



Kochale & 5 others (Suing on behalf of the Residents of Laisamis Constituency and Karare Ward Marsabit County) v Lake Turkana Wind Power Ltd & 4 others; Lesianntam & 5 others (Interested Parties) (Environment & Land Case 163 of 2014) [2023] KEELC 18 (KLR) (16 January 2023) (Ruling)

Neutral citation: [2023] KEELC 18 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 163 OF 2014
PM NJOROGE, JG KEMEI & YM ANGIMA, JJ
JANUARY 16, 2023**

BETWEEN

**MOHAMUD ILTARAKWA KOCHALE 1ST PLAINTIFF
KOCHALE SOMO CHALE 2ND PLAINTIFF
ISSA JITEWE GAMBARE 3RD PLAINTIFF
DAVID TOMASOT ARAKHOLE 4TH PLAINTIFF
WILLIAM LENGOYIAP 5TH PLAINTIFF
SEKOTEY SEYE 6TH PLAINTIFF
SUING ON BEHALF OF THE RESIDENTS OF LAISAMIS CONSTITUENCY
AND KARARE WARD MARSABIT COUNTY**

AND

**LAKE TURKANA WIND POWER LTD 1ST DEFENDANT
MARSABIT COUNTY GOVERNMENT 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT
THE NATIONAL LAND COMMISSION 5TH DEFENDANT**

AND

**AARON ILTELE LESIANNTAM INTERESTED PARTY
HENRY PARASIAN SAKALPO INTERESTED PARTY
STEPHEN NAKENO INTERESTED PARTY**



JOB LMALSIAN LENGOYA INTERESTED PARTY
DAIR LENTIPAN INTERESTED PARTY
GITSON ENERGY LIMITED INTERESTED PARTY

RULING

1. By a notice of motion dated December 13, 2022 based upon article 50(1) of the Constitution of Kenya 2010, sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), section 13(1) & (7) of the Environment and Land Court Act, 2011, direction no 1 of the Environment and Land Court Practice Directions 2014, and all enabling provisions of the law, the 1st defendant sought the following orders;
 - a. Spent
 - b. Spent
 - c. That this honourable court be pleased to issue such orders and/or directions as may be requisite having regard to, inter alia, the expiry on or about January 19, 2023 of the three (3) month extension of time that the court had granted on July 26, 2022.
 - d. That the honourable court be pleased to strike out and/or expunge from the court record the following documents filed by the plaintiffs;
 - i. A replying affidavit sworn by the 2nd plaintiff, Kochale Somo Jale, on October 3, 2022
 - ii. Grounds of opposition dated October 3, 2022.
 - iii. A preliminary objection dated November 22, 2022 and an affidavit in support of the preliminary objection sworn by the 2nd plaintiff on November 22, 2022.
 - iv. Written submissions dated November 23, 2022.
 - e. That costs of the application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Phillipus Leferink on December 13, 2022 and the exhibits thereto. It was contended that although the court had on July 25, 2022 given timelines for the filing and service of various documents by the parties, the plaintiffs had filed and served their documents grossly out of time and without leave of court. It was further contended that there was no explanation tendered for the lengthy delay on the part of the plaintiffs in filing and serving their documents. It was further contended that the plaintiffs' action was intended to undermine the just, expeditious, proportionate and affordable resolution of the 1st defendant's pending application for review. The 1st defendant therefore contended that it would be just to strike out or expunge from the record the plaintiffs' said documents which were filed out of time and without leave of court.

B. The Plaintiffs' Response

3. The plaintiffs filed a replying affidavit sworn by 2nd plaintiff, Kochale Somo Jale, on December 23, 2022 in opposition to the said application on several grounds. Firstly, it was contended that the plaintiffs had on October 17, 2022 orally sought and obtained leave of court to file their documents out of time. Secondly, that even if leave had not been obtained the 1st defendant had not demonstrated what prejudice, if any, it shall suffer as a result of such late filing and service. Thirdly, that administration of



justice required that all disputes should be heard and determined on merit. Fourthly, the court ought to invoke article 159 of the [Constitution of Kenya 2010](#) and admit the impugned documents out of time.

C. Directions On Submissions

4. When the application came up for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 1st defendant filed its written submissions on the application on December 29, 2022 whereas the plaintiffs filed theirs on January 5, 2023. There is, however, no indication on record of the rest of the parties having filed any submissions on the application.

D. The 1st Defendant's Submissions

5. The 1st defendant submitted that the plaintiffs were bound by the directions on the filing and service of the documents given on July 25, 2022 and by filing their documents several months out of time they were in violation of the court orders made on July 25, 2022. It was submitted that the plaintiffs did not obtain leave of court to file their documents out of time and that no explanation was offered for the undue delay in filing and serving their documents. It was further submitted that court orders are never made in vain and that all concerned parties were bound to observe and abide by such orders. The 1st defendant relied upon the case of [Neeraj Jayatilaiya Kalaiya v Duncan Cheruiyot & 5 others](#) (Environment and Land Case Civil Suit E394 of 2021 (2022) KEELC 2269(KLR) 23 in support of the prayer for striking out.
6. The 1st defendant further submitted that it shall suffer great prejudice by the late filing since it has been deprived of the opportunity of responding to the various issues raised in the plaintiffs' documents by way of rebuttal.
7. It was the 1st defendant's submission that the plaintiffs had not satisfied the principles for extension of time since no explanation for the lengthy delay had been tendered. The 1st defendant cited the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR in that regard. The court was consequently urged to grant the orders sought in the application.

E. The Plaintiffs' Submissions

8. The plaintiffs, on the other hand, submitted that the impugned documents although filed out of time, were filed with leave of court which was sought and obtained on October 17, 2022. It was further contended that the lengthy delay was occasioned by a communication breakdown between the plaintiffs and its advocates. In particular, it was contended that the plaintiffs lacked financial and economic means to properly instruct their advocates hence the delay.
9. The plaintiffs further submitted that the court had a wide discretion to grant an extension of time should it find that the impugned documents were filed out of time. The plaintiffs relied upon the following cases of; [Trust Bank Limited v Amalo Company Ltd](#) [2002] eKLR, [Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others](#) [2017] eKLR, and [Thomas Sbering v Nereah Micabel Said & 4 others](#) [2022] eKLR.



F. The Issues For Determination

10. The court has considered the 1st defendants notice of motion dated December 13, 2022, the plaintiffs' replying affidavit sworn on December 23, 2022 as well as the material on record. The court is of the opinion that the following issues arise for determination herein;
 - a. Whether the impugned documents were filed out of time.
 - b. Whether the plaintiffs have made out a case for extension of time.
 - c. Whether the 1st defendant's prayer for striking out the impugned documents should be granted.
 - d. What orders or directions should be given in view of the imminent expiry of the last extension of time granted to the defendants.

G. Analysis And Determination

- (a) Whether the impugned documents were filed out of time
11. The court has considered the material and submissions on record on this issue. Although the 1st defendant contended that the plaintiffs' documents were filed out of time and without leave of court, the plaintiffs contended that they orally sought and obtained leave to file out of time on October 17, 2022. The court has checked the record of proceedings recorded before Hon Justice P M Njoroge (PJ) before whom the matter was listed on October 17, 2022. There is no indication of any leave having been sought or obtained by the plaintiffs' advocates. in fact, the record shows that the plaintiffs' advocates simply apologized for delay. The court is thus satisfied that the impugned documents were filed out of time and without leave of court.
 - (b) Whether the plaintiffs have made out a case for an extension of time
12. The court has noted that the plaintiffs did not file any application for extension of time but they chose to ask for an extension in case the court found that their documents were filed out of time. The court has further noted that the plaintiffs did not render any explanation at all for the delay in their replying affidavit. It is their advocates on record who attempted to offer an explanation from the bar through their written submissions.
13. There is no doubt that the court has a wide discretion to grant an extension of time and to admit documents filed out of time. However, judicial discretion must be exercised judicially and upon reason. It cannot be exercised arbitrarily or capriciously. It cannot be exercised upon mere sympathy. It must be based upon sound reasons.
14. As indicated before, the plaintiffs did not offer any explanation at all in their replying affidavit save to state that lateness was not a serious default and that it could be excused under article 159 (2) (d) of the *Constitution*. Although their advocates attempted to offer an explanation for the delay in their written submissions, the same was merely a lame excuse. It is incredible that the plaintiffs were able to communicate well with their advocates during prosecution of the suit and only became inaccessible after delivery of judgment. It cannot be the case that Marsabit county became only remote and inaccessible after delivery of judgment in the plaintiffs' favour.
15. The court is also unable to accept the explanation offered from the bar that the plaintiffs were facing economic and financial constraints hence could not sufficiently instruct their advocates to comply with the court's directions made on July 25, 2022. The plaintiffs did not in their replying affidavit make



- such an allegation. They did not file any affidavit of means to demonstrate their inability to pay their advocates to continue handling the matter on their behalf. It was also not explained why the plaintiffs did not get into an arrangement with their advocates so that they could pay them later. As far as the court is aware, there is no law in Kenya requiring professional fee to be paid in advance.
16. The court is of the opinion that where there is delay in complying with directions issued by a court the court may excuse the delay where there is a reasonable explanation for the delay. The court will consider such factors as the length of the delay, the explanation for the delay, the degree of prejudice the adverse party may suffer, the effect of the delay on expeditious disposal of matters among other reasons. See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission* (supra). The court has noted that in the cases cited by the plaintiffs the delay was not so prolonged and inordinate and there was at least some explanation tendered for the delay unlike in the instant case where the plaintiffs did not offer any or any reasonable explanation.
 17. For instance, in the Trust Bank Limited Case, the delay was for a few days only and the bank's advocates had a reasonable explanation for it. In the Thomas Shering Case, the objection taken was to the production of some of the plaintiff's documents at the trial on the basis, inter alia, that the relevant list of documents had been filed out of time. That case concerned a full trial of the suit hence its circumstances are different from those of the instant matter. Finally, in the presidential election petition of Raila Amolo Odinga & another (supra) the petitioners' additional documents were admitted out of time for good reasons which were tendered before the court. It is a matter of public knowledge that there are very tight and strict timelines for filing and determination of presidential election petitions hence it is possible for a party to come across crucial information after the initial timelines.
 18. The court has considered the issue of possible prejudice which was raised by the 1st defendant. It was submitted that should the plaintiffs documents be allowed out of time then it shall be prejudiced in the sense that it shall have no opportunity to respond to and possibly rebut the plaintiffs' allegations contained therein. The court agrees with the 1st defendant's contention that it shall suffer prejudice should the plaintiffs documents be admitted so late in the day. The plaintiffs were given sufficient time to file their responses and documents and they squandered that opportunity. They should not be allowed to prejudice the 1st defendant on account of their own default. In the premises, the court is not inclined to grant the plaintiffs an extension of time.
 - (c) Whether the 1st defendant's prayer for striking out the impugned documents should be granted
 19. The court has already found and held that the plaintiffs' documents were filed out of time. The court has also found that they were filed without leave of court being obtained for that purpose. The court has further found that the plaintiffs have not made out a case for extension of time to file their documents out of time or to have them admitted out of time. It would, therefore, follow that the 1st defendant is entitled to the orders sought for striking out or expunging the impugned documents from the record.
 - (d) What orders or directions should be given in view of the imminent expiry of the last extension of time granted to the defendants
 20. The court is aware that the last extension granted to the defendants with respect to the process of regularization of setting apart the suit properties is due to expire on or about January 19, 2023. It is also evident that the 1st defendant's application for review will not have been concluded by then. Accordingly, the court is of the opinion that the appropriate order to make in the circumstances is to grant a further extension of time. In the premises, the court is inclined to grant a further extension of



time for a period of 6 months with effect from the date hereof or until the delivery of the ruling on the application for review, whichever comes first.

H. Conclusion And Disposal Order

21. The upshot of the foregoing is that the court finds merit in the 1st defendant's application dated 13.12.2022. The court further holds that the plaintiffs have failed to demonstrate a case for extension of time sought. Accordingly, the court makes the following orders for disposal of the application:
- a. The plaintiffs' plea for extension of time and admission of their documents out of time is hereby declined.
 - b. The following plaintiffs' documents which were filed out of time and without leave of court are hereby struck out:
 - i. The replying affidavit of Kochale Somo Jalesworn on October 3, 2022.
 - ii. Grounds of opposition dated October 3, 2022.
 - iii. The preliminary objection dated November 22, 2022 and the affidavit in support thereof.
 - iv. The written submissions dated November 23, 2022.
 - c. With regard to prayer c in the application, the defendants are hereby granted an extension of 6 months from the date hereof or until delivery of the ruling on the 1st defendant's application for review, whichever comes first.
 - d. Each party shall bear its own costs of the application.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF JANUARY,2023 IN THE VIRTUAL PRESENCE OF:

Mohammed Amin holding brief for Sagana for the Plaintiffs.

Njoroge Regeru with James Wairoto & Cecil Kuyu for the 1st Defendant.

Jackline Njuguna for the 5th defendant.

Patrick Kiprop for the 1st to 5th Interested parties.

M/S Faith Kabora for the 6th Intended Interested Party.

M/S Janet Kungu for the 3rd and 4th defendants.

HON. JUSTICE P.M NJOROGE – PRESIDING JUDGE

HON LADY JUSTICE GRACE KEMEI – JUDGE

HON. JUSTICE YUVINALIS ANGIMA - JUDGE

