



Gilgil Distributors Limited v Njeru & another (Environment & Land Case 147 of 2012) [2023] KEELC 17494 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 147 OF 2012**

FM NJOROGE, J

MAY 24, 2023

BETWEEN

GILGIL DISTRIBUTORS LIMITED PLAINTIFF

AND

GRACE RWAMBA NJERU 1ST DEFENDANT

VIRGINIA NJERI & ESTHER WANJA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JOHN MAINA KAMANGARA). 2ND DEFENDANT

RULING

1. The application before me is for the following orders:
 - 1) ...spent.
 - 2) That this honourable court be pleased to stay further proceedings herein in closing the pending submissions scheduled for 2/5/2023 pending the hearing and determination of this application.
 - 3) That the proceedings taken on the 27/3/2023, be set aside and the matter be fixed afresh for the hearing of the 2nd defendant's case.
 - 4) That in the alternative, this honourable court be pleased to direct the witness of the 2nd defendant witness to be recalled for cross-examination by counsel for the 1st defendant.
 - 5) That cost of the application be provided for.
2. The application is premised on the grounds at its foot and in the supporting affidavit sworn by her advocate, Mr. Kisilah Daniel Gor dated 28/3/2023. It is stated by the applicant that the matter proceeded in the absence of the 1st defendant's counsel on 27/3/2023 when the 2nd defence witness gave evidence. It is further averred that counsel for the defendant was at the time of that hearing involved in



several other matters before two other courts of equal status, and that the delay in attending court was not deliberate. It is stated that counsel did arrive in court on that date but after the conclusion of the proceedings. The applicant avers that the applicant's right to a fair trial is threatened with infringement for no fault of her own making, and prays that the mistakes of her counsel ought not be visited upon her.

3. In opposition to the motion the respondents filed sworn affidavits. The plaintiff's counsel in his affidavit sworn on 29/3/2023 stated that the applicant has not demonstrated any solid basis to warrant the granting of the orders sought. It is stated that the hearing date had been taken by the 1st respondent's advocate and he must have ascertained that the date was convenient; that the time of hearing allocated by the court was consented to by the said counsel on that date and so he can not be heard to complain over pressure of work as he must have been aware of his work schedule; that counsel's lack of organization is not a good cause for setting aside orders or vacating proceedings; that the applicants have failed to undertake to underwrite the huge cost of the hearing held on 27/3/2023; that the matter being old the orders sought should not be granted as vacating the proceedings would be a big step backwards; that no prejudice would be occasioned to the applicant since the evidence given is that of an co-defendant and that the orders sought are against the spirit of the provisions of Sections 1A and 1B of the Civil Procedure Act.
4. In the replying affidavit filed by the 2nd defendant's counsel it is averred that the 1st defendant's counsel failed to turn up even though the hearing took long; that the 2nd defendant is elderly and it would be unfair to drag her back to court; that the prayers sought by the 1st defendant cannot be effected without the entire case of the 2nd defendant being reopened since ideally the plaintiff should be the last party to cross-examine before re-examination. He avers that the hearing should not be reopened owing to the age of the matter.
5. I have examined the record regarding this case and it is correct that Mr. Kisilah for the 1st defendant confirmed during the virtual call-over on 27/3/2023 that he was ready for the hearing. However, when the court sat on 12.05pm he and Mr. Matiri counsel for the plaintiff were conspicuously absent and the hearing commenced only for Mr. Matiri to walk into court at 12:10pm. DW4 testified to conclusion and was examined by Mr. Matiri and re-examined by Mr. Abuya. I would estimate from the record that the proceedings may have taken 40 minutes at the most but Mr. Kisilah did not appear.
6. The present application is meant to reopen the hearing and fix the matter afresh for the hearing of the 2nd defendant's case according to prayer No. 3 in the application. However, this court does not see any good reason why the evidence of DW4 should be set aside only for her to come and say the same things on another date. The most appropriate order that can be sought in the circumstances, and which has been sought in prayer No. 4, is that DW4 be recalled for cross-examination by counsel for the 1st defendant. Of course this option has been stringently opposed by Mr. Abuya for the 2nd defendant who states that the 2nd defendant is quite elderly and the matter has been in court for well over ten years and that it would be wholly unjust to drag her back to court again in the future date for mistakes that were not of her own making.
7. Mistakes by counsel have been made by counsel and will continue being made in the future. Courts have had different approaches to those mistakes depending on the circumstances of each. Mr. Kisilah has in this case attached a copy of the cause list for 27/3/2023 to show that he had a hearing before another court in this very station and neither counsel for the plaintiff nor for the 2nd defendant have disputed that fact. What they decry is disorganization on the part of Mr. Kisilah which led him to confirm the hour of hearing of 12.00noon whereas he had other matters to deal which would not allow him to attend court for the hearing.



8. Though this court is not intent on condoning any perceived disorganization on the part of counsel, I have observed that it is not unusual for a counsel to have several matters on the same date listed for hearing and it is quite usual for some hearings to be more protracted than was previous expected while the hearing was being confirmed as it all depends on the course of giving evidence-in-chief and cross-examination, which are occasionally not within the control of counsel or court owing to various factors. In the circumstances of this case therefore the extenuating factor is that Mr. Kisilah's plea that he was appearing before another court has not been disputed by other counsel. However, it cannot also be disputed that an element of cost was involved in arranging for the hearing that took place on 27/3/2023 and that more costs would be incurred if it was ordered that DW4 be recalled for cross-examination. For that reason, it is proper that this court weighs carefully the circumstances and give the appropriate orders. I therefore find that the application dated 28/3/2023 partially succeeds and I give the following orders:

- a. That the proceeding of 27/3/2023 shall not be set aside;
- b. That the hearing of the case is reopened to the extent that DW4 shall be recalled for cross-examination by counsel for the 1st defendant and if necessary by counsel for the plaintiff;
- c. That the counsel for 2nd defendant shall have right to re-examine DW4 after cross-examination is over;
- d. The 1st defendant shall pay Kshs. 6,000/= to the plaintiff and Kshs. 12,000/= to the 2nd defendant before the next hearing date as penalty since the other parties were not at fault.
- e. That this matter shall be mentioned on 29/5/2023 for fixing of a further hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 24TH DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

