Koloi & 4 others v Lokwee & 2 others (Environment & Land Case 10 of 2019) [2023] KEELC 18893 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18893 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 10 OF 2019

FO NYAGAKA, J

JULY 18, 2023

BETWEEN

BARNABAS NYAGA KOLOI ..... 1ST PLAINTIFF

EWAAR EWOL ..... 2ND PLAINTIFF

ERUPE EWOI KAPOKOR ..... 3RD PLAINTIFF

MUSA EBEI LOKAALA ..... 4TH PLAINTIFF

BENSON LOKURUKA EBEI ..... 5TH PLAINTIFF

AND

JACOB NGIROTIN LOKWEE ..... 1ST DEFENDANT

JOHN LOOLIO KAAMAN ..... 2ND DEFENDANT

EWOI FLORENCE ATABO ..... 3RD DEFENDANT

RULING

1. The Notice of Motion before me, dated 23/02/2023 and filed on 24/02/2023, was brought by the Defendants. It was anchored on Sections 13(1) and 19(1), (2) and (3) of the *Environment and Land Court Act*, 2012, and "All enabling provisions of the Law (sic)." It sought the following orders:

    1. ...spent

    2. That this Honourable court do issue an order directing the Directorate of Criminal Investigation, Turkana County, Loima Sub-County to file in court and or produce in court as evidence their investigation report in respect of Criminal Case No. 170 of 2020 against the accused because of land dispute between the Jacob Ngirotin Lokwee and Kapkor Family for land situated in Loima Sub- County within Turkana County. That the production of the

Report before this Honourable (sic) will help the Court arrive at a reasonable conclusion in the interest of justice.

3. That this Honourable Court be pleased to allow the Investigations Officer assigned to this case be cross examined by the Plaintiffs herein.

4. Any such directions this Honourable Court deems fit as just and fair for quick disposal of the suit.

5. That the costs of this application be costs in the cause.

2. It was based on grounds that the 1st Defendant sold the suit property to the 2nd Defendant and as a result the 1st Defendant was arrested and charged in Criminal Case No. 170 of 2020. This precipitated in the 2nd Defendant complaining and eventually lodging a complaint with the Directorate of Criminal Investigation (DCI) on how the matter was handled. That the DCI recommended that the criminal case as against the 1st Defendant be withdrawn pending further investigations; the office of the Director of Public Prosecutions requested the Office of the DCI to carry out investigations based on documents provided to it by the Office of the Director of Public Prosecutions in respect of the Criminal Case [indicated in the letter dated 04/02/2020 authored by the County Criminal Investigations Officer (CCIO) Turkana as Court File (CF)] No. 170 of 2020 before the suit was withdrawn; some of the makers of the documents which included the pleadings herein were interviewed by the DCI with a view of a report in respect of the parcel of land in dispute between the Plaintiffs and the Defendants; the DCI, however, advised that he was not obligated to give the report to the Defendants unless ordered by the court; it is only fair and just that an order be issued directing the said office to give parties herein and the Court the report so to assist in resolving the issues involved and more particularly the land dispute between the Plaintiffs and the Defendants; the DCI is endowed with resources and skill to carry out their work and assist the Court with reports; that the court had the power to call for the investigations report and other evidence to assist in the resolution of the dispute herein and the Defendants have approached the Court with haste.

3. The Application was supported by the Affidavit of John Loolio Kaaman sworn on 23/02/2023 and filed with the Application. In it he deponed that he purchased the suit property from the 1st Defendant and subsequently erected beacons to mark the boundaries thereof. However, the same were later destroyed by the Plaintiffs' family in order to put in place their own beacons on allegations that the 2nd Defendant had illegally trespassed on their land.

4. Later he came to learn that the 1st Defendant was arrested and charged in Criminal Case No. 170 of 2020 as a result of having sold his parcel of land to the 2nd Defendant. Consequently, the 2nd Defendant complained and filed a complaint with the DCI on how the matter was handled. The DCI recommended that the criminal case be withdrawn pending further investigations. He annexed and marked as JKL-1 a copy of the letter from the DCI. He deponed further that following the complaint, he was informed by his learned Counsel that the Report prepared by the DCI as directed by the ODPP had been completed and he was of the view that the same would assist the Court in making a just decision. He annexed the Report to the Affidavit and marked it as JKL-2. He swore further that he had no objection in the Plaintiff recalling their witnesses in respect to the Application herein to respond to the DCI's Report in the interest of justice if the Report was admitted. This Court gave directions regarding filing of submissions. The Defendants/Applicants filed thier written submissions dated 24/04/2023. On their part, upon being served with the Application, the Plaintiffs/Respondents purported, in their written submissions and list of Authorities dated 24/05/2023, to have filed a 'Replying Affidavit' sworn on 06/03/2023. However, a cursory glance of the record reveals that indeed no Replying Affidavit was filed by the Plaintiffs in opposition to the instant application. Indeed, the

written submissions do not indicate when the said Replying Affidavit was filed and there is no copy both in the Court file or the online Court filing system. That did not of itself preclude the Court from considering the merits of the Application.

Submissions

5. As pointed out immediately above, the Application was disposed of by way of written submissions. Both the Applicants and the Plaintiffs filed written submissions.

6. In summary the Defendants/Applicants argued, in their submissions, that this Court is vested under Sections 146(4) of the *Evidence Act* with discretionary powers at any stage of the proceedings to allow a party to reopen its case and recall a witness and further there was no law that prevented a party from requesting the court to exercise discretion to reopen a case before judgement is delivered, for purposes of allowing additional evidence. They supported their application with the case of *Samuel Kiti Lewa Vs Housing Finance Cooperation of Kenya Ltd & Ano* (2015) as cited in the case of *Raindrops Ltd Vs County Government of Kilifi* (2020) eKLR, on the point of the discretion that a Court has in re-opening a case, which discretion ought to be exercised judiciously, and the Court to ensure that such re-opening does not embarrass or prejudice the opposite party.

7. They further submitted that they had established sufficient reasons for the grant of the orders they sought in their application as determined in the case of *Odoyo Osodo Vs. Rael Obara Ojuok &Amp; 4 Others* (2017) eKLR since the additional evidence in question could not have been obtained with reasonable diligence for use before trial process or even before the Plaintiffs closed their case as the DCI had not completed its investigations.

8. In their written submissions, the Plaintiffs/Respondents argued that if the Applicants' application was allowed, the Plaintiffs would have to meet a more expended case than was originally pleaded by the Defendants and they would have to summon again witnesses to testify afresh which will occasion injustice and great prejudice to them which could not be made good by costs. They were of the view that the court in exercising its discretion to allow additional evidence is bound to ensure that the additional evidence does not embarrass and or prejudice the other party and they relied in the case of *Harrison C. Kariuki -vs- Blue Shield Insurance Co. Ltd* 2006 eKLR where the court stated as follows: -

> "I hold that to allow extensive amendments sought by the plaintiff at this late stage will occasion great prejudice to the defendant that cannot be made good by costs. it will occasion injustice to the defendant who will have to extensively amend its defence..... It will have to meet a much more expended case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted".

9. They further submitted that the Defendants/Applicants were merely seeking the Court's assistance in obtaining evidence. They applied the reasoning of the court in *Peter Kirika Githaiga & Another V. Betty Rashid* 2016 eKLR cited with approval in *Fredrick Kigwa Odulah v Titus Wanyonyi Wasianju* [2019] eKLR, which determined that it was hardly the role of court to assist parties in fishing for, gathering and or retrieving evidence.

10. Lastly, they submitted that the investigation report was based on statements made by surveyors and it would only be fair that the alleged makers were the ones called to testify and not the Directorate of Criminal Investigations.

Issues, Analysis And Determination

11. I have considered the Application, the facts thereof, the law, the submissions by learned Counsel and the authorities the parties relied on. I am of the view that three issues lie before me for determination. These are:

    a. Whether the Application is properly opposed.

    b. Whether the Plaintiffs should re-open their case by allowing the Defendants to introduce new evidence.

    c. Who to bear the costs of the application.

a.Whether the Application is properly opposed

12. The Defendants/Applicants filed the instant application and the Court gave directions that it be served upon the Plaintiffs/Respondents for purposes of the filing and serving a Replying Affidavit and thereafter written submissions by both parties. When the Application came for inter partes hearing on 20/04/2023 only learned counsel for Plaintiffs/Respondents attended the virtual Court session and indicated that they were yet to file submissions and asked for more time. Both parties were given 14 days to do so. On 10/05/2023 when it came up again for the second time for inter partes hearing the same learned counsel attended and prayed for yet more time. The Court gave the date of 7/06/2023 on which date both learned counsels attended and confirmed they had filed submissions on the Application. The Court gave a date for Ruling.

13. However, upon the court embarking on the determination of the matter, it came across an unfiled document purporting to be a Replying Affidavit. In considering the 'Replying Affidavit' the Court noticed that the Plaintiffs/Respondents had not filed it although in their submissions they referred to one sworn on 06/03/2023.

14. The legal provision on how applications are conducted in this and courts below Order 51 Rule 14 of the *Civil Procedure Rules, 2010*. It provides that;

> " Any respondent who wishes to oppose any application may file any one or a combination of the following documents:
>
> (a) A notice of preliminary objection: and/or;
>
> (b) Replying affidavit; and/or
>
> (c) A statement of grounds of opposition"

15. Thus, a party wishing to oppose an application may do so in one or more of three ways, being, by filing grounds of opposition, a preliminary objection or a Replying Affidavit. It cannot be and has never been by way of submissions solely. Guided by the above provision of the law in the instant case I find that the Plaintiffs/Respondents did not file any of the contemplated documents as provided under Rule 14. Instead chose to state in their filed written submissions that they filed a Replying Affidavit which was not the correct position, and that did not amount to an opposition to the Application.

16. Then, what then happens to the Written Submissions filed by the Plaintiffs/Respondents? In the Supreme Court case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others* [2018] eKLR when the court was faced with a similar scenario the court stated as follows;

> "A Replying Affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect."

17. I am guided by the above authority and also determine that the written submissions filed by the Plaintiffs/Respondents absent of a Replying Affidavit amount to nothing in the determination of the instant Application. That, in my humble view therefore, means that the averments in the Application filed by the Defendants/Applicants are deemed as uncontroverted and unchallenged.

18. Be as it may and having held as such, the Application by the Defendants/Applicants should not be deemed as having been allowed merely on that ground. This Court has a duty to consider the Application and proceed to determine it on its merits. Where meaningless or hopeless unmeritorious applications, pleadings and such like documents or requests find their way to Court it does not leave the Court powerless in meting out justice. The Court does not act mechanically and is not a mere conduit or conveyance of every and sundry request or claim. It behooves the Court to be satisfied that prima facie, with no objection, the Application or prayer before it is meritorious and the prayers sought may be granted. Hence, I will proceed to consider the facts before me as against the jurisprudence on adduction of evidence in Court and re-opening of a suit (closed), for purposes of introducing new evidence.

b.Whether the Defendants should be allowed to re-open the Plaintiffs case after they have closed its case by introducing new evidence.

19. The Applicants did not pray for the re-opening of the Plaintiffs' closed case upon their application being granted. The effect of granting the Application may involve the re-opening of the case that has been closed. It is noteworthy that the instant Application was filed after the close of the Plaintiffs' case but before that of the Defendants was heard. In determining the instant Application, this Court needs to find out if the evidence sought to be introduced, being documentary in nature, was not vailed to the Court at time of filing the Defence. This is because in terms of Order 7 Rule 5 of the *Civil Procedure Rules, 2010*, it is obligatory that a Defendant files his/her Defence together with a List of Documents and copies thereof with it. The Rule, just like Order 3 Rule 2, is silent on filing any document after the close of pleadings. Then, in a situation where a party does not file documents together with the Defence or Counterclaim, they have a higher bar to scale than on a balance of probabilities why they should be given leave of the Court to file the documents (later). This is even more difficult when the suit has gone through compliance under Order 11 of the *Civil Procedure Rules* and been set down for hearing.

20. This Court has had occasion to examine such a scenario before and pronounced itself in a detailed manner as hereinafter. Thus, in *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR this Court stated that:

> "Essentially, I am saying here that the bar at which the court gets convinced that there is need of filing and relying on an additional document or witness statement should be very high, higher than the fifty-fifty chance. This is because by the time the parties are having the pre-trial conference, they shall have weighed their case and become satisfied that all is ready for

the ship of trial to unhook from the anchor and sail. Ordinarily is should not be disturbed sailing unless there is a Tsunami or hurricane. Permit me to give an illustration of why the bar should be higher than the usual standard and how high that should be...."

21. Also, in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR Justice Munyao S held that:

> " It will be seen from the above that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.
>
> There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear-cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. "

22. Similarly, in the case of *Raila Odinga & 5 Others v IEBC and 3 Others* (2013) eKLR the Supreme Court while dealing with an issue of admission of documents outside the stipulated timeliness stated that:

> " The parties have a duty to ensure they comply with their respective time lines, 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/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."

23. One thing remains clear, that in order for the Court to grant leave to a party to file further documents, after pleadings have been filed, they must clearly demonstrate that failure to avail the said evidence was not deliberate.

24. Regarding the aspect of re-opening a Plaintiff's or Defence case, I am minded of the fact that both the Civil Procedure Rules and the *Evidence Act* do not have an express framework on how the jurisdiction is to be exercised. Needless to state, the decision whether or not to allow re-open an ongoing case is purely left to the realm of judicial discretion, which discretion must be exercised judiciously and in the interest of justice.

25. The crucial question to be resolved by the Court when faced with an application to re-open is whether the adverse party would suffer prejudice or not. In my view, the Court has to take into account the various principles that have been developed which govern applications of such a nature.

26. In *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, the Court, in disallowing a similar application held that:

> " Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

27. In associating myself with the above quoted judicial authority I am of the view that a trial should not be used as a fishing ground for new evidence to fill in gaps that an adverse party may have created, for this would negate the very essence of pre-trial disclosure. It must be clear that only new evidence could not be reasonably available to the Applicant even after exercise of due diligence is what the Court may consider when faced with such an application. The position should not be for one party, after the other has tabled his evidence, to start looking for evidence specifically to counter what the other party adduced. That would be encouraging parties to go on a fishing expedition and a hearing will never end. This Court finds that this is what the Defendants seek in their current Application.

28. Moreover, the Applicants did not adduce any evidence on when and whether the report was concluded by the DCI in order for this Court to ascertain that it could not have been obtained with reasonable diligence either before the close of pleadings and or the hearing of the Plaintiffs case. Furthermore, the Applicants did not produce evidence before this Court that the DCI had refused to avail the said report and that the said office was unwilling to produce the Report. Again, it is strange that the Report was conveniently sought to be availed subsequent to the close of the Plaintiffs case. It is this Court's view that allowing the said additional evidence would place this Court in a partisan position, make the Court aid the Applicants in their fishing expedition, and greatly prejudice and cause great injustice to the Respondents who have since closed their case.

29. Furthermore, the additional evidence that the Applicants seek to adduce is a report prepared by the DCI in respect of Criminal Case No. 170 of 2020 over the land dispute between the parties herein which is the subject matter in the present case. In essence, the Defendants/Applicants seem to be seeking for an independent body carrying out its mandate within the law for another purpose other than this suit to surrender information generated for an independent process. It is worth noting that criminal proceedings are independent of civil ones and the standards of proof in each are quite distinct of the other.

30. The Court is of the humble view that the DCI not being a party to this suit cannot be compelled to produce evidence on the part of any of the parties unless and except if the said office was called as a witness herein. As the application stands now, it is a merely fishing expedition by the Applicants. I am guided by the decision in the case of *Peter Kirika Githaiga & Another Vs Betty Rashid* (2016) eKLR,

regarding an appeal from a decision of refusal by the superior court to order the DCI to produce a report by the Document Examiner, the Court of Appeal aptly put it as follows;

> " The appellants may as well call the Document Examiner as a witness. We think that by the appellants asking the court to compel the D.C.I to produce the report, they were asking the court to descend in the arena of conflict which the court should at all times avoid. Further, it does appear to us that by making the application, the appellants were seeking the court's assistance in fishing for, gathering or retrieving evidence, hardly the role of the trial court in Civil Proceedings. It does not matter that the report was in possession of a third party. The fact that such a third party cannot participate in the discovery proceedings is no reason or sufficient reason for an order of review when he can easily be called as witness. Nor is it a consideration that interrogatories and discovery were inapplicable in the circumstances of the case.

31. Moreover, given that the Applicants sought to introduce new evidence after the close of the Plaintiffs' case but did not pray for the Plaintiff's case to be reopened and that they be given chance to confront the evidence before closure of their case, the Application was tailored towards stealing a match against the Plaintiffs hence greatly prejudice them. To this extent this Court concludes that the need to summon the DCI to produce the said is unmerited, and allowing the application would result in granting an opportunity to the Applicants to answer the evidence that has been adduced by the Respondents. For these reasons I find that the application must fail.

c.Who to bear the costs of the application.

32. Section 27 (1) of the *Civil Procedure Act* provides while the award of costs shall be at the discretion of the Court or Judge in whose full power that lie the decision as to whom and what extent they shall be paid, the guiding position in the provision is that costs will always follow the event unless the court or judge in his wisdom for good reasons decides otherwise. I saw no good reason to decide otherwise, particularly for the reason of the Court being used to determine such a frivolous application as the instant one. I hereby grant costs to the Respondents.

33. This suit shall be mentioned on 19/09/2023 for purposes of fixing a hearing date for the defence case.

34. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 18TH DAY OF JULY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE