



Ethics and Anti Corruption Commission v Kongo & 2 others (Environment & Land Case E315 of 2021) [2023] KEELC 209 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E315 OF 2021
MD MWANGI, J
JANUARY 24, 2023**

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION PLAINTIFF

AND

HABIB OMAR KONGO ALIAS DANIEL KONGO 1ST DEFENDANT

KURIA GATHONI 2ND DEFENDANT

ROSE WAMBUI KURIA 3RD DEFENDANT

RULING

(In respect of the notice of motion application dated November 21, 2022 brought under the provisions of sections 1A, 1B and 3B of the [Civil Procedure Act](#), Order 51 rules 1, 3 and 5 of the [Civil Procedure Rules](#) and all enabling provisions of the law)

Background

1. The application under consideration is the notice of motion application by the 2nd defendant/applicant seeking the setting aside of the court's orders of October 18, 2022 dismissing his application dated September 12, 2022 for non-attendance. The 2nd defendant also prays that the said application be reinstated for hearing on its merits.
2. The 2nd defendant's application is premised on the grounds that the 2nd defendant was not aware that the matter was scheduled for hearing of the application dated September 12, 2022 on the September 18, 2022 since his advocate was not in court when the said date was given.
3. The 2nd defendant pleads that he is still interested in prosecuting the said application dated September 12, 2022. It is therefore in the interests of justice and fair hearing that he be granted the orders sought.



4. The application is further supported by the affidavit of James Ndungu Njuguna sworn on November 21, 2022 which expounds the grounds on the face of the application.
5. I note that the application is opposed by the plaintiff by way of grounds of opposition dated December 6, 2022. The plaintiff terms the 2nd defendant's application frivolous, vexatious and an abuse of the process of court intended only to delay the hearing of the case.
6. The plaintiff further points out that the 2nd defendant has filed yet another application in the Court of Appeal in Civil Appeal No E437 of 2022 dated November 21, 2022 seeking stay of execution of the ruling delivered on May 24, 2022 and stay of proceedings in the substantive suit pending the hearing of an intended appeal (against the said ruling of this court delivered on May 24, 2022).
7. The plaintiff further avers that this court granted conditional interlocutory orders which may be threatened by any delays in the hearing of the case.
8. None of the other parties has responded to the application.

Court's directions.

9. The courts directions were that the application be canvassed by way of written submissions. The 2nd defendant/applicant filed his submissions dated December 19, 2022.

Issues for determination.

10. The sole issue for determination is whether the 2nd defendant/applicant has made a case for the setting aside of the orders granted on October 18, 2022.

Analysis and Determination.

11. I have perused the record of the court including the e-filing portal and found out that the 2nd defendant herein filed his application dated September 12, 2022 via the e-filing portal on Friday, September 30, 2022 at 11.58 am. The said application was filed under certificate of urgency which was signed by James Ndungu Njuguna, an Advocate of the High Court of Kenya who certified the application as urgent and fit to be heard at the earliest opportunity for the reasons enumerated in the certificate.
12. As is the practice of this court in handling matters under certificate of urgency, the court dealt with the particular certificate of urgency online on Monday, October 3, 2022. The court made an order that: -

“The application be served for inter partes hearing on October 18, 2022.”
13. Apparently, the order still appears on the court's e-portal as a draft; meaning that it was not published as should have happened after the court issued it. No wonder, the 2nd defendant/applicant was not aware of the date fixed by the court. None of the other parties too was notified of the date.
14. The court record shows that on the October 18, 2022, none of the parties appeared before the court.
15. Obviously, the applicant is therefore not to blame in any way for the malfunction of the court's electronic system. To remedy the situation, I will resort to the court's inherent powers in order to address the flaw and prevent a miscarriage of justice.
16. The Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Benzene Holdings Ltd t/a Wyco Paints* (2016) eKLR described the inherent powers of the court as a 'residual intrinsic authority' which the court may resort to in order to put right that which would otherwise be an injustice.



17. Accordingly, exercising the court's inherent powers, I unconditionally allow the 2nd defendant's application dated November 21, 2022 and set aside the orders of this court issued on October 18, 2022 dismissing the 2nd defendant's application dated September 12, 2022 for non-attendance. Consequently, the application is reinstated for hearing on its merits.

18. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Murithi for the 2nd Defendant/Applicant.

Ms. Faith Ng'ethe for the Plaintiff/Respondent.

Court Assistant- Yvette.

M.D. MWANGI

JUDGE

