



Ansett v Oraro & 3 others (Environment & Land Case 002 of 2023) [2023] KEELC 19321 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 002 OF 2023
AK BOR, J
JULY 19, 2023
(FORMERLY NYERI ELC NO. 36 OF 2016)**

BETWEEN

FIONA LOUISE ANSETT PLAINTIFF

AND

GEORGE ODINGA ORARO 1ST DEFENDANT

DAVID MORTON SILVERSTEIN (BEING EXECUTORS OF THE ESTATE OF THE LATE LIVIA LE POER TRENCH) 2ND DEFENDANT

ANTHONY KIMARU MUTAHI 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

1. Stuart Richard Cunningham, who was the original plaintiff, filed this suit claiming that he entered into a sale agreement dated June 29, 1994 with James Trench prior to his demise in relation to land reference number (LR No) 10422/13 at the agreed consideration of Kshs 1.5 million. The plaintiff claimed that he entered the suit property in 1995 even though James Trench, who later died, did not transfer the land to him. He claimed that the land was invaded by a rowdy gang led by the 3rd defendant who took possession and destroyed the property belonging. He filed a claim for adverse possession and sought to have the suit land transferred to him. He also sought an injunction to restrain the defendants from interfering with the suit land, as well as general damages and specific performance of the agreement dated June 29, 1994.
2. The hearing of the suit commenced on April 4, 2019 before Lady Justice Lucy Waithaka at the Environment and Land Court (ELC) at Nyeri. The file was transferred to Nanyuki ELC on December 7, 2022 for hearing and disposal. On February 28, 2023, the court gave directions for parties to file and



- exchange trial bundles containing pleadings, issues, witness statements and documents within 14 days and that the matter would be mentioned on March 15, 2023 to fix a hearing date.
3. On March 15, 2023, the 3rd defendant's advocate informed the court that they had not filed their trial bundle. The court set down the suit for hearing on May 8, 2023. When the matter came up for hearing on May 8, 2023, the advocates for the plaintiff and 1st and 2nd defendants informed the court that they were ready to proceed with the hearing. The court was told that the 3rd defendant had undergone a surgical procedure on May 6, 2023 and could not attend court. The 1st and 2nd defendants advocates brought it to the attention of the court that the 3rd defendant had served them with a trial bundle on May 5, 2023 which contained new documents that had been filed without the court's leave. Further, that the 3rd defendant's defence was amended on June 18, 2021 but was not filed until February 10, 2023 and served on the parties on May 5, 2023. The advocates beseeched the court to strike out the 3rd defendant's trial bundle and have the court go by what was previously filed because the plaintiff and the 1st and 2nd defendants had already testified.
 4. The 3rd defendant's advocate told the court that they had not filed new documents. He added that the application for amendment of the 3rd defendant's defence was allowed on October 26, 2021 and that the amended defence was attached to the application for leave to amend the defence. He explained that before they took over conduct of the matter there were documents which had been filed on behalf of the 3rd defendant. Further, that the plaintiff and the 1st and 2nd defendants gave evidence before the new firm of advocates came on record. He maintained that the 3rd defendant's documents were properly on record and added that the witness statements filed were to reflect the amendments effected and urged the court not to expunge the documents.
 5. The court directed parties to file and exchange concise written submissions on the legal position of the 3rd defendant's amended defence and counterclaim together with the additional documents and witness statements filed on May 4, 2023.
 6. The plaintiff submitted that the suit was filed in Nyeri in 2010 and that the court gave directions on October 2, 2018 for parties to file their respective bundles. The hearing commenced on April 4, 2019 with the then plaintiff who has since died, giving evidence. The plaintiff closed his case and the 1st and 2nd defendants called one witness to testify and give evidence on their behalf. The 3rd defendant informed the court that they would only be calling the 3rd defendant as a witness. The case was fixed for further hearing on May 28, 2019 but could not proceed on that date. After several applications were filed and determined, the court fixed the case for hearing on July 12, 2021.
 7. The 3rd defendant filed the application dated June 18, 2021 seeking to amend his defence and counterclaim. That application was allowed on October 26, 2021. The matter was transferred to Nanyuki where it was fixed for hearing on May 8, 2023. On May 5, 2023, the 3rd defendant served a trial bundle containing witness statements and list of documents introducing new documents which were not in the bundle he had previously filed.
 8. The plaintiff submitted that the court was bound by the procedure for filing documents laid down in the *Civil Procedure Act* and the rules and referred the court to section 19 of the *Environment and Land Court Act* and orders 7 and 8 of the *Civil Procedure Rules*. She also made reference to order 11 which deals with pre-trial directions. The plaintiff submitted that the submission of, and proof of documents was governed by the *Evidence Act* and beefed up by order 3 rule 2, order 7 rule 2, order 11 and order 16 rule 6 and 7 of the *Civil Procedure Rules* as well as the Practice Directions on proceedings in the ELC issued pursuant to legal notice No. 5178.



9. The plaintiff contended that any party wishing to introduce new or additional evidence must seek the leave of the court before the hearing commences and added that rule 16 of the ELC Practice Directions enjoined parties to comply with the requirements, time limits and deadlines when filing pleadings, witness statements and documents as stipulated in the [Civil Procedure Rules](#). Further, that rule 43 provided for sanctions where there was failure to comply with the [Civil Procedure Rules](#) or directions issued by the court. Such sanctions include imposition of cost, fines, striking out of pleadings and the dismissal of a suit.
10. The plaintiff was emphatic that when the 3rd defendant was given timelines to file his bundle of documents it did not imply that he was not blanket leave to introduce new document which had not been previously filed or served. The plaintiff submitted that a party should not be allowed to ambush other parties by producing documents and pleadings two days before the hearing date and relied on [Mansukhalal Jesang Maru v Frank Wafula](#) [2022] eKLR where the court frowned upon the actions of a party bringing new evidence or witnesses as and when the matter came up in court which in the court's view amounted to conducting a trial by instalments. The court stated that such acts amounted to trial by ambush and an unfair trial and referred to the mischief which orders 3 (2) and 7 (5) of the [Civil Procedure Rules](#) intended to curtail.
11. The plaintiff also relied on [Raila Odinga & 5 others v IEBC & 3 others](#) (2013) eKLR where the Supreme Court declined to allow additional evidence filed outside the stipulated time when it considered the prejudice that would be occasioned to the other parties. She also cited [Alois Oceano D'sumba v Rajnikant Narshi Shah & another](#) (2017) eKLR where Lady Justice Njoki Mwangi considered the import of order 7 rule 5 of the [Civil Procedure Rules](#) and concluded that the court would be perpetuating injustice and it would prejudice the plaintiff's case if it were to allow the defendant to rely on documents filed after the plaintiff had testified and closed his case.
12. The plaintiff mentioned that the 3rd defendant filed documents after the plaintiff and the 1st and 2nd defendants had closed their cases which showed lack of good faith. The plaintiff pointed out that some of the documents were authored as late as September 2022 and added that she stood to suffer great prejudice if the 3rd defendant were permitted to introduce new documents and statements which the plaintiff did not have the benefit of having seen before giving testimony. She urged the court to expunge the documents from the record.
13. The 1st and 2nd defendants submitted that the 3rd defendant's defence and counterclaim was filed well over a year after leave had been granted. That despite leave being granted, it was not a right to be exercised by the 3rd defendant at his whim. That upon leave being granted, the 3rd defendant was required to pay the requisite court fees before serving his amended defence on the other parties in the suit. This is because upon service, the plaintiff who is the defendant in the counterclaim was required by order 7 rule 1 to file her defence to the counterclaim within 14 days of service. The 1st and 2nd defendants pointed out the record reflected that the 3rd defendant's amended defence and counterclaim was filed on May 10, 2023 and served on May 15, 2023, 2 days before the matter was scheduled to be heard on May 8, 2023. They pointed out that that deprived them of the right to respond to the pleading before the hearing. They added that the 3rd defendant was guilty of laches in that his amended defence and counterclaim was filed 15 months after the court granted leave and that there was no explanation given by the 3rd defendant for the delay. Further, that it is difficult for the court to determine whether the delay was excusable since no explanation was given for the delay. They referred to the decision in [Daniel Kibet Mutai & 9 others v Attorney General](#) civil appeal (Eldoret) No 95 of 2016 (2019) eKLR in which the court dealt with the issue of laches which basically refers to lack of diligence and activity in making a legal claim or moving forward with the enforcement of a right. Further, that unreasonable



delay could be viewed as prejudicing the opposing party. The court noted that the person invoking laches was asserting that the opposing party had slept on their rights and as a result of their delay, circumstances had changed, witnesses or evidence may have been lost or were no longer available such that it was no longer a just resolution to grant the plaintiffs' claims.

14. The 1st and 2nd defendant submitted that when the 3rd defendant was granted leave to file and serve his amended defence on October 26, 2021, he was required to comply with the court's administrative procedure of paying court filing fees, causing a copy of the amended pleading to be placed in the court file and thereafter serving the pleading on the other parties in the suit to afford them time to respond. That instead, the 3rd defendant took long to file and serve his amended defence and counterclaim.
15. The 1st and 2nd defendant urged that the order that commended itself was for this court to strike out from the record the documents filed by the 3rd defendant for his failure to take steps to regularize his pleadings within a reasonable time. They added that the 3rd defendant was not keen on complying with court orders and directions and had even been found to be in contempt of court orders.
16. The 3rd defendant submitted that one of the orders he sought in the application for amendment was for the annexed draft amended statement of defence and counterclaim to be deemed as duly filed and served. He urged that as far as he was concerned, leave was granted and the amended statement of defence and counterclaim was duly filed upon the application being allowed as prayed. He urged that the leave was granted unconditionally.
17. The 3rd defendant went further to argue that there were no additional documents filed and that the amended witness statement were made in support of the amendments in the new pleading which was filed with the leave of the court. He contended that the documents he filed placed material before the court that will go a long way in assisting the court to determine the dispute and that they would not prejudice the plaintiff or the 1st and 2nd defendants.
18. The 3rd defendant submitted that the orders issued by the court on October 26, 2021 allowing the amendments had never been set aside or challenged. That those orders still stood and parties could not reopen or litigate matters that had already been determined by the court. He maintained that his amended statement of defence and counterclaim was properly on record. Further, that the fact that the plaintiff had filed the defence to the counterclaim was a demonstration that she would not suffer prejudice and was aware of the case facing her especially since she did not file her defence to the counterclaim under protest.
19. The 3rd defendant argued that once leave was granted to amend a pleading, the party granted leave was at liberty to amend his or her witness statements and file documents in support of the amendments in his pleading because pleadings were not evidence and without evidence they were mere statements. He pointed out that pleadings only contained averments of the parties and until they were approved or disapproved they were not evidence and no decision could be founded upon them. That the consequence of a party failing to adduce evidence renders their pleading unsubstantiated.
20. The 3rd defendant submitted that it defeats logic to seek to amend his defence and counterclaim and then be denied an opportunity to file or lead evidence in support of the amendments. He contended that the plaintiff and the 1st and 2nd defendants were seeking to curtail him from adducing evidence in support of his case in contravention of his right to a fair hearing and access to justice enshrined in articles 50 and 48 of the *Constitution* respectively. He emphasized that the plaintiff and the 1st and 2nd defendant should not be allowed to dictate how the 3rd defendant should conduct his case and what evidence he should produce to support his case.



21. The 3rd defendant went further to argue that nothing barred the court from admitting additional evidence and that even on appeal a party may be allowed to call additional evidence if it did not prejudice the other party. He submitted that the plaintiff and the 1st and 2nd defendants had failed to demonstrate the prejudice or injustice they stood to suffer. He argued that they will have the benefit of looking at the 3rd defendant's documents, interrogating them and cross examining his witnesses during the hearing. Regarding the payment of filing fees, he relied on section 96 of the Civil Procedure Act giving the court discretion at any stage to allow a person to pay fees and that upon payment the documents in respect of which the fee is payable will have the same force and effect as if the fee had been paid in the first instance.
22. The 3rd defendant submitted that when the matter came up for mention on March 15, 2023 the court gave directions for parties to file their trial bundles and any other documents before fixing the matter for hearing. He maintained that his amended defence and counterclaim and the documents filed in support of it were properly on record having been granted leave by the court. In the event that the court found that leave to file additional documents and witness statements was necessary, he urged the court based on section 3 of the ELC Act and article 50 of the Constitution to grant leave for those documents to be deemed to be properly filed and served. He contended that this would further the interest of justice and would not prejudice any party.
23. The issue for determination is whether the 3rd defendant's amended defence and counterclaim are properly on record and whether the additional documents and witness statements are properly before the court. It is not in dispute that the 3rd defendant applied and was granted leave to amend his defence in 2021 after both the plaintiff and the 1st and 2nd defendants had given evidence and closed their cases in 2019.
24. According to rule 6 of order 8, where a court grants a party leave to amend and the party fails to amend within the period specified, or where no period is specified, within 14 days, the order shall cease to have effect, even though the court has power to extend that period. The 3rd defendant was required to file his amended defence and counterclaim within 14 days of October 26, 2021. When he failed to file his amended defence and counterclaim, the order for amendment granted by the court ceased to have effect. The 3rd defendant did not move the court to extend the time within which he should have filed and served his amended defence and counterclaim.
25. The 3rd defendant's amended defence and counterclaim, additional documents and witness statements filed in court on February 10, 2023 are struck out and will be expunged from the court record.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JULY 2023.

K. BOR

JUDGE

In the presence of:

Mr. Michael Amalemba for the Plaintiff

Mr. Erastus Rabut for the 1st and 2nd Defendants

Mr. Jude Orenge holding brief for Nganga Mbugua for the 3rd Defendant

No appearance for the 4th Defendant

