



**Ibui & another v Ibui & 2 others (Environment & Land Case
105 of 2016) [2023] KEELC 19200 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19200 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 105 OF 2016**

**CK NZILI, J
JULY 26, 2023**

BETWEEN

GOERGE MUREGA IBUI 1ST PLAINTIFF

ESTHER WAIRURI MUREBU 2ND PLAINTIFF

AND

TITUS KIREA IBUI 1ST DEFENDANT

JOSHUA KIREA MBIRITHI 2ND DEFENDANT

GEOFFREY KIRIANKI MBIRITHI 3RD DEFENDANT

RULING

1. During the hearing of this suit on May 24, 2023, Mr CP Mbaabu, counsel representing the plaintiff, objected to the line of evidence in chief, for DW 1 in that the 1st defendant never filed a witness statement. Counsel urged the court to bar the witness from testifying on matters falling outside the defence since parties were bound by the pleadings, that if allowed, the plaintiff who had closed his case would be highly prejudiced and would be contrary to Order 11 Rules 6 & 7 of the [Civil Procedure Rules](#) Mr Kibe Muigai counsel representing the defendants termed the objection as premature, an abuse of the court process, lacking merits and based on a misconception of Order 11 of the Civil Procedure Rules, which should not be read in isolation to deny a party a constitutional right as to fair hearing. Counsel urged the court not to accede to the objection; otherwise, it would amount to curtailing a constitutional right to be heard based on subsidiary legislation. Counsel submitted that the objection conflated three aspects, namely; pleadings, affidavit, witness statements and on what was relevant or not relevant. Counsel further submitted that the objection impacted the rules of natural justice and Article 25 of [Constitution](#), which was in absolute terms.
2. In a re-joinder, counsel for the plaintiff retorted that his client was equally entitled to a full disclosure of the defence and that the purpose of a case conference was for the parties to exchange all their pleadings



and documents so that at the hearing, there would be no trial by ambush or adduction of evidence which was not disclosed during case conference.

3. It is trite law that parties are bound by their pleadings. When the objection was raised, this court overruled the objection and allowed DW 1 to proceed with the examination in chief but to restrict his evidence to the issues raised in the pleadings and the documents filed. The court reserved pending the delivery of a comprehensive ruling and the directions.
4. In *Mbutia Macharia vs Annah Mutua Ndwiga & another (2017) eKLR*, the court defined a legal burden as discharged by way of evidence with the opposing party having a corresponding right of adducing evidence in rebuttal, which contributes to evidential burden. The court observed that while the legal and evidential burden rested on the appellant, the evidential burden may shift during the trial depending on the evidence adduced and who would fail without further proof.
5. The law is that in every legal proceeding, parties must adhere evidential standards and that the burden of proof determines which party was responsible for putting forth enough evidence to prove or disprove a particular fact. The *Evidence Act* requires parties to offer direct evidence through the testimony of witnesses or eyewitness accounts. This includes what one saw, said, did, heard or observed to establish certain facts without inference since it is within his knowledge. Direct evidence, therefore, is real, tangible or clear as to the reality, happenings or a thing that requires no thinking or consideration to prove its existence.
6. To this end, Order 7 Rule 5 of the Civil Procedure Rules provides what must accompany a defence. This includes affidavits under Order 4 Rule 1 (2), a list of witnesses to be called at the trial, written statements signed by the witnesses and copies of documents to be relied on during the trial.
7. In *PH Ogola Onyango t/a Pitts Consult Consulting Engineers vs Daniel Githegi t/a Quantalysis (2002) eKLR*, the court observed that interrogatories and inspection was a pretrial procedure meant to facilitate a quick and an expeditious trial of an action and that the introduction of documents after the plaintiff had closed his case was prejudicial and could not be cured by cross-examination, since in civil litigation a level playing field must be present to avoid introduction of documents after pleadings had closed.
8. In *Alois Oceano D'sumba vs Rajnikant Narshil Shah & another (2017) eKLR*, the court declined the adduction of documents introduced after the closure of the plaintiff's case, terming it as tantamount to a court perpetuating an injustice which was prejudicial to the plaintiff.
9. Article 50 (2) of the *Constitution* elevates pretrial disclosure as a cardinal requirement. In *Raila Odinga & 5 others vs IEBC & 3, others (2013) eKLR*, the court held thus:

' The parties have a duty to ensure that they comply with their respective timelines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she is entitled to, and no extra burden should be imposed on a party or court as a result of omissions or characteristics which were foreseeable or could have been avoided. The purpose of presenting witness statements and documents is for the opposite party to have fairness, a level playing field and equality of arms, which aligns with the rules of natural justice'.
10. In *Nicholas Korir Salat vs IEBC (2013) eKLR*, the court observed that the rules assure courts & parties that there was a clear method on how things are done so that outcomes could be anticipated with a measure of confidence, certainty and clarity.



11. In every trial, a party should be allowed to present oral evidence supporting his claim or defence as long as there was prior compliance with the applicable procedural law on disclosure of the claim or defence and its supporting documents.
12. In *Pinnacle Project Ltd vs PCEA Ngong Parish & another (2019) eKLR*, at issue was an introduction of a witness statement after the plaintiff had closed his case, which was termed as trial by ambush, an abuse of the court process contrary to Order 7 of the Civil Procedure Rules, an affront to a fair trial, prejudicial and unjust to the plaintiff. The explanation by the defence was that it was an oversight and or an error on the part of the counsel's court clerk.
13. The court cited with approval *Halsburry's law of England Vol 13* on the doctrine of discovery and disclosure, the need for diligence, duty of care and amount of delay considerations on whether the court should allow the adduction of new or additional evidence. The court held that a trial court may allow a filing of a witness statement on its motion for the quest of administration of justice as it strives to administer substantive justice under Articles 50 & 159 (2) of the *Constitution*.
14. The court cited with approval *Juma & Another vs AG (2003) eKLR*, on the need to adopt a liberal approach to guarantee and clothe the court with a protectionist right which was not absolute since Order 18 rule 10 of the Civil Procedure Rules allows for the recall of witnesses at any stage before final judgment. Further, the court invoked Section 146 of the *Evidence Act*, which allows witnesses to be recalled for further examination in chief, cross-examination, and re-examination. The court said that in closing out such evidence, the contest would not be said to be equal, accurate, transparent or fair, to say the least.
15. Additionally, the court took the view that Article 50 of the *Constitution* was a notice hearing approach. At the same time, the court observed that the *Constitution*, the *Civil Procedure Act* and the Civil Procedure Rules were a model for the fair or procedural administration of justice based on participatory procedures, independent tribunal, prior due process before judgment and continuity of appropriate trial rights at all stages of the hearing, that all that was required to strike a fair balance, if there were missteps or errors, omissions and blunders along the way, since procedural directions serve substantive justice. The court overruled the objection and allowed the filing of a witness statement with a rider that the plaintiff would file a rejoinder witness statement and recall his witnesses for further examination in chief, cross-examination or re-examination on any new matters arising from the defendant's evidence.
16. In the case of *Surgipharm Ltd vs Kenya Invalid & Pharmacy Supplies Ltd & 2 others (2013) eKLR*, the court declined to allow the adduction of new witness statements initially struck out and observed that the defendants had not been left empty-handed since the original witness statements were still on record. The court observed that a witness statement under Orders 37 and 11 of the Civil Procedure Rules was a written statement signed by a person containing the evidence that person would be allowed to give orally, whose primary objective was to improve the efficiency of trials. The court said that in an adversarial system, discovery rules ensured parties were prepared on time and there were no surprises since each party should come to trial with all their cards on the table.
17. As to whether a written statement was binding on the oral testimony of the witness, the court held that a witness statement should set out the facts to which the witness will testify orally at the trial. Citing with approval *Halsbury Laws of England Vol II 5A 6 Edition* paragraph 751, where it is indicated that a witness statement stand as his evidence in chief, but with the permission of the court, may be amplified to include new matters which have arisen since the witness statement was served on other parties, in which case the court should give such permission, only if it considers that there was a good reason not to continue the evidence of the witness to the contents of his witness statement. The court held that a witness statement remained a guide for the oral testimony before the court, which was subject to cross-



- examination, but a witness could deviate from it with the leave of court, since it was not a deposition or sworn statement.
18. Drawing an analogy from an originating summons, the court said that parties may rely on their affidavit(s). The court took the view that locking out an inclusive witness statement would defeat the ends of justice, except if the suit was beyond redemption and based on *DT Dobie & Co Ltd vs Joseph Mbaria Muchina & another (1980) eKLR*, striking out should not arise until discovery or oral testimony was tested by cross-examination of a witness.
 19. Additionally, the court observed that a witness statement was a synopsis of intended evidence at trial, which could not be said to be the only exclusive basis for evidence to be submitted in support of facts alleged in the claim, and a court could allow deviation therefrom, with leave based on its overriding objective to attain substantive justice.
 20. In *Leonard Munyau Mbugua & Another vs Equity Bank Ltd (2020) eKLR*, the court held that apart from the inconvenience of a delay, no prejudice would have been caused to the plaintiff if the defendant was allowed to put in an additional witness statement whose omission was slammed on a mistake of counsel. The court allowed for the recall of the plaintiff's witnesses to present fresh documents after receiving the defence witness statements.
 21. Applying the forgoing persuasive and, to some extent, binding case law, there is no dispute that the plaintiff was allowed to re-amend his pleadings even after the defendants had filed the replying affidavit and witness statement dated April 18, 2017 and February 12, 2021.
 22. It is also not in dispute that the plaintiff had closed his case, and by consent of the parties, he was recalled for further cross-examination and re-examination in chief. It is also not in dispute that this is an Originating Summons under Order 37 of the Civil Procedure Rules, where serious issues have been raised bordering on impropriety, illegalities and irregularities on the part of the 1st defendant in the manner that the subject suit parcels came under his name and were transferred to the rest of the defendants.
 23. In his testimony and documents, PW 1 blamed the 1st defendant for all these irregularities and illegalities. The 1st defendant filed a replying affidavit and a list of documents accompanied by a witness statement.
 24. In the ruling dated July 27, 2022, this court pronounced itself on the parameters and its limited jurisdiction under Order 37 of the Civil Procedure Rules. Unfortunately, parties have chosen to widen the scope of this suit by dwelling on matters beyond the court's jurisdiction based on the nature of the originating summons before the court and the pleadings therein. Parties in law are bound by their pleadings, and issues flow from the pleadings. As much as the parties purport to widen the court's mandate without amending their pleadings, the court, in determining the issues, shall only be solely guided by the law and the pleadings.
 25. Order 37 Rule 18 of the Civil Procedure Rules is clear on the evidence and directions on a summons, especially when parties disagree with the existing facts.
 26. Order 37 Rule 19 of the Civil Procedure Rules grants this court-wide powers at any stage of the proceedings if it finds the originating summons should be continued as if by way of a plaint, including the addition of parties and the supply of better particulars. Only after the court has made such orders will Order 11 of the Civil Procedure Rules apply.
 27. In this suit, the court directed that the matter be heard through viva voce evidence. No specific order was made that parties had to strictly comply with Order 11 of the Civil Procedure Rules. What



the court ordered to be filed on February 3, 2021 was a replying affidavit and the further amended originating summons after new parties were added. The plaintiff was also directed to file responses to the replying affidavits. In my considered interpretation of the Rules, the originating summons is made under a special procedure which is not necessarily bound by Order 11 of the Civil Procedure Rules unless the court has specifically ordered so.

28. As to whether the 1st defendant should be allowed to divert from his replying affidavit and or bring forth additional facts, Order 19 Rule 3 of the Civil Procedure Rules provides that an affidavit shall be confined to such facts which are within the knowledge of the deponent, the statement of information and belief showing the sources the and grounds thereof.
29. The law does not require an affidavit or a witness statement to be comprehensive. Order 2 Rule 10 Civil Procedure Rules provides for matters that must specifically be pleaded, such as misrepresentation, fraud, breach of trust, willful default, undue influence and malice.
30. In the objection before the court, counsel for the plaintiff appears to be equating this suit as strictly governed by Order 11 of the Civil Procedure Rules and a witness statement to an affidavit. As demonstrated above, the two are governed by two different sets of laws. An affidavit is a deposition on oath, unlike a witness statement. An affidavit is confined to matters under the deponent's knowledge, belief and information. It may not be argumentative or based on undisclosed sources of information or documents. It may not contain hearsay evidence.
31. In this suit, the replying affidavit is governed by not only by Order 19 of the Civil Procedure Rules but also the *Oaths and Statutory Declarations Act* (Cap 15) Laws of Kenya.
32. It is the principal document that sets out the whole of the 1st defendant's defence. Even where an affidavit is faulty, the court must look at the same. In *Gideon Sitelu Konchellab Ole Sunkuli vs Julius Lelakeny & 2 others (2018) eKLR*. Further in *Bernard Kibor Kitur vs Alfred Kiptoo Keter & another (2018) eKLR*, the court held that affidavit evidence was evidence which must state the substance of the deponent's evidence and should be confined to facts that the deponent could prove by his knowledge. The court cited with approval Raila Odinga (supra) that a petitioner was obliged to discharge the initial burden of proof before the respondent was invited to bear the evidential burden on a balance of probability.
33. In *Daniel Kibet Mutai & others vs AG (2019) eKLR*, the court cited with approval, *Peter Nyakundi & another vs PS State Planning and Devolution (2016) eKLR* that on affidavit evidence, the failure to file a response by the Attorney General, that he who alleges must prove and that where a respondent did not specifically refute allegations in an affidavit, it meant that such facts were deemed admitted, in absence of any evidence to the contrary. The court said that what was contained in an affidavit was serious, for its consequences may result in perjury, since affidavit evidence was admissible evidence in law, occupying the same place as any other evidence admissible in law.
34. In this suit, the plaintiff has made various allegations against the 1st defendant, which were not confined in his supporting affidavit and witness statements. Most of them have been made during the examination in chief, cross-examination and re-examination. They were not necessarily put in the witness statements and the supporting affidavit to the originating summons. The plaintiff widened the scope of his amended originating summons and made allegations against the 1st defendant. That the evidence forms part of the court's record. The 1st defendant opted to file an affidavit and cross-examined the plaintiff on all his allegations as per his oral testimony over every exhibit, where he said that the footmarks and fingerprints of the 1st defendant were all evident. The 1st defendant has the burden of proof to refute those allegations and answer all the claims made by the plaintiff against him.



35. With the benefit of foresight, the defendants should have foreseen what the plaintiff would say against them during oral testimony. The objection came in at the opening of the 1st defendant's testimony. The court gave directions on the way forward. The court found no prejudice against the plaintiff since he shall have the right to cross-examine the defence witnesses. The plaintiff cannot claim prejudice, yet it is on record all that he said, the documents and the pleadings he relied on touching on the 1st defendant and the other defendants.
36. The court cannot restrict the defendants on what to say in their oral testimony, unless it was irrelevant, irregular, scandalous, hearsay, false, or inadmissible as provided under Sections 33 (c), 68, 69, 79 of the *Evidence Act*.
37. It is the duty of the lawyers and litigants owed to the court to ensure timely and efficient disposal of their cases. The court said this in *Sweilen Gbeitham Saanum vs Commissioner of Land (2015) eKLR*. Unnecessary objection is not one of the ways to expedite this suit. The defendants could not have conceptualized, imagined and wholly anticipated what the plaintiff would say before the court during the case conference. The defendants have not sought to file new witness statements or documents. Even before oral evidence has been tendered, the plaintiff's fear is premature without basis and uncalled for. I find the objection lacking merits, and I disallow it.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 26TH DAY OF JULY 2023

In presence of

C.A John Paul

No appearance

HON. CK NZILI

ELC JUDGE

