, which prayer was granted.
- 16.** Looking at the court proceedings on the above- mentioned dates, it is evident that the orders of the court issued on 30th January,

2025 were not served upon the plaintiff as directed, to enable compliance within the stipulated period. From the court record, the law firm of Bansbury Associates Advocates LLP filed a notice of appointment of Advocates dated 19th February, 2025 on the same date. More importantly, there was no appearance by the 4th defendant/applicant on 7th April, 2025 when a further request was made by the plaintiff/respondent to allow the pleadings as filed. This would have been an appropriate time to challenge the said filing.

17. From the above, would it be reasonable for the 4th defendant/applicant to argue that the suit stood struck out on 6th March, 2025 yet on 19th June, 2025 they sought to file an amended defence. Would the court also turn a blind eye to a party who sought to have an advocate come on record in the said period with the delay in service of the orders issued on 30th January, 2025 which were in fact not served upon him?
18. In the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**, the court stated as follows which I find useful to apply to this context,

“Under the overriding objective spelt out in section 3 of the Environment and Land Court Act, the principal objective of that statute is to enable the court to facilitate just, fair,

expeditious, proportionate and accessible resolution of disputes. As Ouko, JA observed in Nicholas Salat v IEBC & 6 Others, CA (Application) No 228 of 2013,) the general trend, following the introduction of the overriding objective in various statutes as well as Article 159 of the Constitution, is that the courts strive to sustain rather than strike out pleadings on purely technical grounds. The learned judge explained:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

19. From the above, I find the instant application to be made in bad faith considering the factors stated above. It is not possible for the 4th defendant/applicant to admit on the one hand failure to serve the plaintiff/respondent with the orders, and seek 14 days to file an amended defence, and on the other hand seek to have the amended plaint which was deemed properly filed in its absence to be struck out.
20. The notice of motion dated 23rd June, 2025 lacks merit and the same is hereby dismissed. Costs to be in the cause.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 7TH DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
07/11/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Allan Gichuhi for the 4th Defendant /Applicant

Mr. Ochieng for the 1st Defendant

Mr. Tony Odera for the Plaintiff