



Kiplagat v Ratemo (Sued in his Capacity as the Legal Representative of the Estate of Thomas Ratemo Oira) (Environment & Land Case 38 of 2012) [2023] KEELC 16994 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 38 OF 2012**

A OMBWAYO, J

APRIL 28, 2023

BETWEEN

LAWI KIGEN KIPLAGAT PLAINTIFF

AND

JAPHETH AMENYA RATEMO (SUED IN HIS CAPACITY AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THOMAS RATEMO OIRA) DEFENDANT

RULING

1. This ruling is in respect of the defendant’s Notice of Motion application dated February 27, 2023 which is expressed to be brought under order 11, Order 18 Rule 10, Order 40 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to grant leave for the defendant to file certified copies of bank statements of the plaintiff account no 0110098993400 Co-operative bank held jointly with the wife as LK Kiplagat & HJ Kiplagat between the years 2008 and 2011 together with teller accounts as proof of evidence of the defendant.
 - c. That this honourable court be pleased to order that certified copies of bank statements of the plaintiff account no 0110098993400 Co-operative bank held jointly with the wife as LK Kiplagat & HJ Kiplagat between the years 2008 and 2011 together with certified teller accounts as proof of evidence be deemed as duly filed by the defendant.
 - d. That this honourable court be pleased to order for the production of the original certified copies of bank statements of the plaintiff account no 0110098993400 Co-operative bank



held jointly with the wife as LK Kiplagat & HJ Kiplagat between the years 2008 and 2011 together with certified teller accounts as proof of evidence by an authorized agent/servant of co-operative bank of Kenya pending the hearing and determination of this suit.

- e. That this honourable court be pleased to order for the production and perusal of the original file for plot no 34 and 181 Mitimangi Settlement Scheme no 722 Naivasha pending the hearing and determination of this suit.
 - f. That the costs of this application be provided for.
2. The grounds on the face of the application are that the defendant herein filed his Defence, list of documents, witness statement, list of witnesses all dated 22nd day of November, 2012 and filed in Court on the 30th day of November, 2012. That when the matter came up for the Defence Hearing on November 23, 2022 and January 19, 2023 the Plaintiff through his Advocate on record objected towards the production of some of the Defendant/Applicants documents in the list of documents alleging that they were not authentic.
 3. That during the hearing of the plaintiff's case, upon Cross examination by the Defendant, the Plaintiff admitted and acknowledged that he is in receipt of Monies from the Defendant of Kenya Shillings One Million Eight Hundred and Ten thousand (Kshs 1,810,000/=) but when the matter came for Defence Hearing, Counsel for the Plaintiff Mr. Kibet objected and alleged that the only sums of Money the Plaintiff received from the Defendant was Kenya Shillings Seven Hundred and Sixty Thousand (Kshs 760,000/=).
 4. That during the hearing of the Plaintiff's case, the plaintiff acknowledged that he signed various documents during cross examination by the Defendant. That the plaintiff is objecting to the production of the Co-operative Bank of Kenya Deposit slips amounting to Kenya shillings Two Million One hundred and Ninety six thousand (Kshs 2,196,000/=) duly deposited by the Defendant in the Plaintiff account no 0110098993400 Co-operative bank held jointly with the wife as L. K. Kiplagat & H. J. Kiplagat.
 5. That during the defence hearing the Defendant made an application for adjournment which was allowed in order for summons to be issued To Branch Manager Co-operative Bank of Kenya to produce Certified Copies of the Deposit slips that were filed in the Defendant's List of Documents dated 22nd day of November, 2012.
 6. That the Defendant extracted summons and duly served the Head of Legal Co-operative bank who was to produce certified copies of the Deposit slips to confirm that the said Deposit slips were authentic. That upon service, Co-operative Bank of Kenya confirmed to the Defendant that the Defendant's Deposit slips amounting to Kenya shillings Two Million One Hundred and Ninety six thousand (Kshs 2,196,000/=) were authentic and genuine. That the defendant was informed that preservation of original documents such as deposit slips are preserved for a maximum period of seven years but they can produce evidence in terms of Bank statements. That the defendant is seeking to be allowed to file the certified copies of Bank statements of the Plaintiff.
 7. The application is supported by the supporting affidavit of Ratemo Amenity sworn on February 27, 2023. He reiterated the grounds on the face of the application and stated that the defendant made various deposits to the plaintiff's bank account and set out the particular dates. That the total amount of the money deposited was Kshs 2,196,000/=. That the consent of the land control board was obtained and the stamp duty paid. He then set out in great detail the entire process of purchase of the suit properties and stated that he will be prejudiced if the orders sought herein are not granted.



8. In response to the said application, the plaintiff filed a replying affidavit sworn on March 17, 2023. He deposed that the defendant is seeking to introduce documents that have always been in his possession since the inception of this suit. That allowing the defendant's application will amount to trial by ambush. He also deposed that if the defendant's application is allowed, he will be occasioned with substantial prejudice as he will not have an opportunity to put in a response on the same or question the authenticity of the documents he wants to produce. That the issue to do with production of documents was dealt with by Hon. Justice Mutungi in his ruling delivered on March 12, 2022. He further deposed that the defendant's application is therefore res judicata since the court had already pronounced itself on the said issue. The plaintiff deposed that the present application under consideration is an afterthought and should be dismissed with costs.
9. The defendant filed a supplementary affidavit sworn on March 27, 2023 and filed on April 3, 2023. He reiterated the contents of his supporting affidavit to the application and stated that his list of documents filed in court on November 30, 2012 contained item no 28 -39 which were deposit slips amounting to Ksh.2,196, 000/= that were deposited in the plaintiff's joint account. That the said documents are not new documents as alleged. That the plaintiff will not suffer any prejudice if the application is allowed as prayed. He further deposed that Justice Mutungi's ruling only barred him from relying on the letter dated February 20, 2013 listed under item 2 in the supplementary list of documents dated October 25, 2021, the letter dated January 22, 2013 listed under item no 6 in the supplementary list of documents dated October 25, 2021 and the transfer and discharge of transfer obtained in 2013 listed under item 7 in the supplementary list of documents dated October 25, 2021. That Article 159(2)(d) of *the Constitution of Kenya* provides that justice shall be administered without undue regard to procedural technicalities. That the application has been brought without undue delay since the bank statements and teller deposit slips were only obtained after the plaintiff raised an objection to their production.

Submissions

10. The defendant filed his submissions on April 3, 2023. He relied on Order 18 Rule 10, Section 146(4) of the law of *Evidence Act*, Section 19(1) of the *Environment and land Court Act*, Article 159(2) of *the Constitution* and submitted that the documents that he intends to produce are limited to the extent of providing proof that the bank deposit slips amount to Kshs 2, 196,000/=.
11. The defendant also relied on the cases of *Raila Odinga & 5 Others versus IEBC and 3 others* [2013] eKLR, *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2019] eKLR among other cases and submitted that the documents he intends to produce will affect the outcome of the case. The defendant also submitted that the plaintiff will not be prejudiced if the orders sought are granted.
12. The plaintiff in his submissions filed on March 21, 2023 set out the background of the matter and identified three issues for determination;
 1. Whether the orders sought are capable of being granted.
 2. Whether the application is res judicata.
 3. Whether costs should issue.
13. On the first issue, the defendant relied on the case of *Joseph Mumero Wanyama v Jared Wanjala Lyani & another* [2019] eKLR and submitted that the defendant waited until he closed his case before making the application that he be allowed to produced documents that have always been in his possession without giving any explanation for the inordinate delay. The plaintiff also relied on the cases of *Juma*



Et another v Attorney General [2003] eKLR, Johana Kipkemei Too v Hellen Tum [2014]eKLR among other cases in support of his arguments.

14. On the second issue, the plaintiff relies on section 7 of the *Civil Procedure Act*, the cases of *ET v Attorney General Et Another* [2012] eKLR, *The Independent Electoral and Boundaries Commission v Maina Kiai Et 5 others* [2017] eKLR and submitted that Justice Mutungi had already pronounced himself on the said issue vide the ruling delivered on March 17, 2022.
15. On the third issue, the plaintiff relied on the case of *Orix Oil Limited v Paul Kabeu* [2014] eKLR and sought that the defendant's application be dismissed with costs.

Analysis and determination

16. The defendant is seeking that the court grants him leave to file and produce as evidence, certified copies of the bank statements of the plaintiff's co-operative bank account no 0110098993400.
17. Th defendant alleges that the said issue of production of documents has already been dealt with by the court in its ruling delivered on March 17, 2022 thereby making the present application res judicata.
18. Section 7 of the *Civil Procedure Act* provides as follows;

No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

19. The doctrine of res judicata was explained in the case of *Independent Electoral and Boundaries Commission v Maina Kiai Et 5 Others* (2017)eKLR and the court stated as follows;

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.
 - b) The former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
20. Upon perusal of the court record, there is indeed a ruling delivered on March 17, 2022. The ruling was on whether the court would strike out the defendant's supplementary list of documents dated October 25, 2021 for being filed without leave of court together with the defendant's further witness statement dated October 25, 2021. The court in its ruling noted that some documents in the supplementary list of documents had not been discovered during pre trial and they were therefore expunged from the record. The said documents included letters dated February 20, 2013 and January 22, 2013 and the transfer and discharge of charge that had been listed under item (7) in the supplementary list of documents.



21. It is my view that the documents that were expunged from the record are different from the documents the defendant is seeking leave that they be produced in the present application. A further perusal of the court record indicates that the defendant had filed a list of documents on November 30, 2012. The documents listed as no 28 to 40 are deposit slips of various amounts of money deposited in Co-operative Bank of Kenya Account no 0110098993400. This are the same documents that the defendant is seeking leave to produce certified copies of. Annexed to the defendant's application is a court order summoning among other people the Bank Manager Co-operative Bank of Kenya to produce relevant documents.
22. It is my view that the plaintiff will not be prejudiced in any way if the defendant is allowed to produce the original certified copies of bank statements of the plaintiff's account no 0110098993400 Co-operative Bank as the plaintiff will have the opportunity to interrogate the said documents during cross examination.
24. The defendant is also seeking for an order for the production and perusal of the original file for Plot no 24 and 181 Mitimangi Settlement Scheme no 722 Naivasha which was not opposed by the plaintiff and so it can be allowed. In conclusion therefore, the defendant's application dated February 27, 2023 has merit and is allowed as prayed.

RULING DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 28TH DAY OF APRIL 2023

A.O. OMBWAYO

JUDGE

