



Lemayian & another v Ranch & 11 others (Environment & Land Case E012 of 2023) [2024] KEELC 896 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEELC 896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E012 OF 2023
CG MBOGO, J
FEBRUARY 27, 2024**

BETWEEN

SAIPEI NAREYO LEMAYIAN 1ST PLAINTIFF

NENGOE ENE MAINGUSI 2ND PLAINTIFF

AND

OLOIRIEN GROUP RANCH 1ST DEFENDANT

JAMES TEMEI 2ND DEFENDANT

JULIUS KAIPAI KAYIONI 3RD DEFENDANT

OLOIRIEN LAND CARE LIMITED 4TH DEFENDANT

JOSHUA TEMEI SAITOTI 5TH DEFENDANT

SHADRACK LETEIPA TIKAN 6TH DEFENDANT

SAMWEL LEKISHON SONORWA 7TH DEFENDANT

PUTAA OLE TOGOM 8TH DEFENDANT

HON. ATTORNEY GENERAL 9TH DEFENDANT

LAND REGISTRAR TRANSMARA SUBCOUNTY 10TH DEFENDANT

SURVEYOR TRANSMARA SUB-COUNTY 11TH DEFENDANT

LAND ADJUDICATION OFFICER TRANSMARA SUB-COUNTY 12TH DEFENDANT



RULING

1. Before this court for determination are the notice of motion applications dated February 27, 2023 and March 1, 2023 respectively.
2. The notice of motion application dated February 27, 2023 was filed by the defendants and is expressed to be brought under sections 1A, 1B, 3A & 63 of the Civil Procedure Act, seeking the following orders: -
 1. That the honourable court be pleased to strike out the amended plaint amended on 21st day of November, 2022 with costs for material non-compliance with the mandatory court ruling and/or order dated the 22nd day of November, 2022.
 2. That the respondents be ordered to bear the costs of this application.
 3. Such further and/or other orders be made as the court may deem fit and expedient.
 4. The application is premised on the grounds *inter alia* that vide the ruling of the court delivered on 22nd November, 2022, the plaintiffs were granted leave to file and serve an amended plaint within 14 days from the date of delivery. Further, that the plaintiffs failed to do so within the time stipulated and filed the same on February 23, 2023.
 5. The application was supported by the affidavit of Ouma Maurice Otieno, advocate sworn on even date. In his affidavit, the counsel deposed that the court directed that the amended plaint be served within 14 days from the date the ruling was delivered. However, the plaintiffs went into slumber and served the amended plaint on February 23, 2023, which is 103 days later.
 6. The counsel deposed that this action has made it impossible for the defendants to put in their amended defence within the time stipulated as this was dependent on the service of the amended plaint upon them first. He further deposed that the plaintiffs' conduct is oppressive and amounts to an abuse of the process of the court as they are not desirous of prosecuting the suit expeditiously.
 7. The notice of motion dated March 1, 2023 was filed by the plaintiffs and is expressed to be brought under section 1A & B, 3 & 3A and section 63 (e) of the Civil Procedure Act and orders 50 rule 6 and 51 rule 1 of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. That this honourable court be pleased to grant an order of enlargement of time and grant leave to the plaintiff to serve the amended plaint dated November 21, 2022 and filed in court on the November 29, 2022.
 3. That upon grant of prayer 2 above, this honourable court be pleased to deem service of the plaint and upon the defendants on February 24, 2023 and February 28, 2023 as proper service.
 4. That costs be in the cause.
8. The application is premised on the grounds that for reasons beyond their control, the amended plaint was served out of time.
9. The application is supported by the affidavit of Gordon Ogola, the counsel for the plaintiffs sworn on even date. In his affidavit, the counsel deposed that for personal reasons, a clerk employed at his law



firm resigned and with effect from December 11, 2022. That the said clerk known as Mr. Joseph was tasked with filing and serving the amended plaintiff within the stipulated time. That later, he perused the file in his office and he did not find the amended plaintiff or any affidavit of service.

10. The counsel further deposed that it was until February 21, 2023 when upon enquiry from the advocate for the 1st to 8th defendant that he realized that the amended plaintiff had not been served. The counsel deposed that it was now within his knowledge that the amended plaintiff was filed within the stipulated time and that the inadvertence on their part has been explained.
11. The application was opposed by the replying affidavit of counsel for the 1st to 8th defendants sworn on March 14, 2023. In his replying affidavit, the counsel deposed that according to the ruling delivered on November 22, 2022 the plaintiffs were required to file and serve the amended plaintiff within fourteen days from the date thereof. Instead, the plaintiffs' served the amended plaintiff upon the defendants on February 23, 2023, 103 days later.
12. The counsel further deposed that the plaintiff exhibited similar lethargic conduct in the past in Narok ELC No 500 of 2017. Besides, that the plaintiff failed to make any meaningful steps with a view to have the matter prosecuted and instead, went to deep slumber to the greater prejudice of the defendants.
13. It is worth noting that the plaintiffs' in this matter did not file a response to the notice of motion dated 27th February, 2023.
14. Both applications were canvassed by way of written submissions. On January 26, 2024, the plaintiffs filed their written submissions dated December 14, 2023 where they raised two issues for determination as follows: -
 - i. Whether the court should strike out the amended plaintiff.
 - ii. Whether the court should grant an order of enlargement of time and grant leave to the plaintiff to serve the amended plaintiff.
15. On March 17, 2023, the 1st to 8th defendants filed their written submissions March 15, 2023 where they raised two issues for determination as listed below: -
 1. Whether the honourable court should strike out and/or expunge from the court records the amended plaintiff by the plaintiff amended on the 21st day of November, 2022.
 2. Whether this court should enlarge time and grant leave to the plaintiff to serve the amended plaintiff dated 21st November, 2022.
16. I have considered both applications, the replying affidavit with respect to the notice of motion dated February 27, 2023 and the rival submissions filed by both parties.
17. The genesis of the notice of motion dated February 27, 2023 was precipitated by the failure of the plaintiffs to comply with the ruling delivered by the ELC court in Kilgoris on November 22, 2022.
18. In the said ruling, Washe J issued the following orders: -
 - a. The plaintiffs are hereby granted leave of fourteen (14) days from the date of this ruling to prepare, file and serve their amended plaintiff.
 - b. The defendants upon service of the amended plaintiff by the plaintiff shall have leave of fourteen (14) days to prepare, file and serve their amended defence.
 - c. The plaintiffs upon service of the amended defence shall have leave of seven (7) days to prepare, file and serve their reply to defence if need be.



- d. The matter will thereafter be mentioned before the Deputy Registrar for the pre-trial conference.
- e. Costs of the application will abide the outcome of the suit.
19. In their application, the 1st to 8th defendants contended that they were served with the amended plaint on February 23, 2023 which was 103 days from the date when the said ruling was delivered. The 1st to 8th defendants maintained that failure to comply with the orders of the court has resulted in their failure to comply with the directions of the court in filing the amended defence within the period stipulated therein. They decried previous tendencies of the plaintiffs' failure to comply with the court's orders and more particularly ELC Case no. 500 of 2017.
20. I have perused the proceedings and I note that when this matter came up for mention on March 7, 2023, Mr. Ogolla, the counsel for the plaintiffs informed the court that they had not been served with the instant application. I have perused the record in this file, and I noted the affidavit of service sworn by Ouma Maurice Okoth, the counsel on March 10, 2023. The affidavit of service depicted service of the notice of motion dated February 27, 2023 upon the firm of Gordon Ogola & Kipkoech. The said service was effect through its office email, ogolakipkoechadvocates@gmail.com on March 1, 2023 at 6:00 pm. The said application was sent again on March 2, 2023 at 9:24 am.
21. Further, and I note, is that despite service of the notice of motion dated February 27, 2023, the plaintiffs did not file a reply to this application.
22. The legal provision on ways of opposing an application is order 51 rule 14 of the Civil Procedure Rules which provides that;
- “Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
- a. A notice of preliminary objection: and/or;
 - b. Replying affidavit; and/or
 - c. A statement of grounds of opposition.”
23. Based on the above provision of the law and in the absence of any reply whatsoever to the application, it is not difficult to see that the application as it is, is uncontroverted or unopposed. However, in deciding whether to strike out a plaint, the court ought to exercise so judiciously its discretion not to cause any injustice to any party.
24. In the case of Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others [2005] eKLR, it was held as follows:
- “In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT Dobie & Company (kenya) Ltd v Muchina [1982] KLR 1 in which Madan JA at p. 9 said: -
- “The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal



with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

25. It is not disputed that filing of the amended plaint was done within the period stipulated pursuant to the ruling. The only defect was service. The reasons advanced by the counsel for the plaintiffs in the notice of motion dated March 1, 2023 are, in my view, excusable for the reason that it may not have been in bad faith. The amended plaint was indeed filed but it was not served. It is against the foregoing and while relying on article 159 (2) (d) of the *Constitution*, as well as associating myself with the decisions cited above, that I decline to strike out the amended plaint.
26. The inaction of the plaintiffs to serve the amended plaint within the time stipulated has indeed negatively affected the 1st to 8th defendants’ period of filing their amended defence within the period issued pursuant to the orders of the court.
27. While I decline to grant the order to strike out the amended plaint, I will allow the notice of motion dated March 1, 2023 in terms of prayers 2 and 3.
28. On the other hand, the 1st-8th defendants are entitled to costs of both applications assessed at Kes 75,000/-.
29. For clarity, the notice of motion dated February 27, 2023 is disallowed in terms of prayer no 1 save for costs as stated above. I opine that this suit should be set down for hearing and determined on its merits.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 27TH DAY OF FEBRUARY, 2024.

HON. MBOGO C.G.

JUDGE

27/02/2024.

In the presence of:

Mr. E. Meyoki – C.A

and in the absence of : -

Plaintiffs’ counsel

Defendants’ counsel

