



**Nickson v Collins & 3 others (Environment & Land Case
1 of 2024) [2024] KEELC 1797 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 1 OF 2024
FO NYAGAKA, J
APRIL 12, 2024**

BETWEEN

AMUHAYA SAGINI NICKSON PLAINTIFF

AND

SAMMY COLLINS 1ST DEFENDANT

TITUS BARAZA 2ND DEFENDANT

EDWIN MULONGO MAKHANU 3RD DEFENDANT

CALEB SIMIYU MAKHANU 4TH DEFENDANT

RULING

1. Before me are two oral applications, one by the Applicant praying that the document titled “Answers to Defendant’s Replying Affidavits” which he filed on 07/03/2024 be expunged. The other was by the Respondents that the said document be not expunged but that their Preliminary Objection to the said document and their Replying Affidavits in response to the “Answers” be deemed properly filed.
2. The background of these contending prayers is necessary at this stage. It is that on 04/01/2024 the Applicant moved the court vide an Application dated 03/01/2024 for temporary orders of injunction. My learned brother judge did not grant temporary orders but fixed the application for mention on 18/01/2024. On that date this Court was not satisfied as to service of the Application. It fixed it for mention on 24/01/2024 when the Applicant demonstrated, though with difficulty, that he had served the application. This Court granted interim orders but immediately thereafter the Respondents moved the Court to vacate the orders since they were not served.
3. The application for setting aside the interim orders was argued and disposed of vide a Ruling delivered on 16/02/2024. It was by the said Ruling that this Court gave various directions and timelines in readiness for the inter partes hearing of the Application dated 03/01/2024 for the parties comply and



the application be heard on 20/03/2024. It was the said Directions that the parties did not comply with hence the instant applications.

4. Against this backdrop, this matter was scheduled for inter partes hearing of an application dated 03/01/2024. When the parties appeared before me, learned counsel for the Applicant raised an issue that he had not been served with submissions in the matter hence the Respondents were not in compliance with the Directions issued on 16/02/2024. Further, that he had been served with a Preliminary Objection the previous day, and he had not prepared for it. He argued that he did not see the reason why the Respondents were that late in compliance.
5. On their part, the Respondents argued that the mistake was caused by the Applicant who served them with his submissions the previous night at 9:22 PM. Therefore, they could not comply with the directions on filing written submissions. Further, that instead, they were surprised to be served by the Applicant with a document which he titled, “Answers to the Defendants’ Replying Affidavits”. They contended that the document was filed without leave of the court; it was a strange one, and that in the circumstances they managed to file both a Further Affidavit in response to those “Answers” and the 2nd Defendant had filed a Preliminary Objection to the same.
6. The Respondents prayed that either the “answers” should be struck out, or in the alternative, if they were allowed to be on record then, their Replying Affidavits be deemed properly filed, the Preliminary Objection be taken up, and they be given time to file written submissions, within 14 days. When these issues were raised, learned counsel for the Applicant admitted that indeed he had filed the “Answers to the Defendants’ Replying Affidavits” and that he had not sought leave of the Court. He also admitted that had filed his written submissions and served them the previous night. For that reason, he prayed that the documents he filed without leave of the court be expunged from the record. He prayed further that subsequent to the grant of the prayer, he be given leave to file a fresh response to the replying affidavits since they raised new issues.
7. On their part, the Respondents argued that the Answers to the Replying Affidavits should be deemed properly filed and the documents they filed in response thereto, by way of Further Affidavits, do remain on the record and be deemed properly filed and part of the record. That as a result, the Court proceeds to deliver its Ruling on the application but they be given 14 days to file their submissions.

Analysis and Determination

8. I have carefully considered the Applications before me, the law, and the rival submissions by both the Applicant and the Respondents. I am of the view that only three issues are for determination in this instance, that is, whether the document referred to as “Answers to the Defendants’ Replying Affidavits” properly before Court. Second, is whether the Documents filed by the Respondents in response to the “Answer to the Defendants’ Replying Affidavits” are properly before Court, and third, who to bear the costs of these applications.
9. This court has, just like many others before, considered instances where documents are filed out of the time stipulated by law or order of court without leave of court being sought. It has not minced its words that such documents are a nullity. They can neither be legalized nor sanitized. Leave, whether through an application that is determined first or extension of the time by the consent of the parties without application to court as provided for under Order 51 Rule 7 of the *Civil Procedure Rules*, MUST be granted first before a document is filed. This Rule must, however, be read in context. It does not give a blanket extension of time even where time is inflexible. It only deals where extension of time is left to the discretion of the Court. Where the timelines are strictly stipulated, and also where it deals with institution of suits, claims or other matters I doubt that it would be applicable since the *Limitation of*



Actions Act or the laws that given the institution of such suits or other claims or petitions are clearly provided for in the parent Acts or Rules pursuant to the law regimes relevant thereto.

10. Thus, of the status of documents filed without leave of Court being sought first, the Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR held as follows:

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

11. Further, Order 51 Rule 14 of the Civil Procedure Rules, 2010, provides for the manner in which applications are to be handled. It provides that where an application has been served, it may be opposed in one of the following three documents or a combination thereof, and which together with any list of authorities should be filed at least three clear days before the date of hearing. The documents are, a Replying Affidavit, a statement of grounds of opposition or a Preliminary Objection.
12. Where an applicant is served with any of these documents, except a preliminary objection, he may with the leave of the court file a Supplementary Affidavit in answer thereto. As to whether a Respondent may file a further affidavit or not the Rules are silent. It is therefore a matter of discretion of the court depending on the interest of justice and the circumstances of the case.
13. In the instant case, the Applicant, upon being served with the Replying Affidavits of the Respondents, in terms of the directions of the Court as given on 16/02/2024 and in line with the Rules (see Section 33 of the Practice Directions of this Court, of 2014, Gazette Notice No. 5178 of 2014), he was required to file submissions and serve the Respondents, and the latter were also required to file their submissions and serve within timelines that were stipulated. Instead of the Applicant filing submissions, he resorted to filing what he titled “Answers to the Defendants Replying Affidavits”. He did this on 07/03/2024. They were actually an Affidavit or a deposition. In them, he deposed to a number of issues. The document was sworn before a Commissioner for Oaths in Nairobi.
14. This is the document that prompted the 4th and 2nd Respondents to file Further Affidavits sworn on 15/03/2024 and 14/03/2024 respectively, and the prayers by the 1st to 3rd Defendants jointly and 2nd Defendant separately for leave to file submissions after 14 days from the date of the instant ruling.



15. What is clear is that the Applicant did not comply with the directions of the Court. He went on a frolic of his own, actually. This is unacceptable. In *Tana Teachers' Cooperative and Credit Society Limited -v- Andriano Muchiri* [2018] eKLR the Court of Appeal stated:

“A party cannot egregiously fail or refuse to comply with directions of the court claiming that the said directions were salutary and not accompanied by any sanctions and hope to seek refuge in the overriding principle. That in our view amounts to gross abuse of court process. There must be an end to litigation and it behooves this Court to tell the appellant that its journey ends at this point.”

16. That said, guided by the decision in the *Salat case* (*supra*) it is clear that where a document required to be filed within a certain period is not filed within that time, or where a document that ought not to be filed with leave of the court is filed without it, it is a nullity: it is of no consequence and its place is nowhere than being expunged from the record.

17. In the instant case, the Applicant realized his mistake or error and decided to ‘repent’ of it. He himself prayed that this Court expunges his own document, the “Answers to the Defendants Replying Affidavits”, be expunged. Why would the other party compel him to live with the errors? This is akin to continuing to condemn a human being who has repented of his sins and it has been accepted of God.

18. In case a party wishes to withdraw a suit, a pleading, appeal or any other document he/she is of the opinion that they wish not to be part of the record or in court they should be permitted to do so or be unhindered in doing that, subject only to costs if the other side has incurred any in the course of objecting to it. So, it should be when a party requests that his/her document be expunged from the record. I hold that since the Respondents incurred the costs of appearing on the mention date and also filing other documents in response to the “Answer to the Defendants Replying Affidavits”, it is only reasonable that those costs be paid back to the Respondents. Thus, by way of comparison and which decision I am persuaded by, in *Pacis Insurance Company Ltd v Francis Njeru Njoka* [2018] eKLR the learned judge held:-

“No doubt the Defendant had incurred expenses by the time the suit was withdrawn and should have been notified of intention to withdraw and invited to appear before the registrar for issue of costs to be addressed.

A party having been caused by the other to participate in a suit, is entitled to costs incurred in the event the party instituting the suit decide to withdraw it unless parties agree otherwise or Court on exercising its discretion decide otherwise after giving the parties opportunity to submit on costs.”

19. In deciding over an application to withdraw an appeal filed in the Supreme Court, their Lordships, in *Lelli v Kenya Medical Training College & 2 others* (Petition 10 of 2021) [2021] KESC 21 (KLR) (Civ) (3 December 2021) (Ruling), held:-

“It therefore suffices to say that indeed a party’s liberty to withdraw a matter cannot be taken away and this court has to allow a party who has approached the court to withdraw such a matter, if he deems so fit to do. In effect, the application to withdraw the appeal stands allowed.”



20. In the *Lelli matter* (*supra*), their Lordships cited the decision of Ibrahim SCJ in Ochanda, *John O v Telkom Kenya Limited* Motion Application No 25 of 2014 [2015] eKLR where he held:

“I do hold the view that a prospective appellant is at liberty to withdrawal (sic) a Notice of appeal at any time before the Appeal has been lodged and any further steps taken....I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdrawal (sic) or discontinue proceedings or withdraw a notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any.”

21. In instant case, Plaintiff did not apply to withdraw his “Answer to the Defendants Replying Affidavit.” Rather he applied to have it expunged out of the record. The effect expunging, whose meaning is “removal completely from”, a document is basically the same as withdrawal: the document ceases to have any place in the use and part of the record. That being the case, this Court is of the humble view that just as a party has an unfettered right to withdraw, whether formally or informally, a document or proceedings subject only to the adherence of the procedure required depending on the stage of the proceedings or the law as the case may be, a party can also move the Court to have his document expunged from the record subject to costs. This right should not be taken away from them: as they freely approached the Court they should be let to freely leave if they so wish.
22. Thus, the document titled “Answer to the Defendants’ Replying Affidavit” is expunged from the record save for costs attendant to its being on the record. It therefore follows that any other documents filed by any party relation to the said ‘Answers’ except the preliminary objection to the ‘Answers’ too were filed without leave of this court and were also a nullity. With regard to the preliminary objection to those ‘answers’ and primary objection filed on 20/03/2024 but is dated 14/03/2024, it also goes without saying that once the ‘Answers’ have been expunged, the primary objection will not have any meaning. It too is expunged since it is overtaken by events.
23. This Court is only left to determine whether or not to grant leave to the Applicant to file a Supplementary Affidavit in response to the defendants’ Replying affidavits. On that, the Applicant argued that there were issues raised in the Defendant’s replying affidavits that were new or not addressed by the supporting affidavit. While he did not point out to the Court which issues required a response, it is in the interest of justice that he be given chance to answer to only NEW facts which were raised in the Replaying Affidavits. He should do this and serve within only seven (7) days of this Ruling. Once he does so, in order to avoid further delay, the Respondents too have leave to file Supplementary Affidavits to answer ONLY to any new facts raised by the Applicant. This be done only within seven (7) days of service of the Applicant’s. No party is bound to wait beyond the period given if the other has not acted within the period because the documents filed outside of the timelines will not be considered.
24. After the above steps are taken, the Applicant shall file written submissions and serve then within seven (7) days of service of the Supplementary Affidavit, or the lapse of the seven (7) days, whichever occurs earlier. Similarly, the Respondents shall file and serve their written submissions within seven (7) days of service of the lapse of the seven (7) days if they are not served with submissions, whichever occurs earlier.
25. The Application dated 03/01/2024 shall be heard on 15/05/2024.
26. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 12TH DAY OF APRIL, 2024.



HON. DR. *IUR* FRED NYAGAKA
JUDGE, ELC KITALE.

