Kibiego v Gichuru & another (Environment & Land Case 333 of 2013) [2023] KEELC 17000 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17000 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 333 OF 2013

JM ONYANGO, J

APRIL 25, 2023

BETWEEN

KIPKURGAT KIBOR KIBIEGO ..... PLAINTIFF

AND

NICHOLAS GICHURU ..... 1ST DEFENDANT

MESHACK RONO ..... 2ND DEFENDANT

RULING

1. By a chamber summons dated December 6, 2021, the 2nd defendant /applicant filed an application seeking the following orders:

    a. Spent

    b. That this honourable court be pleased to set aside the orders issued on October 27, 2021 and grant leave to the 2nd defendant for reopening of the suit and make such orders as to the defendant's witnesses to testify, produce evidence and tender documents.

    c. That this honourable court be pleased to suspend the highlighting of written submissions on December 16, 2021

    d. The costs of this application be in the cause.

2. The main ground on which the application is based is that the 2nd defendant's case was closed without his only witness tendering his evidence yet he had recorded a witness statement which was filed in court.

3. The plaintiff opposed the application through his replying affidavit sworn on October 14, 2022. The 1st defendant did not oppose the application. The court directed that the application be disposed of by way of written submissions and both parties filed their submissions accordingly.

4. Before delving into the merits of the application, it is necessary to give a brief background of the case. On May 30, 2013,the plaintiff filed suit against the 1st defendant seeking a declaration that he is the absolute owner of the parcel of land known as Soy/Soy block 10 (Navilus)/129 measuring 40.47 hectares and that the defendant is a trespasser on the said parcel. He also sought an order of injunction to restrain the defendant from interfering with the suit property and an order of eviction as well as mesne profits.

5. The 1st defendant entered appearance and filed a defence and counterclaim dated July 10, 2013. In the said counterclaim he sought an order compelling the plaintiff to transfer ten (10) acres of eh suit property to him and an order of injunction restraining the plaintiff from interfering with the suit property. In his list of witnesses filed on March 3, 2014 the 1st defendant listed himself, Benjamin Bett and Meshack Rono (2nd defendant) and filed witness statements for each of the witnesses.

6. The hearing of the case commenced on October 1, 2015 when the plaintiff testified and was cross-examined. Counsel for the plaintiff then sought an adjournment as he intended to call the chairman of the Land Control Booard. The matter was subsequently fixed fir hearing on various dates but the plaintiff was unable to call his witness. On January 20, 2017 the 1st defendant testified and the court directed him to make a formal application to join Meshack Rono (2nd defendant) to the suit. The 1st defendant filed the said application and pursuant to the ruling delivered on August 17, 2017, the 2nd defendant was joined to the suit as the 2nd defendant in the amended counterclaim dated September 18, 2017. He then entered appearance and filed a defence dated October 23, 2018 through the firm of Waziri Omollo & Co Advocates. He also filed his list of witnesses containing one witness(Meshack Rono) and the witness statement dated October 23, 2018. The 2nd defendant later instructed the firm of Mukabane & Kagunza Advocates who filed a notice of change of advocates dated October 22, 2020.

7. After the 2nd defendant was joined to the suit, the plaintiff's case was re-opened on May 10, 2019 when the plaintiff testified and closed his case. The 1st defendant testified and closed his case on November 19, 2020 while the 2nd defendant testified on October 27, 2021 and closed his case. The court then directed the parties to file their submissions.

8. On December 6, 2021 the 2nd defendant filed a notice to act in person together with this application. He later instructed the firm of Rotuk & Co Advocates who filed a notice of change of advocates on February 4, 2022.

9. Having considered the notice of motion, supporting and replying affidavit, rival submissions as well as the authorities cited by the parties, the following issues emerge for determination:

    i. Whether the application is incompetent

    ii. Whether the orders sought ought to be granted.

10. Learned counsel for the plaintiff submitted that the application is incompetent as the 2nd defendant did not file a notice of intention to act in person in compliance with order 9 rule 8(1) of the *Civil Procedure Rules, 2010*. She therefore urged the court to strike out the application. She further submitted that the firm of Rotuk & Co Advocates should have filed a notice of change of advocates and not a notice of appointment of advocates.

11. Having perused the record, I note that there is a notice of intention to act in person filed by the 2nd defendant on December 10, 2021. Perhaps the only lapse is that the 2nd defendant did not serve a copy of the same on the plaintiff. It thus follows that the firm of Rotuk & Co Advocates were right in filing a

notice of appointment of advocates as opposed to a notice of change of advocates. Consequently, both the application and the submissions filed by the firm of Rotuk & Co Advocates are properly on record.

12. I will now proceed to determine whether the orders issued on October 27, 2021 should be set aside and whether the 2nd defendant should be allowed to reopen his case, call witnesses and produce documents.

13. Learned counsel for the 2nd defendant submitted that the court has the discretion to set aside its orders as long as it does so judiciously. He contended that the applicant had a right to a fair hearing as provided under article 50 of the *Constitution*. He submitted that courts should be guided by the provisions of article 159 2(d) of the *Constitution* which enjoins the court to administer substantive justice rather than focus procedural technicalities. He further submitted that the court should ensure that it promotes the overriding objective as provided in sections 1A and 1B of the *Civil Procedure Act*. He relied on the case of *Wachira Karani v Bildad Wachira* (2016) eKLR for the proposition that the fundamental duty of the court is to allow parties a proper opportunity to put their cases upon the merits of the matter.

14. He contended reopening the case would not prejudice or embarrass the plaintiff since he would have an opportunity to cross-examine the applicant's witness. He relied on the case of *Simba Telecom v Karuhanga & another* (2014) UGHC 98 for the proposition that the court retains the discretion to allow re-opening of a case although the discretion must be exercised judiciously to ensure that such re-opening does not embarrass or prejudice the opposite party.

15. On her part learned counsel for the plaintiff submitted that the applicant had not advanced sufficient reasons why the case should be re-opened. It was her submission that even though the applicant contended that his case was closed without his witness who had recorded a statement being allowed to tender his evidence, this was not true. She pointed out that the 2nd defendant's list of witnesses dated October 23, 2018 and filed on October 24, 2018 contained himself as the only witness. Furthermore, the 2nd defendant's list of documents filed on the same date indicates that he shall rely on the documents produced by the 1st defendant. It is therefore counsel's contention that the 2nd defendant is not being candid when he states that his advocate failed to call a witness who had recorded his statement or that there are documents in his list of documents which were not produced.

16. She submitted that the court had on October 22, 2018 alluded to the fact that the 2nd defendant was delaying the hearing of this matter and on November 19, 2020 the court granted the defendants the last adjournment. She relied on the case of *Kihumba v Gladys Wanjiru Migwi & another* (2006) eKLR where the court observed that even in land matters, litigation must come to an end. She argued that the application offends the overriding objective which is to expedite the determination of disputes before the court.

17. It is trite law that the court has the discretion to set aside its orders although such discretion should be exercised judiciously. In the case of *Shah v Mbogo* 1967 EA 93 the court observed that:

> " The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.

18. In the instant case the 2nd defendant seeks to re-open his case for the reason that his advocate failed to call a witness whose statement is on record. The 2nd defendant has not disclosed the name of this witness as his list of witnesses only contains his (2nd defendant's) name. If indeed he wished to call more witnesses, he would have applied for leave to file a supplementary list of witnesses but he did not do

so. Order 3 rule 2 and order 11 of the *Civil Procedure Rules* require that parties file and exchange the evidence they intend to rely on in advance to avoid trial by ambush.

19. In the case of *Samwel Kiti Lewa v Housing Finance Co of Kenya Ltd & another* (2015) eKLR the court held as follows:

> " The court retains the discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party,. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be dfeated by inordinate And un-explained delay.
>
> .....In my view if the plaintiff was allowed to re-open his case to so prove, it would amount to fill the gaps in his evidence. That would be prejudicial to the defendants"

20. Having failed to disclose the evidence he intends to adduce, the court is ill- equipped to decide whether it should exercise its discretion in the applicant's favour as it may well be that the applicant intends to fill the gaps in its case.

21. I also note that this case has dragged in court for the last 10 years and re-opening it at this late stage after the 2nd defendant had closed his case will not only prejudice the plaintiff but it will go against the overriding objective of the *Civil Procedure Act* and the *Environment and Land Court Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

22. In the premises I am disinclined to exercise my discretion in favour of the applicant. The upshot is that the application lacks merit and it is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF APRIL 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Miss Rotich for the Plaintif/Respondent

2. Miss Chebitok for the 1st Defendant

3. No appearance for the 2nd defendant/Applicant

Court Assistant: A.Oniala