



Bifwoli v Attorney General & 3 others (Environment and Land Case Civil Suit 144 of 2012) [2023] KEELC 16866 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 144 OF 2012
SO OKONG'O, J
APRIL 20, 2023**

BETWEEN

THOMAS KHAMALA BIFWOLI PLAINTIFF

AND

THE HON ATTORNEY GENERAL 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

WILLIAM NDINYA OMOLLO 3RD DEFENDANT

MICHAEL OGOLA OGOT 4TH DEFENDANT

RULING

- 1 The hearing of this suit commenced before Ombwayo J on January 5, 2020. As at the time Ombwayo J was transferred to Nakuru, he had taken the evidence of the Plaintiff in part and the evidence of two witnesses for the 1st and 2nd Defendants. The Plaintiff started giving evidence and was stood down so that the evidence of the 1st and 2nd Defendants' witnesses could be taken first. From the list of witnesses on record, in addition to completing his evidence, the Plaintiff intends to call two additional witnesses, Herbert Mwangi Kamau and Sheila Yieke. The 3rd and 4th Defendants are yet to start their respective cases.
- 2 What is now before me is a Notice of Motion application dated December 21, 2022 by the Plaintiff seeking an order that this suit be transferred to the Environment and Land Court at Nakuru for hearing by Ombwayo J. The application is brought on the grounds set out on the face thereof and on the affidavit of the Plaintiff sworn on December 21, 2022. In summary, the Plaintiff has averred that the matter has been pending in court for the last 11 years and that it is in the interest of justice that the same be heard and determined within the shortest time possible. The Plaintiff has averred that the hearing of the suit is at an advanced stage in that the Plaintiff and other crucial witnesses have given evidence before Ombwayo J. The Plaintiff has averred that the only witness remaining to testify in the



matter before the case is closed is a valuer whose evidence will not take more than 1 hour. The Plaintiff has averred that the matter involves allegations of fraud and as such the demeanor of witnesses is very important. The Plaintiff has averred that Ombwayo J had not only the opportunity to observe the demeanor of the key and critical witnesses in the matter during their testimony but had also a deeper knowledge and understanding of the history of the dispute and the issues in contention which are critical for rendering a fair and just judgment. The Plaintiff has averred that it would not be necessary for the witnesses to travel to Nakuru for the hearing of the suit as Ombwayo J would hear the matter virtually. The Plaintiff has averred that a total of 6 witnesses testified before Ombwayo J.

- 3 The application is opposed by the 3rd Defendant through grounds of opposition dated February 22, 2023. The 3rd Defendant has averred that the Plaintiff has not disclosed to the court that he gave his evidence in part after which he was stood down and that he is yet to complete his testimony. The 3rd Defendant has averred that the Plaintiff's application is an attempt by the Plaintiff to forum shop for a judge of his choice. The 3rd Defendant has averred that the suit is more likely to be heard faster in Kisumu than in Nakuru where the Plaintiff wants it transferred. The 3rd Defendant has averred that the Plaintiff's application is an abuse of the process of the court and if allowed would erode public confidence in the judiciary and in the administration of justice.
- 4 In his submission in support of the application, the Plaintiff's advocate Mr Simiyu has submitted that 3 witnesses have so far testified in the matter. He has reiterated that the case involves fraud and that Ombwayo J observed the demeanor of the witnesses who testified before him which is important for a case of that nature. The Plaintiff's advocate has submitted that the Plaintiff is not seeking the transfer of the suit from Kisumu to Nakuru but rather the transmission of the file to Ombwayo J in Nakuru to continue with the further hearing of the suit. The Plaintiff's advocate has submitted that the court has jurisdiction to grant the order sought. The Plaintiff's advocate has cited two cases one by the High Court and the other by the Environment and Land Court in support of his submissions. The Plaintiff's advocate has submitted that the issues raised in the 3rd Defendant's grounds of opposition are scandalous and that the Plaintiff is not on a forum shopping mission.
- 5 In his submission in reply, the 3rd Defendant's advocate, Mr Orengo has submitted that the Plaintiff has sought an order for the transfer of this suit to the ELC Nakuru and not the transmission of the file as the Plaintiff's counsel has submitted. The 3rd Defendant's advocate has submitted that no valid grounds have been put forward by the Plaintiff to warrant the transfer of this suit to the ELC Nakuru for further hearing by Ombwayo J. He has submitted that so far only three witnesses have given evidence. These are; the Plaintiff who has given evidence in part and two other witnesses who merely produced documents. The 3rd Defendant's advocate has submitted that since the Plaintiff has given his evidence in part, this court will still have an opportunity to observe his demeanor when he comes back to complete his evidence. The 3rd Defendant's advocate has submitted that nothing turns on the demeanor of the other two witnesses who came merely to produce documents. The 3rd Defendant's advocate has submitted that the hearing of the matter did not reach such an advanced stage before Ombwayo J that he should be called upon to complete the same.
- 6 I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the 3rd Defendant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The following is my view on the matter: The Plaintiff's application was brought under Articles 48 and 165(7) of the [Constitution](#) and Sections 1A, 1B and 18 of the [Civil Procedure Act](#). It is not disputed that this suit is part heard before Ombwayo J and that Ombwayo J took the evidence of 3 witnesses. The evidence of one witness was not completed while the remaining two witnesses gave their evidence in chief, were cross-examined



and re-examined. It is also not disputed that Ombwayo J was transferred from Kisumu to Nairobi and as such he is not in a position to complete the hearing of this matter at Kisumu.

7 Sections 1A and 1B of the Civil Procedure Rules also cited by the Plaintiff as a basis for his application provide as follows:

1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (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.

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) The just determination of the proceedings;
 - (b) The efficient disposal of the business of the Court;
 - (c) The efficient use of the available judicial and administrative resources;
 - (d) The timely disposal of the proceedings, and all other proceedings in
 - (e) The use of suitable technology.'

8 Order 18 Rule 8(1) of the [Civil Procedure Rules](#) gives the court some direction on what to do with part-heard matters. It provides as follows:

- (1) 'Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.'

9 This rule gives a judge taking over a part-heard case from a judge who has been transferred the discretion to proceed with the hearing of the case from where his predecessor left it. As a general rule, this is what normally happens, and for good reason. When a judge is transferred to another court station, he is supposed to attend to the matters at his new station without any distraction. In most cases, the judge will not only get new matters at his new station but will also get part-heard matters left by his predecessor at that station. He will therefore be dealing with both new cases and part-heard cases. Once a judge leaves a station, he is not supposed to be unduly summoned back to that station to deal with ordinary matters that were part-heard before him as his successor is supposed to deal with the same. If that was not the case, judges who have been transferred would not be able to concentrate fully at their new stations as they would divide their time between their old and new stations. These judges



would also require facilitation to go back to their old stations. This is an added cost to the strained court resources. The unencumbered back-and-forth shuttling of judges would in the end not achieve the overriding objective of the *Civil Procedure Act* in that it would compromise efficiency, prudent use of resources and service delivery in the judiciary in general. This in my view is what Order 18 Rule 8(1) of the Civil Procedure Rules was supposed to take care of.

10 Despite the provisions of Order 18 Rule 8(1) of the Civil Procedure Rules, the court may on its own motion or an application by any of the parties direct that the hearing of a part-heard matter does start a fresh or that the hearing of the matter be completed by the judge before whom the same had commenced in which case, the judge may be ordered to come back to his former station where he had heard the matter to finalize the trial. The matter can also be forwarded to the judge at his new station for further hearing and determination. This is a departure from the general rule. It is also one of those rare occasions where a judge would give orders to another judge of the same rank or status.

11 A party seeking to have the hearing of a matter which is part-heard before a judge who has been transferred to be completed by the same judge must give a good reason or sufficient cause before such a request can be granted. The power of the court to grant such a request is discretionary and must be exercised judiciously.

12 The question that I need to answer in the present application is whether the Plaintiff has given a good reason or sufficient cause why this suit should be heard and completed by Ombwayo J.

13 In *Attorney General v Law Society of Kenya & another [2017]eKLR* the court defined sufficient cause as follows:

Sufficient cause or good cause in law means:

The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary, 9th Edition*, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.'

14 I am not persuaded that the Plaintiff has shown sufficient cause to warrant calling upon Ombwayo J to complete the hearing of this suit. I am not convinced that there is anything out of the ordinary in this suit. I am also not swayed that the hearing of the case has progressed to the extent that it would be disposed of faster by Ombwayo J. As I have mentioned earlier in the ruling, so far, only three witnesses have given evidence. I do not know where the Plaintiff got the six witnesses mentioned in his application. Out of the three witnesses, the evidence of one (the Plaintiff) is incomplete. The other two witnesses were witnesses for the 1st and 2nd Defendants. This means that the Plaintiff is yet to close his case. The Plaintiff has indicated that he intends to call one more witness before closing his case. The 3rd and 4th Defendants will thereafter call their witnesses before the hearing of the case is concluded. In the circumstances, the claim by the Plaintiff that the hearing of the suit had reached an advanced stage before Ombwayo J is not correct. The Plaintiff's claim in his affidavit that: 'only 1 witness (valuer) is remaining to testify before the matter is closed or concluded and the judgment is rendered' is also not correct.

15 The other ground that was put forward by the Plaintiff as a basis for his application was that there are allegations of fraud against the Defendants and since Ombwayo J had observed the demeanor of the witnesses who testified before him, it is important that he finalizes the hearing of the suit. Courts observe the demeanor of witnesses in all cases before them. There is nothing exceptional in cases where fraud is alleged as concerns the demeanor of witnesses. It is not clear to me why the Plaintiff thinks that



the court had made observations regarding the demeanor of the witnesses who have already testified in the matter. Order 18 Rule 7 of the Civil Procedure Rules allows the court to make note of the demeanor of witnesses. I have not seen any such note on record meaning that there may have been nothing peculiar about the demeanor of the said witnesses for it to be a basis for the judge to be asked to come back to complete this suit.

- 16 The Plaintiff also raised the issue of Ombwayo J. being seized of 'deeper knowledge and understanding of the history of the case'. What I can say to this is that; this is a court of record. The knowledge and understanding alluded to by the Plaintiff must be based on the material on record other than something personal to the judge. If that is the case, then any judge can gain the same knowledge and understanding upon considering the record.
- 17 For the foregoing reasons, I find no merit in the Plaintiff's application dated December 21, 2022. The application is dismissed with costs to the 3rd Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF APRIL 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the 1st and 2nd Defendants

Mr. J.A.Orengo for the 3rd Defendant

N/A for the 4th defendant

Mr. Kevin-Court Assistant

