



**Abdalla v Adballah & 3 others (Environment & Land Case
25 of 2021) [2024] KEELC 204 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 25 OF 2021
FM NJOROGE, J
JANUARY 29, 2024**

BETWEEN

BASHIR ALI ABDALLA PLAINTIFF

AND

SAID MOHAMMED ADBALLAH 1ST DEFENDANT

HABIB SAID 2ND DEFENDANT

ISLAM AHMED 3RD DEFENDANT

AHMED MOHAMMED HAMI 4TH DEFENDANT

RULING

1. The notice of motion dated 8th November 2023 is the subject of this ruling. The notice of motion is founded on the grounds enumerated on the face of it and on the supporting affidavit sworn on even date by the 1st Defendant/applicant. The motion is said to be brought under order 40 rules 1,2,21 (1) (2), 3, 4 and 9 of the Civil Procedure Rules; and section 3 and 3 (A) of the Civil Procedure Act. The 1st defendant/applicant wants this court to grant him the following orders: -
 1. Spent.
 2. That the draft defense herein attached be duly admitted upon payment of the requisite filing fees.
 3. That this honourable court be at liberty to grant any other order in the best interest of justice.
 4. That costs be in the cause.
2. The 1st Defendant's contention is that upon filing of this suit, the Plaintiff proceeded to engage him in negotiations with a view of settling their issues out of court. He stated in his affidavit that despite the Plaintiff's promises to pay the amount owing to him, which is the main cause of action in this



suit, the Plaintiff has maliciously filed a request for judgment. The 1st Defendant/applicant deposed that on the date that the said request was filed, the Plaintiff's advocate had discussed with his advocate, Mr. Nyang'au, and promised to pay the sum of Kshs. 1,200,000/- hence eliminating the need to file a defence at that point.

3. The Plaintiff opposed the application. He filed the following grounds of opposition dated 19th November 2023: -

1. That the plaint together with the enclosures were duly served in the year 2021.
2. That prior to the request for judgment 2 years had since lapsed.
3. That the 1st Defendant/applicant instead fraudulently or by virtue of false malicious representation proceeded and extracted court summons, plaint and supporting documents on the same file to mislead the court that it was the plaintiff, and as evidenced on the court file.
4. That the tenets of legal procedure provide that the defendant ought to file a defence and if need be a counterclaim of demand.
5. That in the event the application is allowed, then the 1st Defendant should be condemned to pay punitive costs of Kshs. 150,000/- as malicious misrepresentation and/or fraud.

4. I have duly considered the written submissions filed by the plaintiff as ordered by this court. The defendants filed no submissions. The sole issue for determination is whether leave should be granted to the 1st Defendant to file defence out of time, and in turn whether the 1st Defendant's draft defence should be deemed as duly filed. To answer this question, I will briefly examine the conduct of and issues between the parties herein, from the time this suit was filed.

5. The Plaintiff instituted this suit on 9th April 2021 vide a plaint evenly dated. The Plaintiff sought a declaration that he is the legal owner of Swahili house without land situated near Sheikh Nassir Mosque Malindi on Plot No. 682/2 (the suit property). The Plaintiff's claim was that as per a sale agreement dated 16th November 2020, he agreed to purchase the suit property on the guarantee that the same was sold free of any third-party claim. The agreed purchase price was Kshs. 1,700,000/=. He paid a deposit of Kshs. 500,000/= and was to settle the balance by 8th December 2020. Before then, the 2nd and 3rd Defendants, broke the door of the suit property and have since caused the Plaintiff not to enjoy quiet possession.

6. Alongside the Plaint, was a notice of motion application for injunction which the 1st Defendant responded to in a Replying Affidavit dated 26th April 2021. He also filed an undated notice of appointment of advocates and memorandum of appearance on 19th April 2021 through the firm of Nyang'au T.O & Company Advocates. Thereafter, it has been one application after the other. The most recent being an application for interlocutory judgment against the 1st Defendant, for failure to lodge a statement of defence. That application prompted the filing of the present application.

7. The time for filing defence is prescribed in Order 7 Rule 1 of the Civil Procedure Rules which provides as follows: -

“Where a defendant has been served with a 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.”



8. In this case, appearance was filed on 19th April 2021 by the 1st defendant. The defence therefore needed to be filed latest on 3rd May 2021. Having failed to do so, the 1st Defendant needs to give reasons as to why his documents need to be admitted out of time. In the case of Beatrice Wanjiru Kamuri v John Kibira Muiruri [2016] eKLR, my brother Munyao J expressed himself as follows: -

“ 11. I on my part, have little sympathy for persons who deliberately file their documents late. If such party does not file his documents within time, he needs to give reasons as to why his documents need to be admitted, or else there is a risk that the same may be struck out. I agree, that striking out is an extreme measure which should only be resorted to where it is clear that a party is abusing the court process and attempting to steal a march on the other party. But that does not mean that parties ought to take for granted what is prescribed in the rules. I do not think that a party who cannot give good reason why he/she has filed his/her documents late ought to go scot-free as if there has been no breach of rules. There ought to be sanctions, in the form of fines or costs meted out upon such party, or else litigants will have no incentive to file their documents within the prescribed period. There is a purpose why the rules prescribe for various time frames within which to file and serve documents and these time frames ought to be given the utmost respect. Simply because a matter does not invite the entry of interlocutory judgment is not a licence to any litigant to file his defence outside the time prescribed by Order 7 Rule 1.”

9. With good reason, a litigant can persuade a court of law to exercise its power to allow the filing and service of a pleading out of time.

10. The 1st Defendant’s reason in this case is that the Plaintiff made him believe that they will settle the matter out of court and therefore he did not see need to file a statement of defence. In my view, this explanation is indeed flimsy as there is no evidence adduced to substantiate existence of the alleged negotiations for an out of court settlement. Be that as it may, I recognize that parties have a right to not be condemned unheard. I have also noted that the 1st Defendant has filed a draft statement of defence.

11. That defence should be scrutinized for triable issues as the presence thereof may form one of the pillars for the grant of the prayers sought in it.

12. I note that the plaintiff’s claim is that he bought the suit property from the 1st defendant who initially owned it; that he made a partial deposit therefor; that a vital condition was that the suit land was free from any third party claim; that however the 2nd and 3rd defendants interfered with the plaintiff’s quiet possession of the suit land; that notwithstanding the interference by the 2nd and 3rd defendants and during the pendency of the present suit, the 1st defendant demanded from the plaintiff the balance of the purchase price. The suit claims misrepresentation and seeks a declaration of ownership on the part of the plaintiff and an injunction against the defendants.

13. The 1st defendant’s proposed defence on the other hand denies the claim and states that the land was sold to the 1st defendant by the 4th defendant. The said defence maintains that the land was properly sold to the 1st defendant and that the arrest of the 2nd and 3rd defendants are but a ploy by them and the plaintiff to ensure that the 1st defendant does not get the balance of the purchase price.

14. In this court’s view there is at least one triable issue in that defence and I will say no more but to order that the said defence though filed out of time, be admitted into the record but on certain conditions to be set out herein below.



15. In the end, the draft defence is hereby admitted on condition that the requisite filing fees are paid within 7 days hereof; a further condition is that the costs of the application assessed by this court in the sum of Kshs. 20,000/- shall also be paid to the plaintiff only and that payment shall be effected within 14 days from today failure to which the defence will stand struck out. In addition, the plaintiff shall file and serve a comprehensive trial bundle duly indexed and paginated, by 27/02/2024 and subsequently all the defendants shall file and serve their trial bundles duly indexed and paginated, by 27/03/2024. This matter shall be mentioned on 28/03/2024 for the fixing of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

