



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ogonda v Maina & 4 others (Civil Appeal E042 of 2024)
[2025] KEHC 4992 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E042 OF 2024
WM MUSYOKA, J
APRIL 25, 2025**

BETWEEN

FR. JACOB OLUBEBA OGONDA APPELLANT

AND

BISHOP BENJAMIN MAINA 1ST RESPONDENT

FATHER ISAACK OTIENO 2ND RESPONDENT

EDWARD OGOMA 3RD RESPONDENT

SAMUEL ODUMA 4TH RESPONDENT

JAMES ORENGO 5TH RESPONDENT

(An appeal arising from orders made in the ruling by Hon. TA Madowo, Senior Resident Magistrate, SRM, delivered on 23rd August 2024, in Busia CMCCC No. E045 of 2024)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondents, for compensation for damages and costs. The appellant had been the priest in charge of the Uranga Mission of the Legio Maria of African Church Mission, when, on 11th February 2024, he was forcibly evicted from the church premises at Uranga Mission, without any justification or authority from the higher church authorities, or legal justification under *the constitution* of the church. The appellant complained that that conduct exposed him to embarrassment and entitled him to compensation by way of punitive damages.
2. The respondents filed defences, in which they denied everything pleaded in the plaint. It was pleaded, in the alternative, that the respondents did visit the premises in question, where they only delivered a letter of transfer for the appellant, to him, and that the appellant left the precincts of the church at his own pleasure.



3. The appellant then filed an application, on 14th May 2024, dated 19th April 2024, seeking the striking out of the defence, and for entry of summary judgement in terms of his request for judgement, dated 23rd March 2024. The grounds on the face of the application were that the respondents had failed to enter appearance on time, had not obtained orders for extension of time to file defence, 3 of the respondents had filed notices of appointment instead of a memoranda of appearance, 1 of the respondents never entered appearance, filing fees for the defence were not paid, and the defence was filed out of time without leave.
4. That application was canvassed by way of written submissions, following directions that were given on 13th June 2024. Ruling was delivered on 23rd August 2024, dismissing the said application. The court found that the defences had, indeed, been filed out of time, but accommodated the said defences, in exercise of the inherent powers of the court, on grounds that the same raised triable issues.
5. The appellant was aggrieved, hence the instant appeal. The grounds of appeal, in the memorandum of appeal, dated 27th August 2024, revolve around the trial court not recognising that the appellant had properly filed his request for judgement; the court equated a notice of appointment to a memorandum of appearance; the court holding that there was a hiccup in the e-filing system without proof; the court holding that the filing of documents out of time without leave was not a sufficient cause to strike out pleadings and that the same was an abuse of the court process; the court failing to give reasons for its decision; and the court failing to hold that documents filed out of time must be with leave of court.
6. Directions were given on 3rd February 2025, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
7. The appellant has identified 2 issues for determination, whether there were sufficient points of law to warrant grant of the orders sought on appeal, and whether there is entitlement for the orders sought. He points at the procedural rules in Order 2 rule 15, Order 5 rule 1, Order 6 rule 1 and Order 10 rule 11 of the Civil Procedure Rules, to argue that there was non-compliance with the requisite rules of procedure.
8. The 1st, 2nd, 3rd and 5th respondents submit on 2 issues, whether a notice of appointment of Advocates and the memorandum of appearance serve similar purposes; and who should bear the costs of the appeal. They argue that the 2 documents serve the purpose of notifying the other party of the address of service of the party filing them. They cite *Paragon Electronic Limited vs. Bamburi Special Products Limited* [2020] KEHC 7930 (KLR)(Sergon, J), for the point that the 2 filings really serve similar purposes, and where a party files one rather than the other there would be no prejudice. On costs, they submit that the same are at the discretion of the court, and they follow the event. The 1st, 2nd, 3rd and 5th respondents rely on section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR [2016] KEHC 7064 (KLR)(Mativo, J). They urge that the trial court did not fall into any error.
9. The 4th respondent has identified 1 issue for determination, whether the appeal is merited. He argues that the filing of documents out of time is not always a sufficient ground for striking out a suit or pleadings. He also submits on the right to be heard, founded on the principle of natural justice and Article 50(1) of *the Constitution*. He relies on *Simon Kirima Muraguri & another vs. Equity Bank (Kenya) Limited & another* [2021] eKLR (Mwita, J), *JMK vs. MWM and another* [2015] eKLR [2015] KECA 524 (KLR) (Makhandia, Ouko & M'Inoti, JJA) and *David Oloo Onyango vs. Attorney-General* [1987] eKLR [1987] KECA 56 (KLR)(Nyarangi, Platt & Gachuhi, JJA).
10. There has been a seismic shift, in recent times, on striking out of pleadings on grounds that the same were filed out of time, and generally on punishing parties for procedural lapses. That is what the



oxygen rule and Article 159(2)(d) of *the Constitution* are about. See Kimani Muhoro vs. John Waiganjo Mbuthia & Mark Gituku Gichuhi [2013] KECA 419 (KLR)(Nambuye, Koome & Odek, JJA) and Avtar Singh Bachu & another vs. Henry Taita Tum [2018] KEELC 3265 (KLR)(JM Onyango, J), In re Estate of Edward Talam Limo (Deceased) [2025] KEHC 2752 (KLR)(Nyakundi, J). Emphasis, these days, is given to substantive justice, rather than procedural justice. Instead of dwelling on procedural technicalities, the court and the parties ought to focus on the substance of the suit. See Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei, Returning Officer, Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo [2013] KECA 113 (KLR) (Ouko, Kiage & Mohammed, JJA).

11. The objective, which should override everything, is doing justice to the parties, by going to the heart or core of the dispute, rather than determining it on technicalities of procedure. See Mwangi S. Kimenyi vs. Attorney General & another [2014] KEHC 4220 (KLR) (Gikonyo, J), Utalii Transport Company Limited & 3 others vs. NIC Bank Limited & another [2014] KEHC 7255 (KLR)(Gikonyo, J) and Mghangha & 2 others vs. Mwakesi [2025] KEELC 3297 (KLR)(Wabwoto, J). The effect of this development is that the court is clothed with very wide discretion, when confronted with matters such as those raised in the application the subject of the impugned ruling. See Philip Keipto Chemwolo & another vs. Augustine Kubende [1986] KECA 87 (KLR)(Platt, Gachuhi & Apallo, JJA), Esther Wamaitha Njihia & 2 others vs. Safaricom Limited [2014] KEHC 6699 (KLR)(Havelock, J) and Naiberi River Campsite and Resort vs. Jomo [2024] KEELRC 804 (KLR)(MA Onyango, J).
12. The determination by the trial court was well within discretion. It was conceded, by the trial court, that there were procedural lapses by the respondents. However, it was found and held that the lapses were not fatal. They were curable, and the court granted orders that cured them. Striking out of pleadings is always a drastic and draconian step, that should only be taken in exceptional circumstances, and no party should be driven out of the seat of justice without being afforded a fair chance for a hearing. See Mwangi S. Kimenyi vs. Attorney General & another [2014] KEHC 4220 (KLR) (Gikonyo, J), Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] KECA 591 (KLR) (Makhandia, Ouko & M'Inoti, JJA) and Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei, Returning Officer, Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo [2013] KECA 113 (KLR) (Ouko, Kiage & Mohammed, JJA). In any event, lapses, of the sort that the respondents were accused of, are remediable with costs.
13. I, therefore, find that there is nothing to fault in the manner that the trial court handled the application, dated 19th April 2024, vide the orders that were made on 23rd August 2024. There is no merit in the instant appeal, and I hereby dismiss it. On costs, I note that the events, that provoked its filing, were set in motion by the respondents, when they failed to file their papers within the timelines set by the law. Each party shall, as a result, bear their own costs. The original trial court records shall be returned to the relevant registry, while the instant appeal file shall be closed. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 25TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Fr. Jacob Olubeba Ogonda, the appellant, in person.

Advocates



Mr. Odaa, instructed by Ngala Awino & Company, Advocates for the 1st, 2nd, 3rd and 5th respondents.

Mr. Juma, instructed by the Attorney General, for the 4th respondent.

