



**Moschion v Mwangi (Environment & Land Case 350 of 2018)
[2023] KEELC 17144 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 350 OF 2018**

LN MBUGUA, J

APRIL 27, 2023

BETWEEN

DOROTHY SEYANOI MOSCHION APPLICANT

AND

CHARLES KIMERIA MWANGI RESPONDENT

RULING

“Poise the cause in justice's equal scales, Whose beam stands sure, whose rightful cause prevails.
Thyself shall see the act; For, as thou urgest justice, be assured Thou shalt have justice, more than
thou desir'st William Shakespeare”

Background

1. There are nine consolidated matters herein namely; files numbers 350 of 2018, 915 of 2012, 305 of 2018, 338 of 2018, 348 of 2018, 349 of 2018, 367 of 2018, 368 of 2018 and 374 of 2018 of which case no 350 of 2018 is the lead file. All the said suits were instituted by the same plaintiff, one Dorothy Seyanoi who claims that her land parcel No 5892 (mother title) was fraudulently transferred to the defendants. The matters are scheduled for hearing on June 26, 2023.
2. The issue falling for determination is whether the plaintiff in all the suits save Case No 915 of 2012 should be allowed to file and serve witness statements at this stage; And consequently, whether the defendants in the aforementioned suits should also get an opportunity to file their witness statements and documents.

The Case Management exercise

3. At this juncture it is crucial to set out the case management exercise undertaken by this court so far. I took over this matter on September 30, 2021 where I found a pending application dated March 12, 2021, in which the plaintiff was challenging the ruling on consolidation of the files dated December



10, 2020. In a ruling delivered on February 23, 2022, I dismissed the aforementioned application while stating as follows at paragraph 14;

“In order to expedite the trial and keeping in mind that the focus ought to be on the substantive issues in dispute, the court directs each party to bear their own costs of the application”.

4. On the same date of February 23, 2022, the court gave a date for Pre-trial directions on July 26, 2022. Ordinarily, the court conducts its Pre-trial exercises, mentions and applications in the virtual platform, however for this case, I had already discerned that the files required a harmonious and more effective and strategic management, noting that there were rather many advocates in the matter; I therefore directed the Pre-trial exercise to be conducted in open court.
5. On that date of July 26, 2022, the advocates for the parties in the various files expressed their desire to file trial bundles. It also emerged that there were more pending applications!. The exercise of the prosecution of the pending applications commenced, continued on October 6, 2022, until November 3, 2022 when the court gave comprehensive directions geared towards the Active Management of the cases as follows;
 1. The court gave a date for ruling on the pending applications on February 2, 2023.
 2. The court directed the plaintiff to file and serve her Trial Bundles in the various files by December 3, 2022, while the defendants and the Interested party were to file theirs by January 17, 2023.
 3. The date of February 2, 2023 for the ruling on the various applications was also to serve as a Pre-trial date in open court.
 4. Documents not served or filed outside the given timelines were to stand as expunged.
 5. A hearing date was set for June 26, 2023; Date was blocked such that no other matters shall be listed on the aforementioned date.
 6. The plaintiffs in the various files was to serve all parties who were absent with the directions given on November 3, 2022.”
6. On February 2.2.2023, the court delivered its ruling as scheduled in relation to the applications dated May 21, 2019, May 9, 2019 and April 8, 2019. Therein, the court gave a lengthy account of the need to expedite the trial, while stating as follows at paragraph 20 and 21;
 - i. Whereas this file is not all that old, nevertheless, it is apparent that a Gordian Knot is in the offing, unless there is active intervention from this court.
 - ii. The court has already given both a Pre trial date as well as a hearing date. To this end, parties should focus on the substantive issues geared towards finalization of the suits instead of filing various applications”.
7. The court proceeded to give yet another date for Pre-trial directions on March 7, 2023 in open court. Come the said date of March 7, 2023 and the Pretrial exercise again aborted as the court had observed thus;

“The court notes that Mr Miyare (for the plaintiff) is not able to retrieve his documents and information necessary to conduct a pretrial. As such the case shall be adjourned.

Further orders;



1. Further Pretrial directions to be conducted on April 14, 2023 in open court from 9.00 am (whole day).
2. The parties to have a summary of their documents primarily a Trial bundle containing;
 - a. Their pleadings,
 - b. Their witness statements, and
 - c. Their Documentary evidence.”
8. Pursuant to the directions given on March 7, 2023, the court proceeded into open court on April 14, 2023 and conducted the pre-trial exercise which went on from 9.32 am until 12.35 pm. The court even availed two court assistants Vanilla and Benson so as to have a seamless and speedy process of case management.
9. It turned out that although the plaintiff had filed her pleadings and documents, no witness statements had been filed in all the files save case No 915 of 2012. The defendants in the affected files had not filed their witness statements as they were apparently waiting for the plaintiff to cross reference documents in her witness statement. This situation applied even in cases number 367 of 2018 and 374 of 2018 where the defendants had a Counterclaim.
10. The interested party in case no 338 of 2018 who was joined in these proceedings vide the ruling of February 2, 2023 is however an exception as they had duly filed their trial bundle containing their pleadings, documents and witness statements in preparation for the trial.
11. At the end of the exercise, Counsel Mutuku holding brief for Mr Miyare for the plaintiff addressed the court as follows;

“My instructions are to request for 14 days to put in witness statement in the matters. Reason being that the plaintiff a senior citizen has been unwell and is requesting to be indulged to file the witness statements.”
12. The application prompted the advocates for the rival parties to seek leave to file their respective trial bundles to include the witness statements, hence this ruling.

Determination

13. The legal regime governing the conduct of Pretrial processes swaddles various laws and rules including Article 159 (2) (b) of the [Constitution](#) of Kenya on expeditious trial, Article 50 (1) of the said Constitution on legitimate expectation of fairness as well as Section 1A and 1B of the [Civil Procedure Act](#) on the overriding objective of the said statute and Order 3 as well as Order 11 of the [Civil Procedure Rules](#) on Case Management.
14. The overarching principle in the above mentioned law is the “Expeditious delivery of justice” as Justice delayed is justice denied. The principle emphasizes minimal delays, while promoting timely conclusion of cases. Further, the principle encompasses the doctrine of predictability and reliability, such that there is no trial by ambush, that there is improved quality of litigation and that the workload is quantified.
15. The objectives of the Pretrial exercise would thus include; -
 - a. The early identification of the issues in dispute, with Court’s intervention at an early stage,



- b. Dealing with the issues of Disclosure which entails the filing and exchanging of witness statements and documentary evidence in a structured manner, well in advance of the hearing date.
 - c. Considering in advance the determination of any arguments *inter-alia* relating to the admissibility of any documentary, technical, expert, forensic or electronic evidence (eg. Cadastral survey/maps).
 - d. Monitoring the progress of the case in compliance with directions,
 - e. Ensuring that evidence, whether disputed or not, shall be presented in the shortest and clearest way.
 - f. Encouraging the parties to co-operate in the progression of the case.
 - g. Addressing all relevant preliminary issues including site visits, summons to witnesses, notices to produce etc.
16. It is clear beyond peradventure that this court has strived to apply and uphold the abovementioned principles and objectives of case management as manifested in the various rulings and directions. So much so that the Pre-trial exercise of April 14, 2023 was scheduled on a Friday (whole day), just so as to have quality preparation in readiness for the trial. Equally, the date scheduled for hearing on June 26, 2023 was solely reserved for this matter.
17. With this background in mind, the court had put the parties on notice regarding their obligations in relation to the preparation of the trial. For good measure, I find it expedient to regurgitate the said obligations as set out under the provisions of Section 1 A of the [Civil Procedure Act](#):
- “(3) 3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
18. In the Supreme Court of Kenya case of [Dande & 3 others v Director of Public Prosecutions & 2 others](#) (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (Civ) (19 May 2022) (Ruling), the court stated that the practice of filing documents at the 11th hour was irregular and un-acceptable.
19. It is pertinent to note that this court had allocated these matters adequate time and resources in preparation for the trial scheduled on June 26, 2023. As such the parties were expected to fully comply with the given or agreed directions. In the case of [Muchanga Investments Limited vs Safaris Unlimited \(Africa\) Ltd & 2 Others](#) Civil Appeal No 25 of 2002 [2009] KLR 229, the court stated thus regarding judicial time;
- “Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
20. In the case of [Isiolo Stage View Enterprises v Isiolo County Government & 2 others](#) [2018] eKLR, I had this to say on why time standards are important;
- “Time standards help courts to closely manage and monitor the processing of cases from filing to conclusion. Further, time standards set defined targets for the completion of key process steps and events, establish overall goals that judges and lawyers must meet, create the



expectation of what constitutes timeliness, and are essential to eliminating and avoiding case backlogs. The standards reflect a commitment by the courts to complete cases promptly, and also reflect what court users' regard as a reasonable time for the resolution of case. The net effect of non-compliance with the set timelines is delay, creation of backlog, more acrimony and even confusion”

21. In *George Abonyo Obete T/A Rakwel Body Builders v Ecobank Kenya Limited* [2017] eKLR, the court had this to say on the issue of non-compliance with court's directions;

“That the failure to comply with the clear directions of the court on the timelines of filing and service would obviously result to delay in the finalization of the matter which inevitably means more costs”.

22. Should this court allow the plaintiff more time to file the witness statements?, which invites the next question; Does the non-compliance with the courts Pretrial directions on the part of the plaintiff amount to an issue of procedural technicality which can be cured at this stage?.
23. The question of procedural justice vis a vis substantive justice was dealt with at length in an election petition case; *Alexander Khamasi Mulimi v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, where the court stated that a case could be dismissed for non-conformity with the rules when “the infraction complained of has caused prejudice to the other party”. But it must be demonstrated that the infraction complained of goes to the root of the dispute that is before the court.
24. The explanation given by the plaintiff's counsel as to why the statements had not been availed was that the plaintiff is old and is unwell. On age, that explanation is not plausible since the plaintiff can only get older!. On the explanation that plaintiff is sick, the court was not told of the nature and extent of plaintiff's illness. Considering that the case is now about 5 years old, it was crucial for the plaintiff's counsel to give a credible account of why there were no statements since year 2018!. After all, the matter had come up severally for the conduct of Pre-trial and the issue of the sickness was never raised.
25. The provisions of Order 3 Rule 2 of the *Civil Procedure rules* require claimants to file their suits accompanied by written statements. This court had however overlooked this proviso and had given the plaintiff several opportunities to file and serve the requisite documents in readiness for the trial. I find that the failure to file witness statements for the last five years is not a mere technical procedural infraction. Rather it is an issue which goes to the root of the dispute and adversely affects the entire system of the administration of justice.
26. The right to be heard is sacrosanct and is embodied in the latin maxim “audi alteram partem”. However, a party is only entitled to reasonable opportunity to be heard, See *Nginyanga Kavole vs. Mailu Gideon* (2019) eKLR. The instant case appears to be one of mere inaction which is not excusable. Thus this is a situation whereby the plaintiff has driven herself from the seat of justice.
27. In the case of *Mavuno Industries Limited & 2 Others Vs Keroche Industries Limited* [2012] eKLR, it was noted that courts must warn litigants and counsels that the courts are now on the driving seat of justice, where the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process, starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner.
28. The provisions of Order 11 Rule 3 (5) state that;

“Where orders or directions are given at a case management conference –



- a. The judge or Deputy Registrar or Magistrate or case management officer shall record the orders or directions and inform the parties thereof; and
- b. Where necessary, the Judge or Deputy Registrar or Magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the Judge or Deputy Registrar or Magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.”

29. I find that the prayer made for the plaintiff to file their witness statements is not merited. These matters are already scheduled for hearing on June 26, 2023. The question is; What then is going for trial?. The defendants are going to defend themselves against who? and what?. Nothing!. The logical route is to strike out the 8 matters.
30. It is noted that in cases no 367 of 2018 and 374 of 2018, the defendants have lodged Counterclaims. However, they have not filed any witness statements thereof ostensibly because they were waiting to be served with the statements of the plaintiff. This was fatal to their case, after all, a counterclaim is capable of standing alone, and can be prosecuted as a formal proof, where a plaintiff's suit is no longer in existence. That being the case, the Counter Claims in the two suits must equally face the same fate; they are struck out

Final orders

1. The plaintiff's case in the suits; 350 of 2018, 305 of 2018, 338 of 2018, 348 of 2018, 349 of 2018, 367 of 2018, 368 of 2018 and 374 of 2018 are hereby struck out.
 2. The defendants' Counter Claims in the cases 367 of 2018 and 374 of 2018 are hereby struck out.
 3. The plaintiff is hereby condemned to pay costs of all the suits mentioned in clause 1 above to the defendants and the Interested Parties.
 4. The Case No 915 of 2012 shall proceed as scheduled on June 26, 2023. The file 915 of 2012 is hereby severed from the 2018 series files which no longer exist. The proceedings in ELC 350 of 2018 to be exported in the active file 915 of 2012 by way of photocopying proceedings.
32. I conclude the analysis herein with this quote;
Not everything that is faced can be changed. But nothing can be changed until it is faced. (James A Baldwin)”.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N MBUGUA

JUDGE

In the presence of:-

Miyare for plaintiff

Litoro for Defendant in 350 of 2018 and for 2nd, 3rd, 4th Defendants in 368 of 2018

Shah for 3rd Defendant in 915 of 2012, and Defendants in 367 and 374 of 2018



Mwango holding brief for Sisule for 1st and 2nd Defendants in 915 of 2012

M/s Jagongo holding brief for S.C Jan Mohamed in 305, 338 and 348 of 2018 and for 1st Defendant in 349 of 2018.

M/s Ndirangu holding brief for Mr Nderitu (SC) for 7th Defendant in 368 of 2018

Court assistant: Vanilla

