



Ruto v Kipngetch & 4 others (Environment & Land Case 321 of 2015) [2023] KEELC 16392 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 321 OF 2015
LA OMOLLO, J
MARCH 16, 2023**

BETWEEN

CHEROTICH KIPRONO RUTO PLAINTIFF

AND

REUBEN KIPNGETICH 1ST DEFENDANT

CHARLES KIPNGETICH 2ND DEFENDANT

JENNIFER KIPNGETICH 3RD DEFENDANT

KEN KIPNGETICH 4TH DEFENDANT

WESLEY KIPNGETICH 5TH DEFENDANT

RULING

1. This ruling is in respect of the plaintiff’s Advocate objection in respect of the defendant’s expert witness (DW2) giving his testimony.

Factual Background.

2. This suit was commenced by way of a Plaint dated June 27, 2022. In the Plaint, the plaintiff sought for the following orders:
 - a. An order of temporary injunction restraining the defendants herein whether by themselves, their agents and/or servants from invading, trespassing,



cultivating or in any way whatsoever interfering with the Plaintiff's quiet possession and use of L.R Number Molo South/Keringet Block 2/114 (Kirobon) comprising approximately 42.210 Hectares within Keringet and currently occupied by the Plaintiff.

- b. Vacant possession of the suit property.
 - c. An order of permanent injunction restraining the Defendant herein whether by themselves, their agents and/or servants from invading, trespassing, cultivating or in any way whatsoever interfering with the Plaintiff's quiet possession and use of L.R Number Molo South/Keringet Block2/114 (Kirobon) comprising approximately 42.210 Hectares within Keringet and currently occupied by the Plaintiff.
 - d. Costs of this suit.
 - e. Interests on (d) above at court rates.
Any other or further relief that this honourable court may deem fit and just to grant.
3. The defendants on the other hand filed their statement of defence dated May 10, 2017 where they state that they have been in possession of the suit land since March 2, 1987 when their father purchased the same from Kirobon Farmers Ltd and denied all the other allegations in the Plaintiff.
 4. The plaintiff's case was heard and closed on February 7, 2022. This court commenced hearing of the defence case on January 19, 2023 and adjourned it to February 13, 2023 for further hearing.
 5. On February 13, 2023 DW2 took the witness stand and while giving his testimony, the plaintiff's advocate raised an objection. His objection was on three grounds:
 - a. That the matter came up for pre-trial directions and it was expected that parties adhere to Order 11 Rule 2. He went on to state that a pre-trial questionnaire dated June 5, 2018 was filed and in answer to the question whether either party would be calling an expert witness, no disclosure was made.
 - b. That the plaintiff testified and closed her case and the defendant vide a letter dated April 1, 2022 sought an expert opinion on a document which had been admitted in evidence as Exhibit P2 (b).
 - c. That the testimony of DW2 is prejudicial to the Plaintiff's case as the plaintiff will not have opportunity to seek a contrary opinion and that this is akin to stealing a match against the plaintiff adding that it does not constitute fair trial
 6. Counsel for the plaintiff after setting out his grounds of objection, asked the court to reject the evidence of DW2 adding that calling him as a witness is in bad faith.

Defendants Response.

7. Counsel for the defendant submitted that leave of the court was



sought vide an application dated January 27, 2021 and leave was granted to the defendants to file a supplementary list of documents and that the list of documents attached the documents that the witness intends to produce.

8. Counsel further submitted that the grounds on the face of the application stated that the defendants intended to call an expert witness. He further submitted that the application was not opposed and he assumes, therefore, that it was allowed.
9. It was also submitted that counsel for the Plaintiff had not demonstrated what prejudice will be occasioned to the Plaintiff.
10. He ended his response by asking the court to bear in mind article 159 on the Constitution of Kenya 2010 as it makes it ruling on the objection.

Response to the defendant's submissions.

11. Counsel for the plaintiff stated that the application dated January 27, 2021 only sought leave to file a supplementary list of documents but did not state that they intended to file an expert witness' report.
12. On the question of prejudice, counsel submitted that the Civil Procedure Rules and the Evidence Act state that in the absence of a contrary opinion, the evidence of an expert witness is taken as truth adding that it would cause great miscarriage of justice to the Plaintiff.
13. On account of this objection and responses thereto, DW2 was stood down. The said objection now forms the basis of this ruling.

Analysis and Determination.

14. It is this court's view that the main issue for determination is:
 - a. Whether or not DW2 ought to be disqualified from adducing evidence in the present case.
15. I feel the need to set the record straight. The application dated January 27, 2021 sought leave to file a supplementary list of documents and bundle of documents. I have perused the list of documents and documents attached thereto and did not find any document or report by DW2 i.e. Emmanuel Karisa Kenga. It is evident that counsel for the Defendant has misrepresented facts to this court.
16. After close of pleadings, the provisions of Order 11 of the Civil Procedure Rules come into play. Order 11, Rule 2, of the Civil Procedure Rules provides as follows;

“ After the close of the pleadings parties shall within ten days complete, file and serve the pre-trial questionnaire as provided in Appendix B.”
17. This suit was filed in the year 2015, the statement of defence was filed on May 12, 2017. At the time of filing this suit and close of pleadings, Appendix B paragraph 9 required an answer as to whether an issue had been identified which required a written report of an expert. Paragraph 10 seeks to know whether parties have agreed to have a single expert to prepare a joint report. Paragraph 11 seeks answers as to whether parties might need directions relating to payment of the express fee and expenses. Paragraph 12 seeks to know in which field an expert is needed and lastly paragraph 13 seeks to know whether the experts have agreed on their respective reports and if not whether they have held without prejudice discussion in order to narrow down the issues.



18. The pre-trial questionnaire by the plaintiff was filed on July 15, 2018 and bears no mark in answer to the questions therein. The record doesn't have a pre-trial questionnaire filed by the defendants.
19. Order 7 rule 5 of the [Civil Procedure Rules](#) provides that a defence and counterclaim shall be accompanied by:
 - a. An affidavit where there is a counterclaim.
 - b. A list of witnesses to be called at the trial.
 - c. Written statements signed by the witness except expert witnesses.
 - d. Copies of documents to be relied on at the trial.
20. Order 3 Rule 2 makes the same mandatory requirements for- Plaintiffs.
21. These rules of procedure are intended to cure the mischief of parties ambushing each other with evidence during trial. One of the tenants of natural justice is that a trial must be fair. A fair trial is a wide term. Relevant to the circumstances of this case is that all parties shall be given equal opportunity to access documents related to the case. This ensures that parties adequately prepare for trial and that no party is caught unawares with evidence or witness information during trial.
22. The [Civil Procedure Rules](#) are mindful of this position as hence the requirements under order 3 Rule 2, Order 7 Rule 5 and finally Order 11.
23. The circumstances presenting in this case are that the plaintiff's case has been closed, the plaintiff did not have knowledge that there was an issue that required a written report of an expert or that there was already a document made by an expert witness
 which the Defendants intend to produce or the name of the expert witness who was supposed to produce the document.
24. From the brief introduction and testimony of DW2, he received instructions from the plaintiffs advocate vide a letter dated February 1, 2022 which letter requested him to examine some signatures on documents. The request was in respect of a letter dated January 23, 1978– Exhibit P2 (b).
25. The plaintiff commenced hearing of her case on February 20, 2022 and closed on their case on February 7, 2022. It is evident that the opinion of DW2 was sought on a document that had been produced by the Plaintiff and it was before the close of the plaintiff's case.
26. In the English case of [Luckwell vs Limata](#), [2014] EWHC 536, where an application to exclude and/or disqualify a witness from court was made, Justice Holman had this to say:-

“If a court is, in fact, sitting in public, and if an application is made to exclude a witness or witnesses, then the court may exclude them. But it should only exclude them if the court is satisfied, on the facts and in the circumstances of the particular situation, that it would, for good reasons, be an appropriate step to take. The threshold may not be a high one. The reason may not need to be a very cogent one...”
27. I also note from the record that the defendants on December 1, 2020 objected to the production of Exhibit P2 (a). Mr. Kirui who appeared for the defendants objected to its production stating that he wanted the document produced by the maker as he had a feeling that it might be a forgery. The Learned Judge overruled



the objection stating that Mr. Kirui had earlier on admitted that the author is deceased and he cannot therefore insist that the said exhibit be produced by a maker who is no more. The Defendants had enough time from the year 2020 to make known their intentions to subject the said document to forensic examination and also accord the Plaintiff opportunity to seek alternative opinion but they chose not to.

28. Further, the defendants are and were aware of the procedures laid down by the *Civil Procedure Rules* intended to ensure a fair trial. These were available but they did not make use of them. Introduction of a witness not previously disclosed and a document not previously exchanged during the pre-trial stage is in bad faith.
29. In *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR, The Learned Judge grappled with issues as I do now had this to say;
- “This court is guided by the Supreme Court decision of *Raila Odinga & 5 others v IEBC & 3 others*, Supreme Court of Kenya, Petitions Nos. 3, 4 and 5 of 2013 (2013) eKLR. Their Lordships considered the prejudice that would be occasioned to the adverse parties and thereby declined to allow additional evidence filed outside the contemplation of the rules. Similarly, in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, my brother Justice Munyao declined an application by the defendant for leave to furnish a supplementary list of witnesses and documents after the plaintiffs had testified and closed their case. I am persuaded by that authority that this is the correct position. Also, in *Alois Oceano D’sumba v Rajnikant Narshi Shah & another* [2017] eKLR, whose facts regarding the stage of the proceedings, her Ladyship Justice Njoki Mwangi, in considering the import of Order 7 Rule 5 of the *Civil Procedure Rules*, was of the
- “... view that this court would be perpetrating injustice and would prejudice the plaintiff’s case if it was to allow the defendant to rely on the documents filed...” after the plaintiff had testified and closed his case. This reasoning also persuades me to agree with the respondent herein that there would be great injustice to the plaintiff if I allowed the instant Application.”
30. I find that the plaintiff has sufficiently demonstrated that she is bound to suffer prejudice as she will not have opportunity to offer a rebuttal to the evidence of DW2 having closed her case.

Disposition.

31. In the result, I find that the objection raised by the plaintiff is merited and is hereby upheld.
32. Consequently, DW2 who had been stood down is excluded from giving evidence and producing his report.
33. it is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiff.

Mr. Kirui for the Defendant.



Court Assistant; Monica Wanjohi.

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