



**Wachira v Safaricom Company Limited (Civil Suit E005 of 2022)  
[2024] KEHC 4077 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4077 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E005 OF 2022  
RN NYAKUNDI, J  
APRIL 25, 2024**

**BETWEEN**

**BONFACE WANGAI WACHIRA ..... PLAINTIFF**

**AND**

**SAFARICOM COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. What is pending before this court is the Notice of Motion application dated October 11, 2023 seeking the following orders;
  1. The defendant’s defence dated July 10, 2023 and witness statement dated September 25, 2023 be deemed as being properly filed and served.
  2. The costs of the application be in the cause.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the application.
3. The applicant contends that it filed its defence on July 10, 2023 and duly served it upon the plaintiffs who did not object to the defence and did not serve the defendant with a notice of entry of an interlocutory judgement. Both the parties engaged in negotiations with an aim of amicably settling the matter. Under this belief, the defence filing was temporarily delayed.
4. The defendant stated that it had a valid defence and the plaintiff will not encounter any detriment if the court admits the defence as he will still have the opportunity to present his case.
5. In her affidavit in support of the application, Joy Impano, counsel on record for the respondent, averred that the plaintiff commenced a suit against the applicant vide a plaint accompanied by a Notice of Motion dated 3<sup>rd</sup> June 2022. The defendants’ counsel entered appearance on June 17, 2023 and



- proceeded to engage the plaintiff's advocates on settlement. She reiterated that due to the ongoing settlement counsel inadvertently filed a defence within the statutory timelines.
6. Counsel averred that following the court's directive that the parties should proceed to hearing of the main suit and abandon a pending interim application to expedite the resolution of the claim, the defendant applied for and obtained leave on 17<sup>th</sup> June 2023 to file the documents. During the hearing dated 26<sup>th</sup> September 2023, the plaintiff's counsel raised objections to the defence, prompting the filing of the application to request the court to admit the defence as duly filed and served.
  7. Counsel maintained that the defence raises triable issues and urged the court to consider the provisions of Article 159 of the Constitution, sections 3 and 3A of the Constitution of Kenya and place more emphasis on the substantive rather than procedural justice for the parties involved.

### **Applicant's submissions**

8. Learned counsel for the applicant filed submissions on February 24, 2024. Counsel cited section 3A of the Civil Procedure Act and urged that the admission of the defence and witness statement will not prejudice the plaintiff as the same was filed well in advance of the hearing and the plaintiff's case. Further, that the same does not significantly alter the nature of the defendant's position by introducing new facts or addressing issues that arose during the hearing. She relied on the case of Peter Kariuki Waweru v Kiambu County Government & Another (2015) eKLR.
9. It is the applicant's case that although there was a delay in filing of the statement of defence, the defendant has demonstrated sufficient cause to warrant the discretion of the court in providing that the delay was occasioned by the belief that the matter would be resolved amicably due to the settlement discussions that were ongoing. Counsel cited the case of Wachira Karani v Bildad Wachira (2016) eKLR on the definition of the term sufficient cause and urged that the delay in filing the defence was inadvertent. She submitted that the defendant seeks the court's indulgence and reprieve from the harsh and draconian sanction of being excluded from these proceedings.
10. Counsel reiterated that the defence raised triable issues and that there would be no prejudice occasioned on the plaintiff by the defence being allowed.

### **Respondent's submissions**

11. Learned counsel for the respondent filed submissions on February 29, 2024. Counsel urged that the court gave clear timelines and issued a final adjournment and asked parties to ensure that the documents were filed before the pre-trial on July 7, 2023. The parties failed to abide by the court's timelines while hiding behind 'parties negotiating'. Counsel cited the case of Raila Odinga & Others v IEBC & 3 others, Supreme Court of Kenya Presidential Petitions Nos. 3,4,5 of 2013 (2013) eKLR.
12. The respondent stated that the case was filed in 2022 and since then the matter has always been adjourned by the defendant. Further, that the defendants' claimed negotiations have never been in good faith and is used to justify the failure of the applicant to abide by the court's rules.
13. The plaintiff maintained that the defence was never served and further opposed the application, relying on Order 7 Rule 5 of the Civil Procedure Rules. Counsel cited the decision of Sendy Kenya Freight Limited v Multiple Solutions Limited (2021) eKLR in support of this submission. Counsel prayed that the court dismiss the application.



## Analysis & Determination

14. Upon considering the application and the responses thereto, the following issues arise for determination;

1. Whether the court should allow the defence dated July 10, 2023 and witness statement dated September 25, 2023 be deemed as being properly filed and served

This application by the defendant dated 11.10.2023 is hinged in the scope of constitutional imperatives under Art. 10 on National values and Principles of governance, Article 27 (1) which states that: “Every person is equal before the law and has the right to equal protection and equal benefit of the law. This is also the case in Article 47 on fair Administrative Action whose dictates are that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. In this error fair trial rights in Article 50 of the Constitution are non-derogable.

15. Before embarking on this issue for determination, it is imperative that the court set out an important issue being the default judgement. Learned counsel for the plaintiff filed a request for judgement under Order 10 Rule 10 of the Civil Procedure Rules. The request was filed on July 3, 2023, at which point counsel for the defendant had come on record as of June 17, 2022. Upon perusing the record of the court, it is not clear as to whether the request for judgement was granted. As there is no judgement on record, and there is no mention of the default judgement it is therefore evident that none was delivered. This is further informed by the conduct of the parties continuing with the matter after the said request. It follows that the next port of call is to determine the main issue for determination. The fulcrum of the issues raised in the applicant’s application on leave to be granted for its defence to be canvassed on the merits finds support in the case of John Michael Njenga Mututho vs Jayne Njeri Wanjiku Kiara (2008) eKLR, Caroline Mweu Mwandiku vs Patrick Mweu Musimba & 2 Other 2013 eKLR, William Kinyanyi Onyango vs IEBC 2013 eKLR

16. To sum it up the court in Nicholas Arap Korir Salat vs IEBC & 6 others 2013 eKLR.

“ The court stated *inter-alia* that deviations from and lapses in form and procedures which do not go to the jurisdiction of the court or which do not occasion prejudice or discourage of justice to the opposite party ought not to be elevated to the level of criminal offence attracting such heavy punishment of the offending party who may in many cases be innocent since the rules of procedure are complex and technical. In case in such instances the court should raise to its highest calling to justice by sparing the parties the draconian approach of striking out pleadings.....”

17. It is evident that the parties attempted to have this matter settled by mediation which was unfortunately unsuccessful. In order to determine whether to exercise discretion and allow the defence, I am guided by the holding in Patel vs East Africa Cargo Handling Services Ltd [1974] EA where it was stated

“The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given to it by the rules.....where it is a regular judgement.....the court will not usually set aside the judgement unless it is satisfied that there is a defence on merit.....defence on merit does not mean.....that a defence must succeed, it means.....a triable issues, “that is an issue that raises a prima facie defence and which should go to trial for adjudication.”



18. Notably, in the present suit, there is no judgment to set aside. In *Peter Kariuki Waweru vs Kiambu County Government & Another* [2015] eKLR Onguto J (as he then was) stated *inter alia*

“...The discretion thus ought to be exercised whilst basically taking into account the same related factors. Firstly, it would be appropriate to know the reason for the delay in filing the defence statement whilst also considering the period of delay. The court must then also consider the nature of the claim as well as the defence proposed to be tendered.”

19. The defence was filed on July 10, 2023, a week after the request for judgement was entered and a month after counsel for the defendant came on record. In my view, this cannot be considered an inordinate delay. I also take note of the fact that the matter was subject to mediation and negotiations.

20. Taking into consideration the nature of the claim and the defence proposed, it is my considered view that the plaintiff will not be prejudiced if the court allows the application as prayed. The defence was filed before the hearing and the same does not introduce alter the nature of the defence case. Our constitutional democratic order requires an orderly, fair, expeditious, proportionate, resolution of disputes by courts and other independent tribunals. The Republic of Kenya since promulgation of the *Constitution* in 2010 is founded on the rule of law as one of the key pillars in Article 10 as read with Article 48 which are very foundational in guaranteeing every citizen to seek the assistance of a court of law whose adjudication powers are also spelt in Article 50 (1) of the *Constitution*. The essential features of this scope on right to access to justice requires that the law in its procedures must provide individuals with meaningful access to independent courts and have their disputes adjudicated in compliance with Article 50 of the same *constitution*.

In the premises, I order as follows;

1. The defendant’s defence dated July 10, 2023 and witness statement dated September 25, 2023 is deemed as being properly filed and served.
2. The respondent shall bear costs of the application
3. Status Conference on 16.5.2024

It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF APRIL 2024**

.....

**R. NYAKUNDI**

**JUDGE**

