Rick v Chebet & another (Environment & Land Case E232 of 2023) [2025] KEELC 16 (KLR) (16 January 2025) (Ruling)

Neutral citation: [2025] KEELC 16 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E232 OF 2023

JO MBOYA, J

JANUARY 16, 2025

BETWEEN

BRAYAN MICHAEL RICK ..... PLAINTIFF

AND

JAMES CHEPKOIYWA CHEBET ..... 1ST DEFENDANT

ARNORLD MASWAI ..... 2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant [hereinafter referred to as the Applicant] have approached the court vide the Notice of Motion Application dated the 13th November 2024 brought pursuant to the provisions of Order 18 Rule 10 , Order 40 Rule 7, Order 51 Rule 1, 2 & 3 of the Civil Procedure Rule; Section 1A and 3A of *Civil Procedure Act* and Article 47[1], Article 50[1] & [2] [g] of *the Constitution* 2010 and wherein the Applicants have sought for the following reliefs;

   i. .....Spent.

   ii. .....Spent.

   iii. Thatthe Honourable Court be pleased to set aside the proceedings of 5th November 2024 in this matter.

   iv. Thatthe Defendants be given opportunity to Appoint an Advocate to represent them in the suit.

   v. Thatthe matter be set down for hearing after a newly appointed Advocate for the Defendant comes on record

   vi. Thatthe Plaintiff be recalled to testify afresh on a hearing date to be given by the Honourable Court.

vii. Thatcosts of this application be in the cause.

2. The instant application is anchored on various grounds which have been highlighted in the body thereof. In addition, the application is supported by the affidavit of James Chepkoiywa Chebet[Deponent] sworn on the 13th November 2024.

3. Upon being served with the instant application, the Plaintiff/ Respondent filed grounds of opposition dated the 20th November 2024; and wherein the Plaintiff/Respondent has raised various grounds to inter-alia that the court is functus officio. Furthermore, the Plaintiff/Respondent has also contended that the Applicant herein is guilty of a deliberate scheme intended to obstruct, delay and or defeat the expeditious hearing and determination of the matter.

4. The instant application came up for hearing on the 21st November 2024; whereupon the parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. The Applicant proceeded to and filed written submissions dated the 25th November 2024 whereas the Plaintiff/Respondent filed written submissions dated the 2nd December 2024. For coherence, the two [2] sets of written submissions are on record.

Parties Submissions

a. Applicant's Submissions:

6. The Applicant filed written submissions dated the 25th November 2024 and wherein the Applicant has reiterated the grounds contained in the body of the application. In addition, the Applicant has also highlighted the averments contained in the body of the supporting affidavit.

7. Furthermore, the Applicant has thereafter ventured forward and highlighted four [4] salient issues for consideration and determination by the court. Firstly, the Applicant has contended that even though the matter herein was scheduled for hearing on the 5th November 2024 and 7th November 2024, both dates inclusive; his [Applicant's] advocate on record filed an application dated the 28th October 2024 and wherein the Advocate hitherto on record intimated that same was desirous to cease acting for the Applicant.

8. Additionally, the Applicant has submitted that when the matter came up for hearing on the 5th November 2024, the application by his previous advocate seeking to cease acting was pending. In this regard, it has been contended that the Applicant anticipated that the court would proceed and give directions pertaining the hearing and disposal of the said application before venturing to undertake the main hearing.

9. Nevertheless, the applicant has posited that the court failed to give directions on the disposal of the pending application. At any rate, it has been submitted that the court dismissed the application for adjournment and thereafter proceeded with the main hearing.

10. Secondly, the Applicant has submitted that other than the application to cease acting which had been filed, learned counsel Mr. Kandie sought for an adjournment on behalf of the Applicant's previous counsel, but the Application for adjournment was declined. In this regard, the Applicant has contended that the matter therefore proceeded ex-parte, without the participation and involvement of the Applicant.

11. Thirdly, the Applicant has submitted that to the extent that the proceedings of the 5th November 2024 were taken in the absence of the Applicant previous counsel and by extension the Applicant herein, same [proceedings] were therefore ex-parte.

12. To the extent that the proceedings under reference were ex-parte in nature, the Applicant has submitted that the court is therefore seized of the requisite jurisdiction and discretion to set aside the impugned proceeding[s] and the consequential orders. In addition, the Applicant has submitted that the court is equally clothed with jurisdiction to recall the Plaintiff for fresh hearing. To this end, the Applicant has referenced the provisions of Order 18 Rule 10 of CPR.

13. Finally, the Applicant has submitted that same is entitled to legal representation. In this regard, the Applicant has cited and referenced the provisions of Article 50[2] of *the Constitution* 2010.

14. Nevertheless, the Applicant has further contended that despite his right to legal representation, the matter herein proceeded for hearing without same [Applicant] being afforded the opportunity to appoint an advocate to take over the conduct of the matter in place of [Applicant's] previous counsel.

15. Arising from the foregoing, the Applicant herein has submitted that the Application beforehand is meritorious and thus same ought to be allowed. To this end, the Applicant has implored the court to allow the application and set aside the proceedings of 5th November 2024.

b. Respondent's Submissions:

16. The Respondent filed written submissions dated the 2nd December 2024; and wherein the Respondent has reiterated the grounds of opposition dated the 20th November 2024. In addition, the Respondent has highlighted and canvassed four [4] pertinent issues for consideration and determination by the court.

17. First and foremost, learned counsel for the Respondent has submitted that the instant matter was scheduled for hearing on the 5th November 2024. Furthermore, learned counsel for the Respondent has submitted that the hearing date was fixed by consent of the parties and hence the said date was known to and within the knowledge of all concerned parties.

18. In addition, learned counsel for the Respondent has submitted that when the matter was called out for hearing on the 5th November 2024, learned counsel for the Defendants made an application for an adjournment. However, it has been posited that the application for adjournment on behalf of the Defendants was dismissed and the court provided elaborate reasons for declining the adjournment.

19. On the other hand, learned counsel for the Respondent has also submitted that following the dismissal of the application for adjournment on behalf of the Defendant [including the current Applicant], learned counsel for the Defendant exited the court platform and declined to participate in further proceedings.

20. As a result of the foregoing, learned counsel for the Respondent has submitted that the impugned proceedings were therefore inter-partes and not otherwise. Besides, it has been contended that to the extent that the court dealt with and addressed the application for adjournment and declined same, the court is now functus officio.

21. To buttress the submissions touching on and concerning the doctrine of functus officio, learned counsel for the Respondent has cited and referenced inter-alia the case of Raila Odinga & 2 Others v IEBC & 3 Others [2013]eKLR; Sholley v Judicial Service Commission & Another [2023] KESC 8 [KLR] and Telcom Kenya Ltd v John Ochanda [Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Lts] [2013] KECA 36 [KLR] , respectively.

22. Secondly, learned counsel for the Respondent has submitted that the Defendants [including the Applicant herein] have adopted and deployed a deliberate scheme intended to defeat and/or delay the expeditious hearing and determination of the suit. In this regard, learned counsel for the Respondent has submitted that the Defendants herein have deployed various tactics and sought for various adjournment, whose sole intention was to obstruct the hearing of the matter.

23. Owing to the foregoing, learned counsel for the Respondent has submitted that the circumstances surrounding the instant matter and the number of adjournments that have been sought for by the Defendants demonstrate a scheme/plot intended to frustrate the hearing and determination of the matter.

24. To this end, learned counsel for the Respondent has submitted that the filing of the application dated the 28th October 2024 by the Applicant's previous counsel and the consequential adjournment were all intended to achieve the ulterior motive of defeating the scheduled hearing.

25. Thirdly, learned counsel for the Respondent has submitted that the conduct displayed by and on behalf of the Defendants overtime does not bode well with the interest of justice and the overriding objectives of the court to hear and dispose of matters expeditiously and without undue delay. To this end, learned counsel for the Respondent has cited and referenced the provisions of Section 1A and 1B of the *Civil procedure Act*.

26. Taking into account the conduct of the Defendants, learned counsel for the Respondent has submitted that the Defendants herein [including the Applicant] are not deserving of equitable discretion of the court. In any event, it has been submitted that the discretion of the court ought not to be exercised in favour of a party who has demonstrated a plot or habit to obstruct the course of justice.

27. In support of the Submissions that the discretion of a court cannot be exercised in favour a party who has chosen to obstruct the cause of justice, learned counsel for the Respondent has cited and referenced the locus classicus decision in Shah v Mbogo [1967] EA.

28. Finally, learned counsel for the Respondent has submitted that the Defendant herein was duly knowledgeable of the application dated the 8th October 2024 and wherein their [Applicants] advocate intimated that same [Advocate] was desirous to cease acting. However, the Respondent submitted that despite being aware of the said application, the Defendants herein failed to exercise diligence to appoint new counsel.

29. Owing to the foregoing, it has been contended that the Defendants herein and in particular the Applicant, was keen to delay the hearing of the matter. To this end, learned counsel for the Respondent has submitted that the sum total of the behaviours and that of the Defendants and in particular, the Applicant was calculated to defeat the scheduled hearing.

30. In the premises, Learned counsel has contended that the Applicant's conduct smacks of negligence and thus same [conduct] cannot suffice to warrant the exercise of discretion in favour of the Applicant.

31. Flowing from the foregoing submissions, learned counsel for the Respondent has urged the court to find and hold that the said application is not only misconceived, but same constitute[s] an abuse of the due process.

32. Arising from the foregoing, learned counsel has implored the court to dismiss the application with costs to the Respondent.

Issues for determination:

33. Having reviewed the Notice of motion application; and having taken into account the grounds of opposition and having taken the cognizance of the written submissions filed by the respective parties, the following issues do emerge [crystalize] and are thus worthy for determination

    i. Whether the Application dated the November 13, 2024 is competent and legally tenable taking into account the provisions of Order 9 Rule 8 of the CPR, or otherwise.

    ii. Whether the proceedings undertaken on the 5th November 2024 were Ex-parte in nature or otherwise; and whether the court is Functus officio.

    iii. Whether the Applicant has established and demonstrated sufficient cause/basis to warrant the setting aside the proceedings of 5th November 2024 or otherwise.

Analysis And Determination

Issue Number1

Whether the application dated the 13th November 2024 is competent and legally tenable taking into account the provisions of Order 9 Rule 8 of the CPR or otherwise.

34. It is common ground that the Defendant herein [inclusive of the applicant] engaged and retained the services of M/s Peter Kibet & Co Advocates to act for same. To this end, the firm of M/s Peter Kibet and Company Advocates proceeded to and filed a statement of defence for and on behalf of the Defendants.

35. Subsequently, the said firm of M/s Peter Kibet and Company Advocates filed various court pleadings including the application dated the 8th December 2023; as well as the application dated the 28th October 2024. Pertinently, there is no gainsaying that the Defendants herein were duly represented by an advocate of their own choice.

36. Suffice it to state that the advocate who had hitherto been retained by the Defendants [inclusive of the Applicant] filed an application dated the 28th October 2024 and wherein same [erstwhile advocate] sought to cease acting. For good measure, the application under reference remained pending up to and including the 21st November 2024.

37. Notably, on the 21st November 2024 the Defendants previous counsel, namely, Mr. Peter Kibet appeared before the court and the same [erstwhile advocate] intimated to the court that he [Advocate] was keen to prosecute the application 20th October 2024. To this end, the application under referenced was canvassed and disposed of.

38. For good measure, the court proceeded to and made the following orders;

    i. The Application dated the 28th October 2024 by counsel for the Defendants and wherein learned counsel for seeks to cease acting be and is hereby allow.

    ii. Consequently, the firm of advocate M/s Peter Kibet & Co Advocate be and are hereby discharged from acting for the Defendants.

    iii. Costs of the application shall be borne by the Defendants.

39. Flowing from the record of the court, what is apparent and evident is that the Defendants previous advocates remained on record up to and including the 21st November 2024. In this regard, the said

advocates were therefore the Defendants' duly recognized agents for purposes of Order 9 Rule 1 and 13 of the Civil Procedure Rules, 2010.

40. Notwithstanding the foregoing, it is instructive to note that the Applicant herein proceeded to and filed the application dated the 13th November 2024 without filing a Notice to act in person in accordance with the provisions of Order 9 Rule 8 of Civil Procedure Rules, 2010.

41. There is no dispute that a party who has hitherto engaged/retained an advocate can exercise his/her right to change advocates. In any event, the right to change Advocate is part of the Constitutional right to Legal representation. Furthermore, there is also no gainsaying that any party is at liberty to act in person.

42. Nevertheless, it is incumbent upon a party who has hitherto acted through an advocate, but is desirous to act in person, to file and serve a notice to act in person. Notably, it is upon the filing and service of such a notice to act in person that the concerned party shall have the requisite capacity to file court processes on his/her own behalf.

43. Taking into account of the importance of Order 9 Rule 8 of the CPR, it is imperative to reproduce same. To this end, the provisions [supra] are reproduced as hereunder;

> Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modifications.

44. My reading and understanding of the provisions of Order 9 Rule 8 of the CPR drives me to the conclusion that it was incumbent upon the Applicant herein to file and serve a Notice of intention to act in person. Instructively the notice to act in person ought to and should be filed, atleast alongside the application dated the 13th November 2024.

45. In my humble view, the application dated the 13th November 2024 was filed during the subsistence of representation by the firm of M/s Peter Kibet & Co advocates and prior to filing of a Notice to act in person.

46. Simply put, the application under reference was not only premature, but same was also irregular, procedural and illegal. In this regard, there is no gainsaying that the Application was incompetent.

47. Before departing from this issue, it is imperative to underscore that the rules of procedure bind all parties, irrespective of whether that parties' are represented by counsel or otherwise.

48. Furthermore, it is also apposite to underscore that the rules of procedures cannot be disregarded with licentious abandon. For coherence, procedural impropriety, which touches on non- compliance with the rules, impacts on the right to fair hearing. To this end, it behoves all and sundry the Applicant herein not excepted, to abide by and comply with the rules of procedure.

49. Nevertheless, where a party, the Applicant not excepted, has not complied with the rules of procedure, such a party is at liberty to account for the failure for [sic] the non-compliance or better still, seek liberty to comply. However, it does not avail to any party to disregard and or ignore the laid down rules of procedure and expect the court to treat same [such parties] with kid gloves.

50. To buttress the foregoing holding and exposition of the law, it suffices to cite and reference the case of Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission (IEBC), United Republican Party (URP), Rose Kisama, Naum Chelagat & Cheruiyot Maritim (Petition 8 of 2014)

[2015] KESC 7 (KLR) (Civ) (22 July 2015) (Ruling), where the court [Supreme Court] held as hereunder;

> 31. Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others, Petition No. 14 of 2013, that "Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.

51. On the other hand, the Court of Appeal has also added its voice to the necessity to comply with rules of procedure. In this regard, it is imperative to cite and reference the holding in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko, Independent Electoral And Boundary Commission (IEBC) & Returning Officer Kajiado East Constituency (Civil Appeal 154 of 2013*) [2013] KECA 279 (KLR) (Civ) (8 August 2013) (Judgment), where the court held as hereunder;

> 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 RightsAlliance & 5 OthersCivil 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."

52. Arising from the foregoing discussion, my answer to issue number one [1] is to the effect that the application beforehand was filed in contravention of the provisions of Order 9 Rule 8 of the Civil Procedure Rules, 2010.

53. Consequently, and in this respect, the subject application is therefore premature, incompetent and thus legally untenable.

Issue Number 2

Whether the proceedings undertaken on the 5th November 2024 were Ex-parte in nature or otherwise; and whether the court is Functus officio.

54. Having found and held that the application beforehand was filed in contravention of the provisions of Order 9 Rule 8 of the CPR and is thus incompetent, it would have been apposite to strike out the application and terminate the ruling. However and for the sake of completeness, it is imperative that the court ventures forward and addresses the other outstanding issues.

55. Arising from the foregoing, I therefore intend to address the question as to whether or not the impugned proceedings, namely, the proceedings of 5th November 2024 were Ex-parte, or otherwise. Furthermore, I shall also endeavour to discern whether the court is Functus officio.

56. To start with, there is no gainsaying that when the matter herein was called out on the 5th November 2024, both the Plaintiff and the Defendants were duly represented by counsel. Suffices it to state that Learned counsel Mr. Kandie Esquire, appeared before the court holding brief for Mr. Peter Kibet for and on behalf of the Defendants.

57. It is also not lost on the court that the said counsel, namely, Mr. Kandie Esquire, applied for an adjournment for and on behalf of the Defendants. However, the Application for adjournment was

vehemently opposed by Learned counsel Mr. Ojiambo for the Plaintiff. To this end, the court was called upon to render a ruling.

58. Pertinently, the court proceeded to and rendered a ruling whereupon the court found and held that the Defendants had consistently adopted tactics aimed at and intended to defeat the expeditious hearing of the suit. Furthermore, the court also found that the application for adjournment was devoid of merits.

59. Owing to the foregoing, the court proceeded to and dismissed the application for adjournment. In addition, the court ordered and directed the matter to proceed for hearing. For the avoidance of doubt, there is no gainsaying that the matter indeed proceeded for hearing.

60. However, it is worthy to state that before the Plaintiff could be sworn in, learned counsel Mr. Kandie Esquire who was holding brief for Mr. Peter Kibet Esquire walked out from the virtual platform. Suffice it to underscore that Learned counsel walked out on the face of the proceedings and the evidence of PW1 [the Plaintiff herein].

61. From the foregoing, the question that the court must grapple with is whether the impugned proceedings were Ex-parte in nature. To my mind, the proceedings beforehand were carried out and undertaken in the presence of a duly recognized agent on behalf of the Defendants. Consequently and in this regard, the Proceedings cannot be contended to have been Ex-parte in the manner contended by the Applicant.

62. On the contrary, the proceedings of the 5th November 2024 were inter-partes. Instructively, where the proceedings are taken in the presence of an advocate representing a party, such proceedings are deemed to have been taken in the presence of the designated party, in this case, the Defendants.

63. Arising from the foregoing, it is therefore my finding and holding that the impugned proceedings, namely, the proceeding[s] taken on the 5th November 2024; were not Ex-parte as contended by the Applicant. In this regard, the said proceedings are therefore not amenable to setting aside under the provisions of Order 12 of the Civil Procedure Rules, 2010, which provisions relate to Ex-parte proceeding[s].

64. The second aspect that merits discussion touches on and concerns whether the court is functus officio as pertains to the proceedings and the consequential orders that were made on the 5th November 2024.

65. Firstly, it is not lost on this court that the Defendant's counsel who appeared before the court applied for an adjournment. To this end, the court dealt with and disposed of the application for adjournment. For good measure, the application for adjournment was dismissed.

66. To my mind, if the Defendants [inclusive the applicant herein] were aggrieved by the order declining/ dismissing the application for adjournment, then the Defendants were at liberty to appeal.

67. Secondly, having not filed an appeal and the court having dealt with the question of adjournment, the orders arising therefrom were final orders. Such orders cannot be set aside by the same court that made same [the impugned orders].

68. In my humble view, the application beforehand is essentially inviting the court to re-engage with the proceedings of 5th November 2024 and by extension, to set same [orders] aside. Suffice to state that the application constitutes an invitation to this court to sit on appeal its own decision. For coherence, such an invitation is inimical and antithetical to the rule of law.

69. Additionally, it suffices to underscore that the court dealt with the question of adjournment and thereafter decreed the matter to proceed. Even though learned counsel for the Defendants thereafter

walked out of court, the walking out by Learned counsel for the Defendant did not negate the fact that the proceeding[s] were Inter-partes.

70. In otherwards, the court dealt with the issues beforehand on the 5th November 2024. In this regard, the court was rendered functus officio and cannot re-visit the proceedings of 5th November 2024.

71. As concerns the import and tenor of the doctrine of functus officio, it suffices to cite and reference the decision of the Court of Appeal in the case of Telkom Kenya Limited v John O. Ochanda John O. Ochanda (Suing on His Behalf and on Behalf of 996 Former Employees of Telkom Kenya Ltd) [2014] eKLR, where the court stated and held as hereunder;

> Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of Chandler Vs Alberta Association Of Architects [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
>
> "The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
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> 1. Where there had been a slip in drawing it up, and,
> 2. Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"

72. Without belabouring the point, my answer to issue number two [2] is twofold. Firstly, the impugned proceedings, that is, the proceedings that were taken on the 5th November 2024 were not Ex-parte in nature. On the contrary, the said proceeding[s] were inter-partes. To this end, the said proceedings do not lend themselves to setting aside under the provisions of Order 12 of the Civil Procedure Rules, 2010, in the manner posited by the Applicant.

73. Secondly, I find and hold that the proceedings and the consequential orders made on the 5th November 2024 were final in nature. The said orders can only be appealed against and not otherwise. In this regard, this court is rendered functus officio and thus cannot re-visit the consequential Orders made on the 5th November 2024, including purporting to set same aside.

74. Such an endeavour would be ultra-vires and without jurisdiction.

Issue Number3

Whether the Applicant has established and demonstrated sufficient cause/basis to warrant the setting aside the proceedings of 5th November 2024 or otherwise.

75. The Applicant herein has approached the court seeking to have the proceedings taken on the 5th November 2024 set aside and that the matter be heard de-novo. Furthermore, the Applicant has also sought to have the Plaintiff herein to be recalled to testify afresh.

76. The application by and on behalf of the Applicant herein essentially seeks the exercise of direction by the court. To the extent that the Application seeks exercise of equitable discretion, it is important to state and underscore that the Applicant is therefore obligated to establish and prove sufficient cause.

77. Pertinently, it is the establishment and proof of a sufficient cause that enable[s] the court to consider whether or not to exercise its discretion in favour of the Applicant. In this respect, there is no gainsaying that proof/explanation of sufficient cause is paramount and critical.

78. I beg to ask myself whether the Applicant herein has established and proved sufficient cause or otherwise.

79. In an endeavour to discern and decipher whether or not the Applicant has established/proved sufficient cause, it is imperative to take cognizance of the proceedings on record. To start with, the record of the court is littered with several application[s] by and on behalf of the Defendants [inclusive the applicant], which have been filed on the face of scheduled hearings.

80. Secondly, it is also important to underscore that the Defendants herein have previously demonstrated that same are not keen to have the matter heard. To this end, it is not lost on the court that the Applicant herein, in an endeavour to derail the hearing generated a letter dated the 7th August 2024; and wherein same [Applicant] and the 2nd Defendant demonstrated a desire to defeat further proceedings in the matter.

81. Thirdly, the Applicant herein has failed to demonstrate to the court why same [Applicant] did not attend court on the 5th November 2024 when the matter was scheduled for hearing. Granted, his [Applicant's counsel] may [I say may] have been indisposed. But the Applicant and the co-defendant were not indisposed.

82. For good measure, there is no gainsaying that the suit beforehand belongs to the parties and not their advocates. Consequently, it was incumbent upon the Applicant to attend court even when same [Applicant] is represented by counsel. Instructively, the dictum of the Court of Appeal in the case of Habo Agencies Limited v Wilfred Odhiambo Musingo (Civil Appeal 124 of 2004) [2016] KECA 477 (KLR) (Civ) (24 June 2016) (Ruling) is apt.

83. Pertinently, it behoved the Applicant herein and his co-defendant to demonstrate to the court that same [Applicant] has been diligent in his endeavour to participate in the hearing and determination of the matter. For good measure, the law places an obligation upon every party, the Applicant not excepted, to act with due diligence and honesty. [See the provisions of Section 1B of the CPR].

84. Despite the foregoing, I beg to state that the supporting affidavit sworn by the Applicant herein has neither canvassed nor highlighted any plausible or cogent reasons as to why the Applicant did not attend court. Instructively, it is the preferment of a plausible and cogent reason that would have enabled this court to discern the existence of a sufficient cause.

85. Absent any plausible or credible reason, the court is left with no basis at all. Suffice it to underscore that discretion of the court must be exercised reasonably, judiciously and to avert injustice/miscarriage of justice. Nevertheless, the discretion of the court must not be exercised to assist a party who has adopted a scheme calculated to obstruct, delay and obstruct the cause of justice. [See the dictum in Shah v Mbogo [1967] EA page 116; See also Mbogo v Shah [1968] EA; and See also Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR]

86. Finally, it is instructive to state and underscore that what constitutes sufficient cause must be underpinned by bona fides and not otherwise. In addition, any reason that is deployed to persuade the court in an endeavour to exercise discretion must not leave any doubt in the mind of the court as to its bona fides.

87. Without endeavouring to exhaust the nuances and perspectives that underpin sufficient cause, it suffices to take cognizance of the decision of the Court of Appeal in the case of The Hon. *Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011*; where the Court observed as follows;

> " Sufficient cause or good cause in law means:-
>
> 'The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.' See Black's Law Dictionary, 9th Edition, page 251.
>
> Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

88. Flowing from the foregoing analysis, my answer to issue number three [3] is to the effect that the Applicant herein has neither established nor proven the existence of sufficient cause, to warrant exercise of equitable discretion in his favour.

Final Disposition:

89. For the various reasons, [which have been outlined in the body of the ruling], it must have become apparent, nay, eident that the application beforehand is devoid of merits.

90. Other than the foregoing, it is also worthy to reiterate that the court has found and held that the impugned proceedings were not Ex-parte in nature. On the contrary, same [proceedings] were taken in the presence of a recognized agent of the Defendants [inclusive of the Applicant].

91. In the circumstances, the final orders that commend themselves to the court are as hereunder;

    i. The Application dated the November 13, 2024 be and is hereby dismissed.

    ii. Costs of the Application be and are hereby awarded to the Plaintiff/Respondent.

    iii. To the extent that the Judge is on transfer, the matter herein shall be placed before the incoming Judge for purposes of further directions and proceedings including the crafting the pending Judgment where apposite.

    iv. To this end, the matter shall be mentioned before the incoming Judge within 14 days from the delivery of the Ruling or such other time as the parties may agree.

92. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF JANUARY 2025

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Ojiambo for the Plaintiff/Respondent.

Mr. James Chepkoiywa Chebet-applicant

Mr. Arnorld Maswai- the 2nd Defendant.