



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E310 OF 2022

**FURNCON LIMITED
PLAINTIFF**

=VERSUS=

**NAIROBI CITY COUNTY1ST
DEFENDANT**

**MIDDLE EAST BANK KENYA LIMITED2ND
DEFENDANT**

RULING

1. Before me for determination is the Notice of Motion dated 5th February 2025, brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act, and Articles 50(1), 25(c), and 47(1) of the Constitution of Kenya, in which the Plaintiff/Applicant seeks the following orders:

a. Spent

b. Spent

c. That the Honourable Court be pleased to grant leave and admit the Replying Affidavit and Submissions by the Plaintiff filed herein, in opposition to the 2nd Defendant's Notice of

Motion dated 18th June 2024, and the said filed documents be deemed properly on record.

d. That the Honourable Court be pleased to direct that the Plaintiff's Notice of Motion dated 30th July 2024 filed herein is to be heard in priority to the 2nd Defendant's Notice of Motion dated 18th June 2024, and urgent directions be issued for the disposal of the Plaintiff's Notice of Motion dated 30th July 2024.

e. That the costs of this Application be in the cause.

2. The application is based on the grounds appearing on its face together with the supporting affidavit of Solomon Njoroge Kiore, a director of the Plaintiff company, sworn on even date.

THE APPLICANT'S CASE

3. The deponent averred that this matter was scheduled for a ruling on the 2nd Defendant's Notice of Motion dated 18th June 2024, which seeks to strike out the Plaintiff's suit.
4. He further averred that the Plaintiff initially acted in person but later engaged Counsel, who filed a replying affidavit and written submissions opposing the application out of time.
5. The Plaintiff therefore seeks leave of the Court to admit the replying affidavit and submissions out of time and to arrest the delivery of the ruling to allow for the

- consideration of these documents in determining the application. He contended that the delay in filing the documents was not intentional but was due to the Plaintiff's need for additional time to prepare and properly instruct Counsel.
6. He further stated that the Plaintiff filed an application dated 30th July 2024 seeking to bar Mr Akber Abdullah Kassam Esmail and the law firm of Esmail & Esmail Advocates from representing the 2nd Defendant, on the grounds that Mr Esmail was a potential witness in the dispute.
 7. He contended that the said advocate was previously involved in matters relating to a charge between the Plaintiff and the 2nd Defendant, which led to the dispute. He asserted that the advocate's continued appearance contravened Rule 8 of the Advocates Practice Rules, which bars an advocate from appearing in a matter where they might be called to testify.
 8. According to the deponent, the circumstances disclosed a serious conflict of interest and ongoing investigations by the Directorate of Criminal Investigations into the conduct of the Defendants regarding the subject matter of the suit.
 9. In view of the foregoing, the deponent urged the Court to allow the application as prayed.

THE 2ND DEFENDANT'S CASE

10. The 2nd Defendant opposed the application through its Grounds of Opposition dated 11th February 2025.
11. The 2nd Defendant argued that the application is incompetent, irregular, and an abuse of court process for failing to comply with the applicable Civil Procedure Rules. It was further asserted that the issue of jurisdiction is fundamental and ought to be determined first, as proceedings conducted without jurisdiction would be null and void.
12. It was argued that on 24th October 2024, the Court directed that the issue of jurisdiction be determined before all other considerations (Re the Matter of the Interim Independent Electoral Commission (2014) 1 EA 1). It was therefore contended that a Court of equal jurisdiction cannot issue orders or directions that would conflict with the earlier determination by Mogeni J, which required the jurisdictional issue to be addressed prior to any other matters.
13. It was further argued that the High Court has jurisdiction to determine the cause of action pleaded in the Plaint (**HCCOMM No. E382 of 2022, Furncon Limited v Middle East Bank Kenya Limited**). On that basis, the 2nd Defendant maintained that the issues raised by the Plaintiff had already been subject to a determination on jurisdiction.
14. In conclusion, the 2nd Defendant argued that the Plaintiff's application was a belated and spurious attempt

to delay the determination of the pending application on jurisdiction, which has been before the Court since 18th June 2024.

15. The 2nd Defendant also filed a replying affidavit sworn by Mr Akber Esmail, a director of the 2nd Defendant and a partner in the firm of Esmail & Esmail Advocates, in opposition to the application.
16. The deponent averred that on 18th June 2024, the firm, acting for the 2nd Defendant, filed an application to strike out the suit on the grounds that the Court lacked jurisdiction to hear and determine the suit. He stated that the Plaintiff subsequently filed an application seeking to disqualify him and his law firm from representing the 2nd Defendant, arguing that the advocate had previously acted for both the Plaintiff and the 2nd Defendant regarding a discharge of charge over the suit property and was therefore conflicted.
17. He denied the allegations and maintained that neither he nor his firm had ever acted on behalf of the Plaintiff in the discharge of charge transaction concerning the property known as L.R. No. 15941. He explained that the discharge of charge in question was drawn by A.T. Oluoch & Company Advocates, presumably on the instructions of the Plaintiff.
18. He further averred that his firm's role in the transaction was to act on behalf of the 2nd Defendant. By a letter

dated 4th May 2015, the 2nd Defendant instructed his firm to prepare a first legal charge over L.R. No. 15941 to secure a loan of Kshs. 13 million advanced to the Plaintiff. Acting on those instructions, the firm prepared the charge and forwarded it to the 2nd Defendant for execution by the Plaintiff.

19. According to the deponent, the executed charge, the original grant for the property and an unregistered discharge of charge between the Plaintiff and Kenya Commercial Bank Limited, were subsequently forwarded to the firm by the 2nd Defendant for registration purposes. Thereafter, the firm arranged for the assessment and payment of the requisite stamp duty and facilitated the registration of both the discharge of charge and the new charge in favour of the 2nd Defendant. After registration, the documents were returned to the 2nd Defendant along with the original grant.

20. The deponent emphasized that, throughout the entire transaction, the firm had no dealings with the Plaintiff and acted solely on behalf of the 2nd Defendant. He further stated that confirmation of the Plaintiff's execution of the charge was provided by Mr Thomas Thuku Nganga Advocate, who later issued his professional fee notes to the 2nd Defendant and was paid only by the 2nd Defendant.

21. On that basis, the deponent contended that the allegations of conflict of interest were unfounded and that

neither he nor his firm had represented the Plaintiff in any capacity. In conclusion, he urged the Court to dismiss the application with costs.

THE RESPONSE

22. In a further affidavit dated 30th April 2025, the Plaintiff deposed that the 2nd Defendant did not oppose the application for leave to admit the Plaintiff's affidavit and written submissions in response to the 2nd Defendant's Notice of Motion dated 18th June 2024.
23. Regarding the conflict of interest issue, the Plaintiff asserted that Mr Akber Esmail is a material witness in the dispute, as he admitted that he is a director of the 2nd Defendant and, due to that position and his involvement in the underlying transaction, he is barred from appearing as Counsel under Rule 8 of the Advocates Practice Rules.
24. He disputed the claim that the firm of Esmail & Esmail Advocates did not act in the discharge of charge transaction relating to the suit property, L.R. No. 15941 (I.R. No. 65593). He asserted that the Plaintiff had instructed the 2nd Defendant to appoint an advocate for the transaction, following which the 2nd Defendant appointed its chairman, through the firm of Esmail & Esmail Advocates, to act in the matter. According to the Plaintiff, although the firm of A.T. Oluoch & Company Advocates prepared the discharge of charge on behalf of Kenya Commercial Bank Limited, the firm of Esmail &

- Esmail Advocates acted as transaction Counsel and oversaw the legal documentation related to the charge in favour of the 2nd Defendant.
25. He further stated that the said firm issued invoices to the Plaintiff for professional services related to the discharge of the charge and the preparation of the charge instrument, and that the Plaintiff paid these fees. The Plaintiff argued that, although there was confirmation that the property was free from encumbrances, the 2nd Defendant later withdrew money from the Plaintiff's account, allegedly to settle land rates arrears, and then attempted to auction the property for supposed land rent arrears. He maintained that these claims were unfounded and contradicted the earlier confirmations that no encumbrances existed on the property.
26. In light of the foregoing, he maintained that the involvement of Mr Esmail and his firm in the transaction that led to the dispute rendered them material witnesses in the proceedings and created a conflict of interest. He insisted that Esmail & Esmail Advocates should be barred from acting for the 2nd Defendant in this matter.
27. The application was canvassed by way of written submissions

THE PLAINTIFF'S SUBMISSIONS

28. The Plaintiff filed its submissions dated 13th June 2025.

29. Regarding the admission of the replying affidavit and submissions out of time, Counsel argued that failure to admit the Plaintiff's response would breach the principles of natural justice and the constitutional right to a fair hearing. To support this point, reliance was placed on **General Medical Council v Spackman [1943] 2 All ER 337** and in **Attorney General v Ryan [1980] A.C. 718 at page 730**, where it was held that a party should not be condemned unheard. Further reliance was placed on **Mirugi Kariuki v Attorney General, Nairobi Civil Application No. 70 of 1991**, **Onyango v Attorney General, Mandeep Chauhan v Kenyatta National Hospital & 2 others [2013] eKLR**, and **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR**.

30. Regarding the conflict of interest, Counsel submitted that the firm of Esmail & Esmail Advocates is barred from acting for the 2nd Defendant by virtue of Rule 8 of the Advocates Practice Rules, which prohibits an advocate from appearing in a matter where he might be required as a witness. Counsel argued that the advocate had participated in the transaction that gave rise to the dispute and was therefore a material witness in the proceedings. To support this argument, reliance was placed on **Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others [2017] eKLR**, where the Court held that an advocate acts in conflict of interest

when he attempts to serve competing interests or owes duties that cannot be discharged consistently.

31. Counsel also cited Section 134 of the Evidence Act regarding advocate-client privilege, arguing that the continued participation of the law firm in the proceedings could risk disclosing confidential information obtained during their professional engagement with the Plaintiff. Counsel cited **Miscellaneous Civil Application No. 63 of 2019, Manani Lilan & Mwetich Co. Advocates v Veronica Sum**, where the Court underscored that advocate-client privilege is protected under the Constitution and statute and cannot be waived except by the client.

32. Counsel argued that the Plaintiff's application dated 30th July 2024, which challenges the firm's authority to act in the matter, should be heard first as it directly affects the validity of the pleadings filed on behalf of the 2nd Defendant, including the Notice of Motion dated 18th June 2024.

33. Based on the foregoing, Counsel urged the Court to allow the application as prayed.

THE 2ND DEFENDANT'S SUBMISSIONS

36. The 2nd Defendant filed its submissions on 29th September 2025. On behalf of the 2nd Defendant, Counsel submitted that the application seeking to disqualify the firm of Esmail & Esmail Advocates is misconceived. Counsel

argued that the Court should first determine the 2nd Defendant's application dated 18th June 2024, challenging the Court's jurisdiction.

37. Counsel contended that jurisdiction is a fundamental issue that must be addressed at the earliest possible stage before the Court considers any other application. To support this argument, Counsel relied on **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** and **Interim Independent Electoral Commission [2014] 1 EA 1**. Counsel further cited **Joseph Gicheru v Michael Gichuru & another [2013] eKLR** and **Attorney General v Okiya Omtatah Okiiti & another [2020] 2 EA 16**, where the latter held that the issue of jurisdiction can be raised at any stage of proceedings and must be resolved first.

38. Counsel submitted that the Plaintiff's suit pertains to disputes arising from a banking facility and the exercise of statutory power of sale, which are commercial in nature and fall within the jurisdiction of the High Court and not the Environment and Land Court. Counsel relied on **Article 162(2)(b)** of the **Constitution** to argue that the mandate of the Environment and Land Court is limited to disputes relating to the use, occupation, and title to land. To support this argument, reliance was placed on **Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others [2017] eKLR**, **Suzanne Butler & 4 others v Redhill Heights Investments Ltd &**

another [2016] eKLR, Mbaluka v Ogola [2019] eKLR and TSS Investments (2024) KECA 410.

39. Regarding the application for disqualification of Counsel, it was submitted that the Plaintiff failed to establish any conflict of interest justifying the removal of the firm of Esmail & Esmail Advocates. It was argued that the firm acted solely for the 2nd Defendant in the preparation and registration of the charge and had never represented the Plaintiff in the discharge of the charge transaction, which was prepared by another advocate.
40. Counsel further argued that the Plaintiff's allegations are inconsistent with the pleadings and constitute an impermissible attempt to introduce a new case through affidavit evidence and submissions. To support this argument, reliance was placed on **Paramount Bank Ltd v First National Bank Limited and others [2023] KECA 1424 (KLR)**, where the Court of Appeal reiterated that Courts determine disputes based on the pleadings and not on extraneous matters raised in submissions. Further reliance was also placed on **Delphis Bank Ltd v Channan Singh Chatthe & 6 others [2005] eKLR**, where the Court of Appeal recognised that a litigant has a constitutional right to choose Counsel of their choice and that disqualification of advocates should only be ordered when clear evidence of real prejudice or misuse of confidential information is demonstrated.

41. Counsel argued that the Plaintiff did not demonstrate a breach of advocate-client confidentiality or any real risk of prejudice that would justify interfering with the 2nd Defendant's right to choose its legal representation.

ANALYSIS AND DETERMINATION

42. Having considered the application, the respective affidavits and the rival submissions, the following issues arise for determination:

- a. *Whether the Plaintiff should be granted leave to file a replying affidavit and submissions out of time.*
- b. *What directions should be issued regarding the hearing of the applications dated 18th June 2024 and 30th July 2024?*

43. Regarding the first issue, the Applicant seeks leave to admit its response and submissions out of time

44. Order 50 Rule 6 of the Civil Procedure Rules grants the Court power to extend time and states that:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

45. In **Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** The Supreme Court set out the relevant principles as follows:

“It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court***

- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;**
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- vi. Whether the application has been brought without undue delay; and**
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

46. The Plaintiff attributed the delay to the lack of representation. It was argued that the impugned documents were filed after they instructed Counsel. Although self-representation does not, on its own, excuse non-compliance with procedural timelines, it remains a relevant factor in assessing whether the delay was justified.

47. The Plaintiff's explanation for the delay is satisfactory as it was neither intentional nor intended to obstruct justice. The 2nd Defendant has not demonstrated any specific

- prejudice resulting from the admission of the documents, aside from the general inconvenience caused by the delay.
48. This Court notes that the application dated 18th June 2024 raises an issue of jurisdiction which, if upheld, would dispose of the suit in limine. In the circumstances, it would be contrary to the interests of justice to determine such an issue without giving the Plaintiff an opportunity to be heard.
49. Accordingly, the Court is persuaded that this is an appropriate case to exercise its discretion in favour of the Plaintiff.
50. The Plaintiff's replying affidavit and submissions are therefore admitted as duly filed.
51. Regarding the second issue, the Plaintiff urged the Court to prioritize the hearing of its application dated 30th July 2024, which seeks to disqualify the 2nd Defendant's Counsel, over the 2nd Defendant's application challenging the Court's jurisdiction to hear and determine the suit.
52. The law regarding jurisdiction is well established. A Court must determine the question of jurisdiction at the earliest opportunity, as it cannot proceed without it. This principle was explicitly stated in **Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1** and confirmed by the Supreme Court in **In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR)**, as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity, and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

53. The record shows that on 24th October 2024, Hon Mogeni J directed that the application dated 18th June 2024 be heard prior to the Plaintiff’s application. That direction has neither been set aside nor varied.
54. The issue of disqualification of Counsel is a collateral matter and does not relate to the Court’s jurisdiction in the present circumstances.
55. In contrast, the application dated 18th June 2024 raises a pure question of jurisdiction. Should that application succeed, it would render all other proceedings, including the application on representation, otiose.

56. In the circumstances and in accordance with the Court's previous instructions, I find that the application dated 18th June 2024 should be heard and determined first.

57. The upshot of the foregoing is that the Plaintiff's application dated 5th February 2025 partially succeeds in the following terms:

a. The Plaintiff's Replying Affidavit and Submissions in opposition to the 2nd Defendant's Notice of Motion dated 18th June 2024 are hereby admitted and deemed as duly filed.

b. The 2nd Defendant's Notice of Motion dated 18th June 2024 shall be heard and determined prior to the Plaintiff's application dated 30th July 2024.

c. The Plaintiff shall bear the costs of the application.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 24TH DAY OF APRIL, 2026.

.....
T. MURIGI
JUDGE

IN THE PRESENCE OF: -

Mukuha holding brief for Bwire for the Plaintiff

Ahmed- Court assistant