



**Mathenge & another v Belle Holdings Limited; Balala and Abed
Advocates (Applicant) (Environment and Land Miscellaneous Application
54 of 2022) [2023] KEELC 29 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 29 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 54 OF 2022
SM KIBUNJA, J
JANUARY 18, 2023**

BETWEEN

DOMINIC MUREITHI MATHENGE 1ST PLAINTIFF

PRISCILLA WANGECI NJOROGE 2ND PLAINTIFF

AND

BELLE HOLDINGS LIMITED RESPONDENT

AND

BALALA AND ABED ADVOCATES APPLICANT

RULING

1. M/s P. A. Osino and Company Advocates for the 3rd respondent in the main suit moved the court through the chamber summons dated the November 17, 2022 seeking for orders that;
 - a. An interim stay of execution and or temporary suspension/revocation of the exparte final orders given on 9th November 2022 pending the hearing and determination of the application herein.
 - b. Temporary suspension and or temporary injunction restraining the applicant herein from continuing to execute the exparte final orders given on 9th November 2022 pending the hearing and determination of this application.
 - c. The court be pleased to review the exparte final orders given on the November 9, 2022 by revoking, discharging and or setting aside the said orders.

The application is based on the three (3) grounds on its face marked (1) to (3), among them that the 3rd respondent in the main suit is aggrieved with the orders of November 9, 2022, as their counsel had not



been served with a hearing notice; that the order that the two applications be heard together and filing of supplementary affidavit are intended to defeat the requirement for security to be tendered; that the order extending the interim order was without basis as the plaintiffs had failed to disclose that the bill had been taxed at kshs.572,708 to be paid to the 1st respondent in the main suit; that the 1st respondent in the main suit is being kept away from the costs taxed and their constitutional rights under articles 25, 27, 40 and 50 of *the Constitution* of Kenya 2010 have been infringed. The application is supported by the affidavit sworn by Pauline Awino Osino, who at paragraph 1 described herself as advocate “of the 1st respondent in the main suit” more or less reiterating the foregoing grounds.

2. The application is opposed by the plaintiffs through the replying affidavit sworn by Hadassah Rimunya, advocate for the plaintiffs, deposing to the following among others; that the plaintiffs filed a reference dated the November 11, 2022 seeking to set aside the taxing master’s ruling of July 20, 2022 on the 3rd defendant’s bill of costs; that a 30 days stay of execution was granted and the application set down for hearing on the October 27, 2022; the court then proceeded on recess, and the plaintiffs filed the application dated 14th September 2022 as the initial 30 days stay was lapsing; that interim order of stay was granted and the application was set for hearing on October 5, 2022, and subsequently on October 24, 2022, but the court was not sitting on both dates; that on both occasions the court notified the parties on the subsequent hearing dates, including the 9th November 2022, through emails; that counsel for the plaintiffs attended the hearing on the November 9, 2022 and addressed the court on the two pending applications with a similar prayer; that the order that the two applications be heard together was not meant to deny the 3rd respondent’s rights, but for expediency; that the order of 9th November 2022 was extracted, signed on the 1 November 5, 2022 and served on the 3rd respondent on the November 16, 2022; that the 3rd respondent has not been discriminated or denied audience, as leave to file response and submissions had been granted; that the filing of the instant application will cause more delay in the hearing and determination of the reference application dated 11th August 2022; and that the orders of November 9, 2022 should be maintained.
3. The learned counsel for Applicant and the Plaintiffs made their oral rival submissions on the November 24, 2022. For the Applicant, counsel submitted that the court made an order to have the two pending applications heard together when the original record had not been availed. That the stay order sought is for an amount beyond what the Deputy Registrar had awarded. That the applicant is not happy with the order that the two applications be heard together, filing of further affidavit and extension of the interim order. The counsel for the plaintiffs submitted that the hearing date of 9th November 2022 had been fixed and communicated through email by the court, for the court was not sitting on the scheduled date. That the email by the court indicated it had been copied to @Balala advocates which the counsel took to be the advocate for the Applicant.
4. The following are the issues for the court’s determinations;
 - a. Whether the applicant had been served with notice for November 9, 2022.
 - b. Whether the applicant has made a reasonable case for review of the order of November 9, 2022.
 - c. Who pays the costs.
5. The court has after carefully considering the grounds on the chamber summons, affidavit evidence, rival oral submissions, and the record come to the following conclusions;
 - a. That upon the application dated the August 11, 2022 being filed on the August 17, 2022, the court on the 20th September 2022 certified it urgent. The court also fixed it for inter partes hearing before this court on the October 5, 2022 and issued temporary stay of execution till that



date. The court has taken note that it has not been disputed, and indeed the emails attached to the replying affidavit confirms that the date of 9th November 2022 when the orders complained of were issued, had been fixed and communicated by the court to the counsel on record for the parties herein.

- b. That the heading on the chamber summons dated the August 11, 2022, notice of motion dated the September 14, 2022 and the instant chamber summons dated the November 17, 2022 carries the parties as follows;

“Dominic Mureithi Mathenge 1ST Plaintiff/applicant

Priscilla Wangeci Njoroge 2ND Plaintiff/applicant

versus

Belle Holdings Limiteddefendant/respondent

That the two applications above indicated service was to be effected upon “P. A. Osino & Co. Advocates, NSSF Building, 10th Floor, Nkrumah Road. P. O. Box 90390-80100, Mombasa. Paulineawino953@gmail.com”.

- c. The replying affidavit of 23rd November 2022 at the heading carries the parties as follows;

“1. DOminicmureithi Mathenge

2.

Priscilla Wangeci Njorogeplaintiffs/applicants

versus

Belle Holdings Limited 1St Defendant/respondent

Wireless Cell Connect

Limited 2Nd Defendant/respondent

Balala and Abed Advocates ... 3Rd Defendant/respondent.

That vide the notice of appointment dated the 26th September 2022, M/s P. A. Osino and Company Advocates came on record for “BALALA AND ABED ADVOCATES the 3rd Respondent in the main suit ELC NO 74 OF 2021”, and gave their email address as “paulineawino953@gmail.com”.

- d. The email of 28th October 2022 attached to the replying affidavit, from the court communicating the hearing notice of 9th November 2022 for the application dated the 14th September 2022 was addressed to “Balala & Abed Advocates” among others, but does not show that it was copied or addressed to the email of counsel, Paulineawino953@gmail.com. That while it is true that the notice was not sent to the advocate for the 3rd defendant/respondent, the party, M/s Balala & Abed Advocates, who was among those the email was copied to, has not disputed receipt of the same. The party was under duty to notify their duly appointed advocates of the hearing date communicated to them by the court. There is therefore no reasonable explanation tendered by counsel for the 3rd defendant/respondent why they did not attend court and participate in the proceedings of 9th November 2022, when the orders complained of were issued.



- e. The orders issued on the 9th November 2022 extending the interim stay of execution order, granting leave to file further affidavit, and directing that the two pending applications be dealt with together through written submissions did not in any way prejudice any of the defendants/respondents, as leave to file responses to the further affidavit upon service and submissions had been given in the same order.
- f. That from the face of the application dated the 17th November 2022, the 3rd Respondent in the main suit is the applicant in the chamber summons. The copy of the plaintiffs' written submissions attached to the supporting affidavit has Balala and Abed Advocates as the 3rd defendant/respondent in Mombasa ELC NO. 74 of 2021, which has been referred to as the main suit. That is the party M/s P. A. Osino & Co. Advocates came on record for through the notice of appointment dated the 26th September 2022 referred to earlier in (c) above, and has been added in the heading as the Applicant.
- g. Though both counsel did not address the issue, the court is not able to confirm whether the counsel on record for the 3rd defendant/respondent in the main suit, who is the applicant herein, is also on record for the defendant/respondent as no notice of appointment of advocates for them has been filed to date. The parties will probably address the matter during the hearing of the pending applications. As of now, it suffices to note that contrary to what the Applicant seem to believe, there was no final orders issued on the 9th November 2022, as all directions were to culminate in the hearing of the two pending applications. The court finds the Applicant has not made a reasonable case for review of the said orders, and the chamber summons dated the 17th November 2022 has no merits.
- h. That in view of the finding in (e) above, the plaintiffs are entitled to costs of the application as against the applicant, under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
- i. That in view of the foregoing, the court finds and orders as follows;
 - a. That the applicant's chamber summons dated the November 17, 2022 has no merit and is hereby dismissed.
 - b. The Plaintiffs are awarded the costs.
 - c. That so as to fast track the hearing and determination of the pending applications, any party who may not have complied with the directions/orders of November 9, 2022, is hereby granted seven (7) days from today to do so, and corresponding leave granted on the party served.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 18th DAY OF JANUARY 2023

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

APPLICANT: Absent

PLAINTIFFS/APPLICANTS : Absent

DEFENDANT/RESPONDENT: Absent



COUNSEL : Mr. Obonyo for Osino for 3rd Defendant/Applicant and M/s Rumunya for Plaintiff/
Respondent

WILSON .. COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

