



**Kitololo v Middle East Bank Limited; Maarifa Developers Limited (Intended Plaintiff)
(Environment & Land Case 40 of 2006) [2024] KEELC 1047 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1047 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 40 OF 2006
LL NAIKUNI, J
FEBRUARY 20, 2024**

BETWEEN

AUSTIN SALMON KITOLOLO PLAINTIFF

AND

MIDDLE EAST BANK LIMITED DEFENDANT

AND

MAARIFA DEVELOPERS LIMITED INTENDED PLAINTIFF

RULING

I. Introduction

1. This is a brief ruling emanating from some rather straight forward issues that emerged during the proceedings of this case. From the very onset, this being a Court of record, it is imperative that the Honourable Court provides a brief background of the issue at hand. Significantly, it is critical to note that despite of this case having been instituted in the year 2006, close to 18 years ago, it has never commenced herein! Ideally, the protracted matter is not complex at all. However, the proceedings have been marred with numerous interlocutory applications seeking all sorts of reliefs from amendments of pleadings, to joinder of parties and so forth.
2. On 13th February, 2024 this matter was slated for conducting of the final and elaborate Pre-Trial Conference over the case. It is instructive to note that there had been numerous such Pre – trail sessions over the case. The intention was to enable it proceed on for an expeditious disposal. The exercise was to be undertaken pursuant to a Ruling delivered by this Court on 16th October, 2023. The Ruling had been made following an application by the Plaintiff herein seeking an amendment and joinder of a



party. From the said Ruling, the Honourable Court had provided a specific pre - conditions as follows, “*inter alia*”:-

- “ 24. an order of the Court for the Plaintiff/Respondent herein to file and serve a
(b) fresh application seeking for leave to amend Further Further Amended Plaint under the Provisions of Order 8 Rules 2, 3, 4, and 6 of the [Civil Procedure Rules, 2010](#) and hence to add the 1st Plaintiff – Maarifa Development Limited if they so wish to do within the next twenty-one (21) days from the date of this Ruling.....the matter to be mentioned on 13th February, 2024 for Pre – Trial Conference pursuant to the provision of Order 11 of the [Civil Procedure Rules, 2010](#) andthe case fixed for hearing on 13th May, 2024.....”

3. The Plaintiff was expected to have fully complied with this clear direction. But that was not the case whatsoever. Instead, during the afore stated mention date, the attention of the Honourable Court was drawn to an Notice of Motion application dated 14th November, 2023 which was filed through E – filing by the Plaintiff. The said application sought for the enlargement of time to file an application for leave to amend the Further Further Amended Plaint.

II. The Plaintiff/Applicant’s

4. On his part, Mr. Mutugi Advocate for the Plaintiff informed Court that he had written a letter dated 13th December, 2023 to court and copied to Mr. Mokaya Advocate for the Defendant urging it to expedite on delivery of a Ruling of the afore - stated application prior to the mention date of 13th February, 2024. The Honourable Court was made to understand that said application was served. Indeed, as proof of service was there a 4 Paragraphed Affidavit of Service dated 14th December, 2023 sworn by Mr. Titus Mutugi an Advocate of High Court and that Mr. Mokaya Advocate confirmed having received.

III. The Defendant/Respondent’s responses

5. Despite of having been properly served with the application, Mr. Mokaya informed Court that he deliberately refused, ignored and/or failed to respond to it essentially on the grounds that the said application was a nullity and void having breached the pre-condition spelt out from the afore stated Ruling by this Honourable Court on 16th October, 2023. To him, he felt that all along the Plaintiff was merely out to frustrate the hearing and final determination of the case. He further averred that while to him he thought that the said Ruling had provided clear direction to streamline expediency of the matter, but with the current turn of events, parties were drifting back to where they had initially been. He termed this as being extremely unfortunate.
6. As a rejoinder, Mr. Mutugi Advocate indicated that the Plaintiff was committed in having this case heard and finally determined. He stated that the level of commitment was evident from the application and the reliefs sought and the correspondence to Court requesting for a Ruling to be delivered prior to the mention date so that there would be no interruption of the due process. He failed to understand the reason the Defendant failed to respond to the application in whichever way. In the given circumstances, he urged court to allow the application by the Plaintiff and which though served had not elicited any responses thus to deemed as being unopposed and grant the orders sought as prayed.



IV. Analysis on the issue

7. I have considered the issues orally raised herein on this matter. In order to provide a clear direction on the matter, there is only singular aspect for determination herein – What are the consequences of non - failure to respond to a filed application.
8. Before me are a discourse on adhering to Court orders, time - lines and adherence to laid - down procedures. As indicated above, the Ruling delivered by this Honourable Court on 16th October, 2023 provided stringent time lines – 21 days for the Plaintiff/Applicant to have accomplished. In simple terms, the Plaintiff/Applicant was directed to have filed an application seeking for amendment of the Plaint and joinder of parties. From the records, the Plaintiff/Applicant filed the said application on 14th November, 2023. On quick time computation and in accordance with the provision of Order 50 Rules 1, 2 and 3 of the Civil Procedure Rule 2010, certainly it was filed out of time by five clear working days. No cogent reason had been provided by the Plaintiff/Applicant for the said delay and non – compliance of the Court orders. While admitting the lapse and the delay caused, the Learned Counsel stated that “.....the delay was neither so inordinate, unreasonable as to cause any prejudice to the Defendant nor was it advertent.....” I find that expression rather- callous, insensitive and in - compassionate to say the least. It’s not soothing nor remorseful by any standards. This court has stated time without numbers on the significance of strictly adhering to timelines and obedience to court orders. Courts orders are never given in vain nor are they cosmetic nor a formality. At all costs they have to be obeyed whether parties agree with them or not. Should any party be aggrieved or dissatisfied with any court order the available route to take is to come back to court for them to be set aside, varied and/or discharged. None of this has happened. Instead, the Plaintiff/Applicant makes an application seeking for the enlargement of time using the above reasons. It is followed with a letter which I term as being mounting pressure on the Court to render a Ruling before 13th February, 2024. This tantamount to the Plaintiff/Applicant abrogating them self to a sense self entitlement. It is unacceptable by all means. For these reasons the Plaintiff will be penalized and chastised accordingly, as they were given a chance but continued in delaying this matter at the chagrin of the Defendant and this Honourable Court to say the very least.
9. Be that as it may, this is a court of procedure. Notwithstanding the provisions of Article 159 (2) (d) – which holds that:- “Justice shall be administered without undue regard to procedural technicalities” this provisions was not put there to aid defaulters of the Court orders or laid - down procedures. I say so as the provisions of Order 51 Rule 14 (1) and (2) which govern filing of application states as follows: -
- QUOTE
- 14
- (1) 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 or
 - b. Replying Affidavit, and/or
 - c. A statement of Grounds of Opposition.
- (2) the said documents in sub Rule (1) and a List of authorities if any shall be filed and served on the Applicant not less than three clear days before the date of hearing”
10. From the proceedings and the admissions by Mr. Mokaya Advocate for the Defendant, on being served with the impugned application he utterly and wilfully decided not to undertake any of the above



provisions of the law. He failed to file any responses to either challenge and/or controvert the sworn averments by the Plaintiff/Applicant. Critically speaking, and in the given circumstances then and stated out under the provision of Order 51 Rule 14 (4) which states:

“If a Respondent fails to file a Replying Affidavit or statement of Grounds of Opposition the application may be heard ex – parte”

This position is backed up in several decisions – “*Kugo Muganda Vincent v John Mbugua Kungu* (2003) eKLR and *Peter O. Nyakundi & 68 others v Principala Secretary, State Department of Planning, Ministry of Devolution and Planning & another* (2016) eKLR;

Thus, in the instant matter, the application is heard “Ex Parte” and in essence it goes unopposed. It becomes a walk over as it is in a football match in the absence of the other team. Two wrongs never make a right. The English language has a saying:- “What is good for the Goose is Good for the Gander”. At least Mr. Mokaya rather than raising his hands in the air should have formally opposed the application and the court may have favoured him with a Ruling. I should not pen off prior to pointing out to the parties in this matter that there ought to be a finalization of this proceedings with the legal maxim – “Litigation Must come to an end”.

V. Directions and Conclusion

11. In view of the fore – going, I now proceed to grant the following specific directions. These are:-
- a. That the Notice of Motion application dated 14th November, 2023 be and is hereby allowed as prayed the same not being opposed.
 - b. That the Plaintiff ordered to pay a sum of Kenya Shillings Fifteen Thousand (Kshs 15,000.00/=) as throw away costs to the Defendant within the next Seven (7) days of this Ruling.
 - c. That the Plaintiff to file and serve a Further Further Further Amended Plaintiff within the next 14 days from this date.
 - d. That the Defendant herein be granted 7 days to file and serve Amended Defence accordingly.
 - e. That the matter to be mention on 15th April, 2024 to ascertain compliance of this court orders and conducting of the final Pre-Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - f. That the matter to be fixed for full hearing on 13th May, 2024, 26th and 27th June, 2024 respectively.
 - g. That failure to comply with any of these orders/directions automatically the Notice of Motion application dated 14th November, 2023 to be deemed as dismissed with costs and the matter to proceed on for hearing as scheduled.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF FEBRUARY 2024.

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HON. JUSTICE MR. L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA



Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Mutugi Advocate for the Plaintiff.
- c. Mr. Mokaya Advocate for the Defendant

