



**Dayalji v Dayalji & 2 others (Civil Case 198 of 2010)
[2022] KEHC 14461 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE 198 OF 2010
JN KAMAU, J
OCTOBER 24, 2022**

BETWEEN

KISHOR DAYALJI PLAINTIFF

AND

NILESH DAYALJI 1ST DEFENDANT

SUNIL DAYALJI 2ND DEFENDANT

ASWIN DAYALJI 3RD DEFENDANT

RULING

Introduction

1. In his Notice of Motion dated 15th October 2021 and filed on 26th October 2021, the Plaintiff sought for orders that the Ruling that was to be delivered on 23rd November 2021 be stayed and that he be granted leave to file Supplementary Affidavit and submissions to be considered in the aforesaid Ruling.
2. He swore an Affidavit on 25th October 2021 in support of the said application. He averred that he was served with an application to cease acting by his former advocates upon which he engaged the law firm of M/S Otieno Okeyo & Company Advocates to take over the conduct of the suit on his behalf. He added that the former advocate had since consented to his new advocates coming on record for him and a consent to that effect was filed. He urged the court to adopt the same.
3. He contended that after his application dated 25th May 2021 was served upon the Defendants, they filed their Replying Affidavit annexing a letter dated 4th April 2009 indicating that he had welcomed and accepted the Ruling of 24th May 2017 and the consent order dated 19th September 2019. When he disputed having authored and/or sign the letter, his advocates advised him to report to Kisumu Central Police Station which informed him that they would carry out investigations and get back to him.



4. He averred that his disputed signature was subjected to forensic examination which revealed that he did not sign the letter. He urged the court to receive in evidence the said forensic examination report before determining the application dated 25th May 2017.
5. In opposition to the said application, on 9th November 2021, the Defendants filed a Replying Affidavit. The same was undated.
6. The Plaintiff swore a Supplementary Affidavit on 12th November 2021. The same was filed on 17th November 2021. He contended that the said Replying Affidavit was bad in law.
7. His Written Submissions were dated 8th December 2021 and filed on 9th December 2021 while those of the Defendants were dated and filed on 24th January 2022. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal analysis

8. The Plaintiff submitted that the court's discretion under the Section 1A and B, 3, 3A and 63(e) of the Civil Procedure Act and Order 51 of the Civil Procedure Rules to deal with the instant application and grant the orders he sought had not been challenged by the Respondents. He placed reliance on the case of Clarice Odhiambo vs The Coca-Cola Company & Others [2020] eKLR where it was held that where there was new evidence or additional evidence presented that would help the court in effectually and completely determine the dispute then arrest of a pending ruling, granting of leave to adduce such evidence was well within the discretion of the court.
9. On their part, the Defendants placed reliance on the cases of *Inter Countries Importers and Exporters Ltd vs Teleposta Pension Scheme Registered Trustees & 5 Others* Civil Application No 203 of 2016 (eKLR citation not provided), *Brooke Bond Liebig vs Mallya* (1975) EA 266 and *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR where the common thread was that a consent order would only be set aside on grounds of fraud, collusion, mistake and non-disclosure of material facts.
10. It was their case that the Plaintiff's intended further evidence was an abuse of the court process and would not add value in meeting the threshold for setting aside the consent for the reason that it did not in any way demonstrate the said consent was secured by fraud, mistake, an agreement contrary to the policy of the court or without material facts.
11. Notably, in their respective Written Submissions, both the Plaintiff and the Defendant delved into matters of evidence. This court restrained itself from considering the said issues as they were best canvassed with during trial. It was worthy of note that the Defendants were only limited to relying on their Written Submissions. This is because their Replying Affidavit was defective and incompetent ab initio for not having been dated.
12. This was contrary to the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) that stipulates that:-
Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.
13. Turning to the substantive issue, it is trite law that every party has a right to fair hearing as enshrined in Article 50(1) of the Constitution of Kenya, 2010 that provides that:-



Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

14. The Plaintiff therefore had a right to annex any new information he had before the court could reserve its Ruling for purposes of determining the real issues in question. The Plaintiff's new advocates came on record on 10th November 2021 when this court endorsed the consent that was duly executed by the said advocates and his previous advocates. The Forensic Document Examination Report was dated 30th September 2021.
15. As this court reserved its Ruling of the Plaintiff's Notice of Motion application dated 25th May 2021 and filed on 26th May 2021 on 21st July 2021, it was persuaded that it was in the interest of justice that the Plaintiff be granted an opportunity to adduce evidence he felt would assist his case. He had just retained a new advocate to act for him and was entitled to the best legal representation his new advocates could offer him.
16. Indeed, courts must be slow to deny parties opportunities to tender evidence they felt could assist their cases. Delays can be compensated by way of costs where serious prejudice has been occasioned to an opposing party in an application seeking extension of time to do an act. Opposing parties can also be granted corresponding leave to file further affidavits and additional documents to counter those that have been submitted by an applicant.
17. In this case, save for the delay in the delivery of the aforesaid Ruling, this court did not find any prejudice that would be occasioned to the Defendants if it allowed the Plaintiff's present application. If they suffered any prejudice, they did not demonstrate the same to the court.

Disposition

18. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 15th October 2021 and filed on 26th October 2021 was merited and the same be and is hereby allowed. Costs of this application will be in the cause.
19. Consequently, it is hereby directed as follows:-
 1. That the Plaintiff be and is hereby granted leave to file and serve a Supplementary Affidavit by 7th November 2022.
 2. That the Defendants be and are hereby granted corresponding leave to file and serve a Further Affidavit limited to only new issues that may have been raised in the Supplementary Affidavit by 28th November 2022.
 3. That the matter to be mentioned on 13th December 2022 to confirm compliance and/or for further orders and/or directions.
20. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER 2022

J. KAMAU
JUDGE

