



**African Inland Church of Kenya (Registered Trustees) v Enyang & 2 others (Environment & Land Case 46 of 2013) [2023] KEELC 17880 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17880 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 46 OF 2013  
FO NYAGAKA, J  
MAY 31, 2023**

**BETWEEN**

**AFRICAN INLAND CHURCH OF KENYA (REGISTERED TRUSTEES) ..... PLAINTIFF**

**AND**

**NAOMI ENYANG ..... 1<sup>ST</sup> DEFENDANT**

**AMIN ALI MOHAMED ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF TURKANA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a ruling on an application made orally in open Court on April 25, 2023 when this matter came for defence hearing of the 1<sup>st</sup> Defendant's case. On the material date, the 1<sup>st</sup> Defendant gave evidence in chief. Before the conclusion of the said testimony, learned counsel for the party who testified at the time as DW1 moved the Court to stand her down to another date in order to enable her bring to Court the originals of documents on which she had testified and wished to produce.
2. Learned counsel prayed also for witness summons to issue to the District Surveyor of the relevant area to come and testify on matters of the survey of the suit land. Additionally, he sought for leave of the Court to file a supplementary List of Documents. He stated that the three documents were a copy of an Occurrence Book (OB) report, copies of utility bills paid by the 1<sup>st</sup> Defendant to the Municipal Council and invoices that the Kenya Power and Lighting Company had sent to his client in relation to the property in issue. He undertook to also file an electronic certificate in relation to the documents, as required by Section 106B of the *Evidence Act*, Chapter 80 of the Laws of Kenya.
3. The issue of standing the witness down to enable her avail originals of the documents she did not have was not objected to. The parties did not respond on or submit about the issue of witness summons



being issued to the surveyor to testify later. However, regarding the issue of filing a supplementary List of Documents the three learned counsel appearing for the other parties opposed it vehemently.

4. Learned counsel for the Plaintiff of the opposition to the application arguing that it was made late in the day, after the Plaintiff had testified and closed her case. He stated that the Plaintiff would have no chance of responding to the documents to be filed thereby denying a chance to say anything in evidence hence it would be prejudicial to her. His contention was that to do so would offend the rules of procedure and the “cardinal law on fair hearing.” He summed it that the application only a delaying tactic by the 1<sup>st</sup> Defendant.
5. Learned counsel for the 2<sup>nd</sup> Defendant objected to the application by agreeing with the Plaintiff’s submission that the application was urged too late in the stage of the case. He too argued that to do so would prejudice the 2<sup>nd</sup> Defendant. But he did not submit on how that would prejudice his client.
6. As for the 3<sup>rd</sup> Defendant, his learned counsel did not sound to be saying anything on the issue objected to. His submission was on the cross-examination of the witness. He urged the Court direct that the witness be cross-examined on the material date and be recalled later to produce the originals of those documents she did not have in Court. He was of the view that to do so would not prejudice the 1<sup>st</sup> Defendant because recalling her would have given her opportunity to further her case.
7. The Advocate for the 1<sup>st</sup> Defendant responded by relying on Articles 159(2) and 48 of the Constitution saying the two provisions do not state how late so late ought to be in order for one not to be permitted to file additional documents. He resorted to the phrase in the earlier List of Documents he filed in court in which he stated the last items thereon as being “any witness with leave of the court”. On this he argued that it meant the court could grant leave to call any witness.
8. He submitted that the parties had not explained the prejudice they would suffer if the application was allowed. In any event, he argued, it would not be a trial by ambush because the witness had indicated the specific documents she sought to add and that since they were not to be filed the same date the other parties would have a chance to cross-examine on them.

### **Issues, analysis and determination**

9. I have considered the Application, the law and the submissions by all learned counsel. The only issues before me are whether the Application is merited or not and who to bear the costs of the application.
10. Starting with the first issue, this Court notes that the background of the oral application opposed was that earlier in the start of the 1<sup>st</sup> Defendant’s testimony she had given oral accounts of issues that touched on the matters that would appear to be contained in the documents intended to be introduced. For instance, in relation to the OB, she testified that some time in November or December, 2014 the 2<sup>nd</sup> Defendant had ejected her from the suit premises where she used to reside on. Her testimony was that one evening she returned home from duty outside the country only to find the 2<sup>nd</sup> Defendant busy felling trees that were on her alleged Plot. He had many tractors which were being used to do so. She was barred by him from accessing her place. She went and reported the matter to the police. They came together with her to the site but they too were barred from accessing the place.
11. On the second set of documents which were the utility bills of the plot, she testified that to date she had been paying for them for as long as she had been in possession of the plot and residing on it. She specified the utility bills as water, electricity and security. She stated that she had registered herself with Kenya Power and Lighting Company for supply of electricity upon entry onto the land. She was given an electricity meter for which she paid Kshs. 2,500/= using her mobile number. She testified that up to the time of giving testimony she was being billed by the Company for electricity, with the name of



the 2<sup>nd</sup> Defendant being the one referred to in the Company's messages for billing. Therefore, to the extent that the 1<sup>st</sup> Defendant had given oral testimony on matters which were relevant to the facts in issue the question this court asks itself is whether to bar her from giving the documentary evidence in relation to the matters testified on would be in the interest of justice.

12. The law regarding the filing of copies of documents which should accompany the Plaintiff or Defence and Counterclaim is Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules. In particular sub-rules 2(d) of the former and 5(d) of the latter provide for the filing of copies of the documents parties intend to rely on at the trial. There is no provision for late filing of the documents, while in relation to witnesses' statements the relevant sub-rule provides for late filing but not later than fifteen (15) days before the trial conference contemplated in Order 11 of the Civil Procedure Rules.
13. As for the Environment and Land Court the filing of documents is reinforced by the Section 16(d) of the Practice Directions of the Court (see Legal Notice No. 5178 of April 25, 2014). But contrary to the arguments by the 1<sup>st</sup> Defendant's learned counsel that Articles 159(2) and 48 of the Constitution do not give the precise timeline when the filing of documents can be made, this Court is of the view that the two constitutional provisions are not procedural ones in regard to adduction and giving of evidence. The law on evidence is the Evidence Act, Chapter 80 of the Laws of Kenya and the Civil Procedure Rules which steps in to stipulate the timelines for doing certain acts some of which touch on adduction of evidence.
14. This Court has stated before in the case of Mansukhalal Jesang Maru v Frank Wafula [2021] eKLR that in order for a party to satisfy the Court as to be granted leave to file further or other documents after the filing of his case or defence to a case facing him or her, he has to climb to a higher standard than a balance of probabilities. Further, he/she has to show exceptional circumstances that made him or her not to file the documents together with the Plaintiff or Defence or Counterclaim. This is because the law is clear that documentary evidence has, at the time of filing the said pleadings, accompany them by copies. To file a pleading and bring up documents to support the pleading leaves the evidence in support to be suspect and a subject of imagination that it is manufactured.
15. While the Court is not saying that late filing of documents cannot be permitted, it should remain abundantly clear that a party intending to file copies of documents after the filing of either the Plaintiff, Petition or Claim, or Defence and Counterclaim or Response to a Petition or other claim must convince the Court that the documents were not within his/her reach even after exercising all due diligence of a litigant and that they are neither manufactured for the case nor intrinsically engrained in the process of making up a case or a defence, which is an illegal process. In Johana Kipkemei Too v Hellen Tum [2014] eKLR Justice Munyao held as follows:

“This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document,...”
16. The situation becomes more difficult for either party when before or at the time of the trial conference they do not pray for leave of the Court to file copies or further a further set of copies of documents



and exchange them before the trial of the case is fixed. This, as was analogized before is a situation akin to a ship setting assail or an airplane taking off and a passenger calls on the vessel to halt its course and return to port or air field in order to pick up his baggage. It can only happen in the rarest of cases such as a matter of life and death: it rarely does anyway. So, it should be for late filing of documents. Thus, in *Mansukhalal Jesang* (supra) this Court held as follows:-

“22. .What appears to me to be the proper interpretation of the relevant part of the Rule that I have reproduced is that even where a situation calls for a party to be permitted to file additional documents or detailed statements, that happens only at the Pretrial Conference when directions are being given by the Judge and leave is granted therefor. It is not open for a party to come to court afterwards for leave to file additional documents. What the Rule imports is that by the time parties indicate at the pre-trial conference that they are ready for hearing, and do not require additional documents or witnesses for that matter, they have assessed their case and known that it is up to date and tight enough to be sustained with the evidence already presented to both the Court and the other side.

23. To otherwise keep bringing in new evidence or witnesses as and when the matter comes to court, and at any stage, amounts to conducting a trial by instalments. It is akin to a party keeping peeping into a smokescreen and when they see clearly the adverse party’s case and realise that that case is an iron curtain, they go back to the drawing board in order to bring into their aid x-rays and scan machines to use to go through the curtain. This is not only trial by ambush but an unfair trial. It amounts to stealing a match over the other party.”

17. In the instant case, the beginning point to note is that the suit was filed by the Plaintiff on April 23, 2013. It would appear that some of the documents referred to in the testimony of the Applicant were not available to or within her possession. For instance, the number of Kenya Power and Lighting Invoices and messages sent to her mobile number over the suit land, after she had been allegedly put out of possession by the 2<sup>nd</sup> Defendant were sent to her way after the suit was filed. It is not evidence the 1<sup>st</sup> Defendant called for after the case had been brought and she had filed her Defence so as to demonstrate that she had a relationship with the suit land before or even after the case was instituted. It was information generated by offices, independent of her will but it came to her possession after the case had been filed and made ready for hearing. Therefore, this is evidence which in all practical situations she could not have had at the time of filing her Defence.
18. Regarding the OB report on the complaint the Applicant made to the police about her eviction, she stated that the ‘eviction’, allegedly undertaken by the 2<sup>nd</sup> Defendant, took place sometime in November or December of 2014. The court record shows that by that time the Applicant had filed her Defence, which May 14, 2013 to which the Plaintiff replied on June 12, 2013. This court finds that some of the events that show how the applicant lost possession of the land she alleges to have been occupying took place way after the first hearing of this matter took place.
19. The Respondents argue that they will be prejudiced if the 1<sup>st</sup> Defendant is allowed to file and rely on the set of three documents she mentions. While the other defendants did not clearly state what prejudice they would suffer, the Plaintiff was clear that the Plaintiff would suffer prejudice because it has given testimony and closed its case.



20. The issue the Court is supposed to decide herein is whether the prejudice, if any, to be caused to the Plaintiff would be greater than the prejudice to be caused to the 1<sup>st</sup> Defendant and the effect of either of the prejudices on the interest of justice if leave was not granted as prayed. I must state that in order to grant or refuse leave to file documents by a party after filing its pleadings the court must weigh the circumstances of each case and each case must be judged on its own merits, bearing in mind the greater standard I have alluded to above. One thing that stands out clear in the instant case, the applicant came across the information sought to be relied on in the course of the trial.
21. In *Raila Odinga & 5 Others vs IEBC & 3 Others*, Supreme Court of Kenya, Petitions Nos. 3, 4 and 5 of 2013 (2013) eKLR, the Supreme Court of Kenya considered the prejudice that would be occasioned to the adverse parties if additional evidence sought to be relied on after the stipulated time for availing it had passed and declined the Application. Similarly, in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, 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. But in that case, unlike in the instant one, the Defendant never indicated to the Court at the beginning of her testimony that she would be relying on the document she sought to produce later or inform the court that it was not within her reach at the time of testifying.
22. However, in *Joseph Ndungu Kamau v John Njibia* [2017] eKLR the learned judge was prepared to and did re-open both the Plaintiff's and Defence cases but only limited to permitting the Plaintiff to produce in evidence, and cross-examination of the witness producing it, a Court file that could not be traced during the course of trial even with due efforts.
23. From the above analysis, I find that the Plaintiff and the other Defendants will not be prejudiced if leave is granted as prayed for the List of Documents sought to be filed and served to be so done. Instead to refuse the application will occasion greater prejudice to the 1<sup>st</sup> Defendant and the course of justice since it will deny the parties and the Court an opportunity to know the full truth about the events surrounding the suit land herein. I therefore grant the prayer and direct that the List of Documents together with the copies thereof be filed and served within 21 days. The suit will be mentioned on June 22, 2023 for fixing a date for further Defence hearing and issuance of witness summons as prayed. There will be no order as to costs on the instance application.
24. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**HON. DR. IUR FRED NYAGAKA  
JUDGE, ELC KITALE**

In presence of:

Samba for Plaintiff

Onsembe for 3<sup>rd</sup> Defendant

Barongo for 2<sup>nd</sup> Defendant

Githaiga absent

