



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CIVIL SUIT NO. 191 OF 2018

HENRY KIPKOGEI SEREM.....

PLAINTIFF

VERSUS

ERDEMANN PROPERTY LIMITED.....1ST

DEFENDANT

MAVOKO WATER & SEWERAGE COMPANY.....2ND

DEFENDANT

RULING

1. Before this court for determination are two notices of motion filed by the plaintiff and the second defendant, both dated 23/10/2024. The substance of these motions concerns the orders made by this court on 17/10/2023, which struck out the

plaintiff's suit. A summary of the motions and the responses thereto will be provided shortly.

Plaintiff's motion

2. In this unopposed matter, the plaintiff moved the court pursuant to the provisions of **Articles 25 (C), 48 & 51 (1)** of the **Constitution of Kenya 2010**, **Sections 1, 1A, 3, 3A & 63 (e)** of the **Civil Procedure Act**, and **Order 51 Rules 1 & 4** of the **Civil Procedure Rules**. The plaintiff seeks the following reliefs: -

a) Spent.

b) THAT the orders issued by this honourable court on 17/10/2023, which resulted in or had the effect of striking out the plaintiff's suit on 17/11/2023, be set aside.

c) THAT this honourable court be pleased to invoke its inherent power in this case in the interest of substantive justice and reinstate the plaintiff's suit filed on 4/10/2018 for hearing on merits.

d) THAT upon re-instating the suit, the plaintiff's trial bundle filed on 24/11/2023 be deemed as duly filed and served.

e) THAT the costs of this motion be in the cause.

3. The motion is based on the grounds listed on its face and the counsel George Wandati's supporting affidavit, sworn on the instant date. A summary of the grounds supporting the motion are: (a) On 17/10/2023, when the matter was mentioned before this honourable court for the purpose of scheduling a hearing date, the court granted the plaintiff 30 days to file their paginated trial bundle; (b) The court further ordered that, in the event of non-compliance within the stipulated time, the plaintiff's suit would stand struck out without further reference to the court; (c) The default clause was not communicated to counsel on record, Mr. Wandati, by Ms. Maina, who was holding his brief on that day; (d) As a result, the plaintiff's trial bundle was filed and served on 24/11/2023, seven days after the expiration of the 30-day time limit set by the court; and (e) The delay in lodging the documents is wholly attributable to a mistake of counsel and should not be visited upon an innocent party.

2nd defendant's motion

4. This motion is made pursuant to the provisions of **Sections 1A, 1B, 3A, and 27** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules 2010**, and any other enabling provisions of the law. It seeks the following orders from this court: -

a. That this honourable court be pleased to issue an order awarding costs of the suit to the second defendant.

b. That the costs of this motion be provided for.

5. The motion is grounded on the apparent facts on its face and Michael Mang'eli's supporting affidavit, sworn on the same date as the motion. It chiefly states: (a) On 17/10/2023, this honourable court issued directions for the plaintiff to file and serve his bundle of documents within 30 days, failure to which the suit would be struck out; (b) the plaintiff did not comply with the court's orders; (c) the said orders were self-executing; (d) therefore, the suit was struck out as of 17/10/2023; e) the plaintiff did not seek court permission to extend the time after the deadline expired; and, lastly, f) the second defendant is entitled to costs of the suit as costs follow the event.

6. In opposition, the plaintiff deposed an affidavit on 8/03/2025 and referenced his motion, further asserting that since costs follow the event, and no final decision has been made in this case, therefore, such an award would be equivalent to punishing the plaintiff.

7. Despite court directions, parties did not submit written submissions, and the matter was therefore reserved for ruling today. Consequently, having carefully examined the motions, their grounds, and affidavits, the two issues for determination

are: **(a) whether the orders of this court should be set aside** and **(b) whether the second defendant is entitled to costs**. These two issues will be addressed together.

8. Regarding the 1st issue, the relevant law granting courts the authority to strike out suits is found in our **Order 11 Rule 3(5) (b)** of the **Civil Procedure Rules (“CPR”)**, which states as follows: -

“where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.

9. A review of the entire **Order 11** reveals that it does not include provisions for reinstating a struck-out suit or setting aside such orders. This contrasts with situations involving a dismissed suit, such as under **Order 12 Rule 7** of the **CPR**, where the court, on application, may set aside or vary the judgment or order on such terms as it considers just. Moreover, although the plaintiff has sought recourse under **Sections 1** and **1A** of the **Civil Procedure Act**, that cannot assist him, as the core purpose of pre-trial directions is to ensure the court’s business is

conducted efficiently. In other words, he has violated the very provisions he claims to rely upon. Guidance on this is drawn from **Order 11 Rule 3 (1)** of the **CPR**, which explicitly states:

“(1)The purpose of a case management conference shall be to—

(a)promote the expeditious disposal of cases;

(b)afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;

(c)afford the parties an opportunity to settle the case;

(d)determine any other matter relating to the management, hearing or disposal of the case;

(e)deal with pre-trial applications at first instance or formulate a timetable to deal with them as the court may deem fit; and

(f)identify the issues for determination.”

10. Hence, in the circumstances, this court relies on its inherent power as envisaged under **Section 3A** of the **Civil Procedure Act**, which allows it to issue such orders as are necessary to ensure justice is met or prevent the abuse of court process. Accordingly, the key question is whether the plaintiff has established a case that justifies the setting aside of the orders and reinstatement of the suit. However, before we proceed further, it is necessary to emphasise the prevailing

jurisprudence on compliance with court orders and the consequences thereof, which position this court hereby adopts.

In Kenya Tea Development Agency Management Services Limited & another v AIG Kenya Insurance Company Limited [2022] KEHC 662 (KLR), the court stated: -

Before I conclude let me deal with the Plaintiffs' submission that the court lacks jurisdiction and power to strike out a suit for non-“compliance with an order directing it supply particulars. The court has inherent power to enforce its own orders including by striking out a suit. In the case of non-compliance with an order for supply of particulars and discovery, it is settled that where there has been deliberate, wilful and contumelious non-compliance, the court may exercise its penal jurisdiction by issuing peremptory orders to enforce such compliance and in default thereof, striking out the pleading.”

In **OMAR SHARRIF T/A KEMCO AUTO V FREIGHT FORWARDERS LIMITED & ANOTHER [2008] KECA 62 (KLR),** the Court of Appeal held: -

In the case of Hytec vs. Coventry City Council (1997) 1 WLR 1666 to which we were referred by Mr. Inamdar, Auld, L.J, cited the remarks of Beldam, L.J in the case of Caribbean General Insurance Ltd. vs. Frizzel

***Insurance Brokers Ltd. [1994] 2 Lloyd's Rep. 32 CA
as follows:***

“Final, preemptory or “unless” orders are only made by a court when the party in default has already failed to comply with a requirement of the rules or an order, and the court is satisfied that the time already allowed has been sufficient in the circumstances of the case and the failure of the party to comply with the order is in excusable.”(underlining supplied)

That position in law is also well stated in the case of Eastern Radio Service vs. Tiny Tots (1967) EALR 392 to which we were referred by Ms Amarshi. Sir Charles Newhold, then President of the Court of Appeal for East Africa, states at page 395 of that report as follows:

“It is not, I think, in dispute that a litigant who has to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply was due to a willful disregard of the order of the court. Nor is it, I think, in dispute that willful means intentional as opposed to accidental.”

And Sir Clement De Lestang, V.P. stated in that case:

“The authorities show, and there is no dispute about it, that a court ought not to impose the penalty of dismissing a suit except in extreme cases and as a last resort and should only do so where it is satisfied that the plaintiff is avoiding a fair discovery or is guilty of willful default.”

11. In the present case, as of the date of issuing the orders on 17/10/2023, when counsel for both parties were present, this court examined the history of the matter, especially the reluctance of the plaintiff to comply with various orders concerning compliance with **Order 11**, and highlighted the specific dates on which those orders were issued. It also acknowledged that the plaintiff had failed to provide reasons for non-compliance with court orders. Nevertheless, in the interests of justice, it granted the plaintiff 30 days to comply, warning that failure to do so would result in the suit being struck out.
12. Consistent with his customary approach, the plaintiff did not comply with the specified timelines and instead submitted his documents on 24/11/2023. When the parties appeared before the court on the subsequent date of 23/10/2024, Miss Maina, representing the plaintiff, informed the court that she was aware of the orders dated 17/10/2023 and requested that the documents filed on 24/11/2023 be regarded as properly on

record. She also stated that she believed the last date for filing was 26/11/2023, which was evidently incorrect. Counsel Mr Wandati for the plaintiff also addressed the court, saying that he had only recently become aware of the default clause contained in the court's orders.

13. However, the plaintiff was represented in court on the day the court issued the orders of 17/10/2023. Both M/s Maina and Mr Wandati are on record for the plaintiff, and the question of one being aware of the orders while the other was not is irrelevant, and Mr Wandati's arguments cannot stand.

14. By the time this court issued the orders on 17/10/2023, the suit had been ongoing for five years with no end in sight regarding compliance with pre-trial directions by the plaintiff. The plaintiff, as the custodian of his documents, was to provide documents to his counsel; therefore, he bears the responsibility for such delay. Having dragged the defendant through the court process, the onus was on him to ensure that the matter was disposed of expeditiously, which he did not do. His actions were deliberate, and this court cannot assist him. If at all, the mistake lay with his counsel, then he may pursue them in separate proceedings. Thus, this court finds that he is not entitled to the orders sought and declines to set aside its orders of 17/10/2023.

15. Concerning the second issue, it is trite law that costs follow the event, and since the plaintiff's suit was struck out for non-compliance with court directions, the second defendant shall be awarded costs not only for the substantive suit but also for the notices of motion that are the subject of this ruling. Since the first defendant did not participate in these proceedings, costs are not awarded to it. Therefore, the court finds that the plaintiff's notice of motion is not justified and should be dismissed, while the second defendant's notice of motion is to be allowed. Ultimately, this court grants the following disposal orders: -

- a. The plaintiff's notice of motion dated 23/10/2024 is hereby dismissed.***
- b. The second defendant shall have the costs of the suit and the notices of motion, both dated 23/10/2024.***

Orders accordingly.

Delivered and Dated at Machakos this 2nd day of December, 2025.

HON. A. Y. KOROSS

JUDGE

02.12.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant.

Mr. Owino holding brief for Mr. Wandati for the Plaintiff.

Mr. Muuo holding brief for Mr. Mulekya for 2nd Defendant.