Rimber v Unifresh Exotics (K) Limited (Environment & Land Case 427 of 2017) [2025] KEELC 495 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEELC 495 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 427 OF 2017

SM KIBUNJA, J

FEBRUARY 12, 2025

BETWEEN

DENNIS MATANO GONA RIMBER ..... PLAINTIFF

AND

UNIFRESH EXOTICS (K) LIMITED ..... DEFENDANT

RULING

[Notice Of Motion Dated 7th November 2024]

1. The defendant filed the application dated 7th November 2024, that is brought under Order 12 Rule 7 of the Civil Procedure Rules, Sections 3A, 63 (e) of the *Civil Procedure Act* and Article 159 (2) of *the Constitution* of Kenya, seeking for orders inter alia:

    a. "Spent.

    b. Spent.

    c. That the court be pleased to set aside the proceedings of this court held on 6th November 2024.

    d. That the court be pleased to set aside the exparte orders issue on 6th November 2024 which orders closed the defence case and slated the matter of submissions on 19th February 2025.

    e. That the court be pleased to reopen the defence case and direct that the case be heard on priority basis.

    f. That the costs of this application be in the cause."

    The application is premised on the ten (10) grounds on its face marked (a) to (j), and is supported by the affidavits of Moses Njuru and David Kulecho, both advocates, sworn on the 7th November 2024. It is the defendant's case that the matter was scheduled for further defence hearing on 6th November 2024, when Patricia Nguto was to attend court as summoned by court on 30th October 2024; that

they travelled to Ukunda on the 5th November 2024, and the following day Moses attended the virtual court session at 9.05am, when the matter was confirmed for hearing between 10.30 am to 11.00am; that the two deponents left Ukunda at 9.08am for Mombasa, a journey of about one hour through Dong Kundu by-pass, but their vehicle suffered a puncture at the said by-pass at about 9.35am; that as they did not have the plaintiff's counsel's or court assistant's number, they called Patricia Nguto, the witness, at around 10.35am and instructed her to inform the court that they had a puncture and would run late; that the puncture led to a delay of 40 minutes and the deponents arrived at court at 10.45am; that upon arriving at the court at 10.45am, they found their witness, Patricia Nguto, exiting from the witness box, after she had testified, and she informed them that she did not produce any of the exhibits, being letters dated 8th March 2023 and 17th February 2023, as she did not have them with her when testifying; that the delay in arriving in court was not deliberate, intentional or out of belligerence and/or disrespect of the strict timelines within which the court operates; that the court should set aside the proceedings of 6th November 2024, and reopen the defence case for justice and fairness; that the defence case has proceeded substantially having already called 2 witnesses and the defendant is able, willing and eager to defend itself and ought to be allowed a chance to be heard fully in its defence.

2. The application is opposed by the plaintiff, through the replying affidavit of Rose Ngina Musyoka, advocate, sworn on 14th November 2024, in which she inter alia deposed that on 6th November 2024, both herself and the defendant's counsel appeared virtually in court and confirmed their preparedness to proceed with the hearing; that the defendant's counsel informed the court that one witness was in court and the other would testify virtually and the court fixed the matter for hearing at 10.30am; that it is important to take notice of the fact that the defence counsel had vide a letter dated 8th July 2024 to her firm, indicated that Amos Suge, who was to substitute Gibson Kabue as the primary witness, had left the Defendant's employment and, as a result, could not be secured to testify, and it was therefore unclear who the second witness after Patricia, was to be; that there is no need to call another witness as the expert witnesses for the Defence have already testified; that on the material day, she was present in court at 10:30 a.m. as was defendant's witness, Patricia Ngutu, but the defence counsel was nowhere to be seen; that she pleaded with the court to allow additional time for the defence counsel to arrive; that the defence witness called her counsel, who reportedly insisted he was within the court premises, but he did not appear; that the court then directed the hearing to proceed, and Patricia was heard and cross-examined; that the defence counsel's action of claiming to have been delayed due to a tire burst, while earlier he had indicated through Patricia that he was within the court premises, and only to arrive at 10:45 am, well past the allocated hearing time of 10:30 am, demonstrated his lack of urgency to proceed with this matter; that the defence has been delaying proceedings by continuously requesting for adjournments and leniency from the court, resulting in an undue delay of justice; that the court has been remarkably lenient with the defence, allowing multiple extensions of time and adjournments to accommodate additional expert witnesses; that the defence has repeatedly failed to present their witnesses or necessary exhibits promptly, even though the hearing had already commenced; that this application is another instance of undue laxity, on the part of the defence, further delaying the matter to the Plaintiff's prejudice, who has a right to a fair and expeditious trial, as envisaged under Article 159(2) of *the Constitution* of Kenya; that the reopening of the Defence case was a further cause of delay and inconvenience to the Plaintiff, who has consistently adhered to court timelines and cooperated with the judicial process; that allowing the application would result in grave prejudice to the Plaintiff, who has been ready to proceed and conclude this matter and that the defence has already had ample opportunity to present their case; that any further delay is unjustified, and the application should be disallowed with costs to the plaintiff.

3. The learned counsel for the parties made their oral submissions for and against the application along their respective depositions on 3rd December 2024, that the court has considered.

4. The issues for determinations in the notice of motion are as follows:

   a. Whether the defendant has made a reasonable case for setting aside of the proceedings of 6th November 2024 and reopening of the defence case.

   b. Who pays the costs?

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, oral submissions by the learned counsel for both parties, the court record and come to the following findings:

   a. The court record confirms that this suit was commenced through the plaint dated 21st November 2017 and filed on the 22nd November 2017. The hearing started on 1st February 2023, and when the matter was called during the 9.00am call-over, Mr. Kulecho advocate for the defendant asked the court to start the hearing at 11.00am as his colleague, Mr. Njuru, was travelling from Nairobi. The matter was called again at 11.01a.m. when Mr. Kulecho informed the court that Mr. Njuru had not arrived, as he left JKIA at 10.45am via Lamu Airport and would arrive in Mombasa at 1.00 p.m. He further informed the court that as Mr. Njuru was the one with their case file, he had consulted the plaintiff's counsel and agreed they start with the expert witnesses. PW1 testified and was cross-examined by Mr Kulecho. That morning session ended at about 1.50pm and the court directed further hearing to proceed at 3.00pm. It is at that point that Mr. Njuru arrived in court, and he apologized for being late. The court resumed the afternoon court session at 3.00p.m. when PW2 testified, and was cross-examined by Mr Njuru. The hearing was then adjourned to 20th April 2023 at 10.30a.m. On 20th April 2023, the matter was called during the call over, and only the counsel for the plaintiff was present. The court directed that the hearing start at 10.30am. When the matter was called at 11.20am for hearing, the counsel for the defendant moved the court to admit documents they filed on 17th April 11.20a.m, but the application was opposed by counsel for the plaintiff. Though the court struck out the documents for being filed without leave, it granted the defendant leave to file and serve a further list of documents, with corresponding leave to the plaintiff, in the interest of justice. The hearing then proceeded and the plaintiff closed their case. The defence case began with DW1 and DW2 testifying and due to time, further hearing was adjourned to 28th September 2023. The hearing of 28th September 2023 was rescheduled to 18th April 2024, then 11th July 2024 and finally 6th November 2024.

   b. The record further confirms that both counsel for the parties were present during the virtual call over on 6th November 2024, when the hearing was confirmed to start at 10.30am, but when the matter was called at 10.33am, the defendant and their counsel were absent. One Patricia Nguti, a defence witness, informed the court that she had called the counsel on phone and he had requested that the court wait for him for five minutes. The court proceeded with the hearing, with Patricia Nguti testifying as DW3, and finished at 10.45am. The defendant's counsel had not arrived, and the court ordered the defence case closed, and proceeded to issue directions on filing of submissions.

   c. The defendant is through their application, asking the court to set aside the proceedings of 6th November 2024, which is the testimony of their witness DW3, as well as the orders of the

court marking their case as closed. The application is anchored on Order 12 Rule 7 of the Civil Procedure Rules, which provides that:

> " "Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."
>
> The other provisions invoked are sections 3A and 63 (e) of *Civil Procedure Act* and Article 159 (2) of *the Constitution*. Section 3A restates the inherent powers of the court to make orders necessary for the ends of justice, while section 63 (e) provides for supplemental proceedings, specifically interlocutory orders that appear just and convenient. Article 159 (2) provides for the principles guiding the courts and tribunals in the exercise of judicial authority.

d. The defendant's counsel claims to have arrived in court at 10.45a.m. just as his witness had finished giving evidence, and now seeks for that proceedings to be set aside, defence hearing reopened for further hearing. While faced with a similar application the court in Susan Wavinya Mutavi versus Isaac Njoroge & Nairobi City County Government [2020] KEELC 8 (KLR) held that;

> " Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See (i) Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others (2018) eKLR; (ii) Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another (2015) eKLR; (iii) Ladd v Mashall (1954) 3 All ER 745); (iv) Reid v Brett [2005] VSC 18; (v) Smith v New South Wales Bar Association (1992) 176 CLR 256; and (vi) EB v CT (No 2) [2008] QSC 306."
>
> The reasons fronted by the defence on why they did not attend the court on time was that the counsel was in Ukunda during the call-over, and on the way to Mombasa for the physical hearing, his vehicle got a puncture. The counsel had not disclosed to the court during call-over that he was at Ukunda, for the court to consider when allocating the time for commencement.

e. A quick search on Google Maps shows the distance between Ukunda and Mombasa is around 60kms, and it takes about 1 hour 30 minutes by vehicle to get to the courtroom. Counsel contended that along the Dongo Kundu Bypass they sustained a puncture and could not make it to court in time, and arrived at 10.45a.m. when the witness had already testified. It is clear

from these facts that the advocate was well aware of the risk he took by choosing to drive from Ukunda to Mombasa Law Courts, on the morning of the hearing, and within such limited time.

f. From the flight itinerary adduced in court, the counsel arrived in Ukunda on 5th November 2024 at 4.00 p.m. If indeed he was determined to arrive in court on time for his hearing on 6th November 2024, he would have made an early morning drive to Mombasa and ensured he was within the court premises at least by the time set for the start of the hearing. The 6th November 2024 was not the first time the defence counsel had delayed in coming to court. On 1st February 2023 at the start of the plaintiff's case, Mr. Kulecho advocate had informed the court that Mr. Njuru advocate had left JKIA at 10.45a.m. for Mombasa through Lamu Airport, and would be in court at 1.00p.m. While there are no hard rules upon which the court ought to exercise its discretion, the same must be exercised judiciously, with due regards to the facts of each case and for the ends of justice.

g. While exercising my discretion, I take into consideration the conduct of the parties and their counsel throughout these proceedings. The defence counsel's conduct has been less than satisfying as they have occasioned multiple delays, contrary to the provisions of section 1A (3) of the *Civil Procedure Act* chapter 21 of the Laws of Kenya, that obligates the parties and their counsel to assist the court to further its overriding objectives under the Act, by participating in the processes of the court, complying with the directions and orders of the court. This matter was instituted vide a plaint filed on 22nd November 2017, was confirmed ready for hearing on 20th September 2022, the plaintiff's case was heard and closed on 20th April 2023. This being a fairly old case, and therefore falling in the category of backlog, the court is obligated by Sections 1A & 1B of the *Civil Procedure Act*, to further the overriding objective of the Act, which includes the just and expeditious determination of disputes before it. Further to that, the court has inherent powers under Section 3A of the *Civil Procedure Act* to make orders that are necessary for the ends of justice or to prevent abuse of the process of the court. In the case of Catherine Njeri Angote (suing as the Administrator of the Estate of Samuel Angote Ababu (Deceased) versus Lucy Wangari Ngugi & another [2017] eKLR, it was held that;

> " Sections 1A and 1B of the *Civil Procedure Act* deal with the issue of overriding object of the Act which is to facilitate the just, expeditious proportionate and affordable resolution of disputes. Further, the Court has a duty to further the said overriding objective of this Act. The Court is called to further the said overriding objective by ensuring that disputes are determined in a just manner to all the parties, efficient and expeditious disposal of the matter and timely disposal of the proceedings. How does the Court ensures that the above objectives are achieved? The Court is supposed to manage its proceedings and ensure that parties are not given leeways to cause unnecessary delay in timely disposals of proceedings before it. Further that the proceedings of matter in court should be controlled and regulated by the Court but not the parties."

h. The reality of litigation is that counsel come from far and wide, to access justice for their litigants, and the virtual courts have eased up access to courts from wherever a party or counsel could be at the time their matter is called. The virtual court sessions have saved time and expenses that would otherwise have been spent in travelling to the court. However, parties and or counsel with matters that are confirmed for physical hearing during the virtual call-over should not delay the hearing of their cases and waste the other counsel's/party's and court's

time, by failing to arrive in court by the scheduled time. In this case, it was for sure unfair for the defendant's counsel to have participated in the virtual call-over while reportedly at Ukunda, and when the matter is confirmed for hearing at 10.30am, he failed to be present, while the plaintiff's counsel, who had reportedly travelled from Nairobi for the hearing, was in court in time. The defendant's counsel had not disclosed during the virtual call-over that he was at Ukunda, or requested for more time to travel to the court. I find their conduct to have been inconsiderate given that the court had set aside that day to hear the defence to conclusion, and possibly thereafter set the matter down for judgement. In the case of Elishaphan Omolo Nyasita versus John Ojowi Onuko [2015] eKLR, the court had this to say;

> "While it is not something to be encouraged it is a reality that the court cannot ignore. The court nonetheless would like to emphasize that parties should not take scheduling of their cases for hearing for granted and parties must be ready to proceed with the hearing of their cases as scheduled noting that cases are scheduled for hearing on the basis of availability of dates and once allocated on a particular date or time that denies and/or precludes the court the opportunity of allocating another case on the allocated date or time. Given the backlog of pending cases it is undesireable for a party to take a hearing date of a case and fail to proceed with the hearing especially where the court has confirmed and allocated time for the hearing of the case."

h. The defendant's reliance on Article 159 (2) of *the Constitution* is merely an attempt to cover up for their failure to follow the court's directions on the time for commencement of the defence hearing. The Court of Appeal in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR held that;

> "I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."
>
> I need not say more other than observe that what befell the defendant was out of its own fault, and cannot place blame on the other party or court. I find that the defence and their counsel failed to assist the court further with the overriding objective to ensure that the court attains just determination of this suit, which is seven years old, in an efficient, timely and cost-effective manner, by failing to be in court at the time set in the presence. Allowing the application will be prejudicial to the plaintiff, and

definitely, will be tantamount to encouraging abuse of the court process. As such, I find no merit in the defendant's application dated 7th November 2024.

h. In terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the events unless where for good cause otherwise ordered, the plaintiff is awarded costs.

6. Flowing from the foregoing findings on the defendant's notice of motion dated the 7th November 2024, the court finds and orders as follows:

a. That the application has no merit and is hereby dismissed.

b. That the defendant will pay the plaintiff's costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mr Nganyi For Katasi

Defendant: Mr Njiru

Shitemi – Court Assistant.