



Jeremiah’s Creek Limited v Ndungu; Imwati (Interested Party) (Environment & Land Case 103 of 2021) [2023] KEELC 19174 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 103 OF 2021**

**AE DENA, J
JULY 28, 2023**

BETWEEN

JEREMIAH’S CREEK LIMITED PLAINTIFF

AND

TABITHA NDUNGU DEFENDANT

AND

ANDREW THIAINE IMWATI INTERESTED PARTY

RULING

Background

1. This suit was commenced by way of plaint dated February 22, 2017 and is in respect of land parcel Kwale/Diani Complex/1069. It is the plaintiff’s case that it has at all times been the registered owner of the land. The defendant is sued in her own capacity and as the widow personal representative of the estate of Charles Kamau. It is alleged by the plaintiff the parcel was invaded by the defendant’s husband (deceased) who had been permitted to supervise construction on the land. It is contended that the defendant took advantage of her husband’s invasion and moved into the suit land and that attempts to have her vacate the same through notices to vacate have borne no fruit. It is the Plaintiff’s case that both the defendant and her late husband were intent on defrauding the plaintiff and one Maureen Millet off the suit land as she was elderly and also a foreigner. The plaintiff thus prays *inter alia* for an order of eviction against the defendant.
2. In response, the defendant filed a defence & Counterclaim, subsequently Andrew Thianie Imwati the initial registered owner from whom the suit property was allegedly bought and the Land Registrar were enjoined to the suit. According to the 1st defendant the suit land belongs to Escafeld Holdings Limited where her late husband Charles Kamau was the sole director. The defendant filed a counterclaim



seeking for a declaration that the transfer of the suit land to the plaintiff was fraudulent and further that the suit ought to be dismissed with costs of the counterclaim.

3. The case was heard on February 27, 2023 and February 28, 2023 the plaintiff through David Needham its director (PW1) and the Interested Party gave evidence. Both witnesses were cross examined and re-examined. An objection was raised against the production of the Statutory declaration of Maureen Millet dated May 4, 2016 (see item 7 of the plaintiffs list of documents dated February 22, 2017). According to Mr Tindika counsel for the 1st defendant, the document raised very crucial issues relating to the suit and which the 1st defendant required to subject the recorder to examination. That it raised many issues which did not correspond with the witness statement filed by PW1.
4. In response to the above Mr Khakula for the plaintiff submitted the objection was not made in good faith having gone past pretrial directions which were to provide certainty and level playing ground. That before the amendments to the Civil procedure there was a lot of practice by surprise. That no prior objection had been raised and that the document was an affidavit under oath and intention to cross examine should have been notified. That it was within PW1 right to produce it based on the Power of Attorney. Mr Penda for the 2nd defendant left the matter in the hands of the court.
5. I rendered a ruling on the issue where I overruled the objection. Mr Tindika then applied for leave to make any application pursuant to Order 19 of the Civil Procedure Rules which I granted. The hearing continued in the usual manner however PW2 had to be stepped down at the beginning of his cross examination to allow for him to be supplied with the documents he would be cross examined on. Mr Tindika then orally applied to the court to order attendance of Ms Millet for cross examination having been confirmed to be alive.
6. In response Mr Kakula was of the view that Mr Tindika should make a formal application owing to gravity of the application and considering Millet already had health challenges and that the document was not a new document. The court agreed with Mr Kakula and gave direction on filing of the application and its disposal. The application is the subject of this ruling arises out of this.

The Application.

7. The defendant vide a Notice of Motion dated March 31, 2023 seeks the following verbatim orders; -
 1. That pending any further proceedings and/or hearing of this matter Maureen Millet being a Deponent to the Affidavit dated 4th day of May, 2016 filed in this matter do attend court for cross examination on the said Affidavit, together with emails produced in this matter.
 2. That in the event the said Maureen Millet does not attend before this honourable Court for cross examination as requested, the said Affidavit and all her evidence be expunged from the record of all the proceedings in this matter
 3. That the costs of this Application be provided for.
8. The application is premised on the grounds set on its face and the affidavit of Tabitha Ndungu the defendant sworn on 31/3/23. It is deponed that Ms Millet the mother of PW1 swore the affidavit dated 4/5/2016 which was to be filed in HCC No 24 of 2012 by the plaintiff but the suit was withdrawn. That the court admitted the said affidavit as part of the plaintiff evidence despite objection by counsel for the defendant. That under the rules cross examination is mandatory and which is also a constitutional right denied on the evidence presented. The deponent states that in the event Ms Millet is not availed for cross examination the said affidavit and all her evidence be expunged from the record.



9. The application is opposed by the plaintiff as deponed in the replying affidavit of David Needham shareholder of the plaintiff and done to Ms Millet Power of Attorney. It is averred that the application is an attempt to re-argue an oral application/objection heard and dismissed by the court on 27/2/23. That the Power of Attorney was donated to the deponent to prosecute these proceedings due to the said Ms Millet ill health. That the doctors advised that she cannot participate in proceedings as per the annexed medical report date 28/3/2023. That the legality of the said Power of Attorney has not been challenged in the defendants further amended defence and is not an issue. That no legal grounds have been established to justify the production of Ms Millet in court and yet PW1 was extensively cross examined on the said documents.
10. The defendant further avers that having personally transferred money and dealt with the 1st defendant deceased husband in the construction of the land there was no legal basis to expunge the affidavit or even compelling her to attend. That the contents of the document were known to the defendant since its filing in 2017 and were not prejudicial when the matter proceeded for hearing. That the order should have been sought during pretrial directions on 23/7/2019 thus making the application an afterthought calculated at delaying the hearing contrary to the overriding objectives of the Civil Procedure Rules. The 1st defendant urges the application be dismissed with costs.
11. On 18/4/23 Mr Waga state counsel appearing for the Land Registrar informed the court they would not participate in the application.

Submissions

12. The application was canvassed by way of written submissions which parties filed and exchanged.

1st Defendant/applicant submissions

13. The applicant's submissions were filed on 18/5/23 and reiterate the grounds on the face of the application which are reiterated in the depositions of the applicant herein. It is submitted by Mr Tindika counsel for the 1st defendant applicant that failure to cross examine and which is mandatory under section 146 of the Evidence Act will be grossly be prejudicial to the defendant. Further that, the said affidavit contained the bulk of the plaintiff case and will be in utter abuse to right to fair and impartial hearing.
14. On the prayer to have the documents expunged should Ms Millet not be availed for cross-examination, it is submitted that the replying affidavit of PW1 of 18/4/23 sworn before a notary public in UK with the annexures thereto authenticated by unknown Commissioner for Oaths in Nairobi who did not sign the same. That Ms Millet saw a doctor on 31/3/23 way before the date of the present application and the same was clearly preemptive. The doctors report availed by the plaintiff is impugned for the reason that it fell short of being a professional medical evidence since the allegations of inability to attend court emanate from Ms Millet. Further that the said Ms Millet being the author if not availed for cross examination then the affidavit would lack probative value and the only lawful order should be the same is expunged together with its annexures. Reliance is placed on Re Estate of Dorothy Awuor Bollo (Deceased) (2021) eKLR.
15. Citing the provisions of order 19 Rule 2 (1) (2) of the Civil Procedure Rules it is submitted that the court should note the affidavit was filed in a different case and the same having been admitted as part of the plaintiff's evidence it was only fair that Ms Millet is cross examined. Counsel recognizes the power to call for cross examination is discretionary but emphasizes the same should be exercised judiciously. The court is referred to Khen Kharis Mburu & Another Vs James Karong Ng'ang'a & Another (2021) eKLR where the court pointed the power to order cross examination though discretionary should be



exercised where it is to enhance the course of justice and it was not a matter of right. That an applicant must lay proper legal foundation and special circumstances for purpose of examination.

16. It is further submitted that the transactions the subject of the suit were done by two persons, Maureen and the 1st defendant's husband who is deceased which then presented special circumstances to warrant exercise of the courts discretion. That though Order 19 Rule 2 (1) (2) envisages leave at interlocutory stage the same was applicable at substantial hearing.
17. The court is urged to allow the application with costs to the defendant.

Plaintiffs Submissions

18. The plaintiff submissions were filed on 24/05/23. It is submitted that the application is *resjudicata*. That the medical report herein was not preemptive the same having been duly prepared based on the court's directions on the defendant's oral application made on 28/2/23. That the authorities cited by the applicant apply where parties are acting in their own capacities and not through legally appointed representatives who in this case is PW1. That PW1 also had personal interaction with Charles Kamau and his evidence was not hearsay. That the probative value of Maureen's evidence as contained in the affidavit can only be tested at the point of writing the judgement and not at interlocutory stage. That the court cannot expunge evidence already on record and which the defendant participated by cross examination on the same.
19. It is submitted the application ought to have been made during pretrial conference and the Court of Appeals dictum in *Stephen Boro Gittha Vs Family Finance Building society & 3 Others* (2009) eKLR is relied upon where it was pointed that courts should use the new broom of overriding objective to bring cases to finality by declining to hear unnecessary interlocutory applications and instead adjudicate on the principal issues in a full hearing if possible. The court is urged to dismiss the application with costs.

Analysis And Determination

20. I have considered the application, its grounds and responses of the 1st defendant as well as the authorities cited for and against the application and the issue for determination is whether the application is merited.
21. It has been urged by the respondent that the application is *resjudicata* and that this was an attempt to re-argue the objection that was overruled by the court. While this ground was raised I note that both parties did not submit much on it. Infact Mr Tindika Counsel for the applicant avoided it altogether. This may be attributable to the fact that that the idea of this formal application was mooted by Mr Kakhula and which both this court and Mr Tindika obliged. But having said that the point has been raised and I must render myself on the same.
22. I have already set out earlier in this ruling the genesis of the present application and that I did overrule the objection. I rendered myself thus:-

.....while I may not dwell on technicalities in my view the absence of the witness has been explained by the plaintiff. Mr Tindika is not seeing this document for the first time and I don't see what prejudice he will suffer on use of the same by this court. He will have an opportunity to cross examine the witness on the same and this where the crux of the evidence lies. This is how the plaintiff has chosen to prosecute his case. As a court I will not shut out the document which is duly notarised and it doesn't matter the suit under which it was filed was withdrawn it does not cease to be the plaintiffs document. I will allow this document to be referred for the interests of justice and if it will effectually help the court determine the contest between the parties. Parties will further have occasion to submit on the issue during their final submissions.'



23. Mr Tindika then applied for leave to make any application pursuant to Order 19 of the Civil Procedure Rules which the court granted. PW1 then proceeded and at the close of his testimony produced the plaintiffs bundle dated 22/2/17, 20/4/17 and 31/05/22 as exhibits 1,2 and 3 respectively. PW2 had to be stepped down at the beginning of his cross examination to allow for him to be supplied with the documents he would be cross examined on.
24. The doctrine of *res judicata* is set out under the provisions of Section 7 of the Civil Procedure Act, as follows;
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties; or between parties under whom they or any of them claim, litigating under the same Title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
25. Applying the above to the instant application, the issue raised in the present application is for the court to direct the attendance of Ms Millet for cross examination. This is the same issue that was raised by Counsel for the 1st defendant in his oral application and which oral application is permitted under Order 19 Rule 9. Cross examination was the gist of the oral application and looking at my ruling above was rejected by this court. Indeed, counsel proceeded to cross examine PW1 on the same and what remains in my view is for the court when it retires to write its judgement on the matter to analyze the probative value of the document as against the answers given in cross examination. The court is also alive to the fact that at that point it will be enjoined to proceed with caution considering the deponent will not have been cross examined.
26. Additionally, the court proceeded to admit the said affidavit as an exhibit. It is already an exhibit and it cannot be expunged based on the grounds raised in this application. I reiterate its probative value can only be considered at the point of writing the judgement. Parties still have an opportunity to make submissions on its probative value in their final submissions. To consider this application would be tantamount to reopening and or reviewing my own decision which was rendered with finality and where the court declined to exercise its discretion in favor of the 1st defendant.
27. The upshot of the foregoing is that the application is dismissed for being *res judicata*. I will not make an order for costs in view of the fact that Mr Khakula invited the application.

DELIVERED AND DATED AT KWALE THIS 28TH DAY OF JULY, 2023

A.E. DENA

JUDGE

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

No Appearance for 1st Defendant/ Applicant

Mr Kakhula for the Plaintiff/ Respondent

Mr Daniel Disii - Court Assistant.

