Okello v Kairu Enterprises Limited (Environment and Land Case Civil Suit 617 of 2005) [2023] KEELC 20225 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20225 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 617 OF 2005

JO MBOYA, J

SEPTEMBER 28, 2023

BETWEEN

CHARLES A. OKELLO ..... PLAINTIFF

AND

KAIRU ENTERPRISES LIMITED ..... DEFENDANT

RULING

Introduction And Background

1. The Plaintiff/Applicant herein (sic) entered into and executed an Agreement for sale with the Defendant/Respondent; and which Agreement for sale is dated the 26th February 1992.

2. Pursuant to and upon entry into the Agreement under reference, the Plaintiff/Applicant avers that same made various payments towards and in respect of the purchase price/consideration and which payments are said to have been received and acknowledged by the Defendant/Respondent, resting with the payments at the foot of (sic) Bankers cheque Number 68-082, dated the 28th February 2017.

3. Despite the contention that the Plaintiff/Applicant has fully paid and/or liquidated the entire consideration, it is averred that the Defendant/Respondent has failed, neglected and/or otherwise refused to surrender to and in favor of the Plaintiff/Applicant, the requisite completion documents, to facilitate transfer and registration of the suit property in favor of the Plaintiff/Applicant.

4. Consequently and arising from the foregoing, the Plaintiff/Applicant has therefore approached this Honourable court and filed an Application dated the 22nd June 2023; and in respect of which, same has sought for the following reliefs.

    i. .....Spent.

    ii. Directions to be given as to an early Inter-parties hearing date in respect of prayers 3, 4 & 5 hereinbelow.

iii. This Honorable court be pleased to record a Settlement and/or compromise between the Plaintiff and the Defendant in the following terms;

a. That the Defendant shall furnish the Plaintiff with all the Completion Documents relating to the suit property known as Mara Savannah House No. 137 located on Nairobi/Block/82/1761 in exchange for the Plaintiff remitting the final sum Kshs.120, 000/= Only, to the Defendant towards the full settlement of this matter.

iv. This Honorable court be pleased to enter Judgment in this matter in the following terms;

a. That the Defendant shall furnish the Plaintiff with all the Completion Documents relating to the suit property known as Mara Savannah House No. 137 located on Nairobi/Block/82/1761 in exchange for the Plaintiff remitting the final sum Kshs.120, 000/= only, to the Defendant towards the full settlement of this matter.

b. The Property known as Mara Savannah House No. 137 located on Nairobi/Block/82/1761 do vests in the name of the Plaintiff.

c. The Deputy Registrar do execute all relevant documents necessary to effect the transfer of Mara Savannah House No. 137 located on Nairobi/Block/82/1761 to the Plaintiff.

d. The Chief Land Registrar be directed to sign any necessary documents in relation to the release of the title of all the property known as Mara Savannah House No. 137 located on LR. No. Nairobi/Block/82/1761 to the Plaintiff.

e. The Chief Land Registrar be directed to cancel the title of Mara Savannah House No. 137 located on Nairobi/Block/82/1761 currently in the name of Kairu Enterprises Limited and issue the title of all the property known as Mara Savannah House No. 137 located on Nairobi/Block/82/1761, to the Plaintiff/ Applicant.

v. The costs of this Application be borne by the Defendant/Respondent.

5. Instructively, the instant Application is premised and anchored on the numerous grounds which have been enumerated in the body of the Application. Further and in addition, the Application is supported by the affidavit of the Applicant sworn on even date, namely, the 22nd June 2023; and to which the Deponent has attached various documents.

6. Be that as it may, upon being served with the Application herein, the Defendant/Respondent filed a Replying affidavit sworn on the 19th July 2023; and in respect of which same has contended, inter-alia, that the reliefs sought at the foot of the current Application, replicate the reliefs sought at the foot of the Plaint. In addition, it has also been averred that the current Application is intended to impose upon the Respondent a compromise and/or contract, albeit without the blessings of the Respondent.

7. Suffice it to point out that the instant Application came up for hearing on the 20th September 2023; whereupon the advocates for the respective Parties agreed to dispose of the Application by way of oral submissions. Consequently and in this regard, the advocates proceeded to and ventilated their respective positions, for due consideration by the Honourable court.

Parties' Submissions:

A.Applicant's Submissions:

8. The Applicant herein adopted the Grounds at the foot of the Application, as well as the averments contained on the body of the Affidavit; and thereafter, same isolated, highlighted and canvassed four (4) salient issues for due consideration by the Honourable court.

9. Firstly, Learned counsel for the Applicant has submitted that the Applicant and the Respondent herein duly entered into and executed a lawful Agreement for sale, wherein the Respondent covenanted to transfer to and in favor of the Applicant the suit property, whose details are enumerated in the body of the named agreement for sale.

10. Furthermore, Learned counsel for the Applicant has submitted that despite the lapse of time, the Applicant and the Respondent further entered into a mutual understanding/further Agreement whereby the Respondent agreed to complete the transaction by handing over the completion documents albeit upon payment/ remittance of the outstanding balance of the purchase price amounting to Kshs.120, 000/= only.

11. Additionally, Learned counsel has submitted that arising from the demand by the Respondent to be paid the balance of the purchase price, amounting to Kshs.120, 000/= only, vide lumpsum payment; the Applicant proceeded to and paid out the entire Kes.120, 000/= only, vide Bankers cheque which was forwarded to and was duly received by the Respondents advocates. In this respect, Learned counsel for the Applicant has drawn the attention of the court to (sic) the letter dated the 1st March 2017, together with the annexures attached thereto.

12. Secondly, Learned counsel for the Applicant has submitted that the payment of the sum of Kes.200, 000/= Only, that constituted the balance of the purchase price, which was due, owing and payable to the Respondent; coupled with the acceptance thereof, constitutes a binding agreement, which essentially compromises the suit before the court.

13. At any rate, Learned counsel for the Applicant has further submitted that the acceptance of the balance of the purchase price by the Respondent created contractual obligations, which are binding on the Defendant/Respondent and hence the Defendant/Respondent cannot now be heard to renege from the terms of the agreement.

14. Thirdly, Learned counsel for the Applicant has submitted that there was no variation in respect of the agreement for sale that was entered into and executed by the Parties. In any event, counsel has added that the various correspondence which were exchanged by the Parties were in furtherance of the agreement of sale, whose terms are clear, explicit and binding.

15. Lastly, Learned counsel for the Applicant has submitted that the agreement which was entered into between the Applicant and the Respondent juxtaposed against the various correspondence, constitutes a lawful agreement, which meets the threshold set vide the provisions of Section 3(3) of the *Law of Contract Act*, Chapter 23, Laws of Kenya; and also the provisions of Order 25 Rule 5 of the Civil Procedure Rules, 2010, which anchors compromise of suites.

16. Based on the foregoing, Learned counsel for the Applicant has therefore implored the court to find and hold that the subject application is meritorious and therefore ought to be allowed/granted, so as to avert and/or obviate injustice and a miscarriage of Justice.

B.Respondent's Submissions:

17. The Respondent herein adopted and relied on the contents of the Replying affidavit sworn on the 19th July 2023; and thereafter same highlighted and canvassed three pertinent issues for consideration by the Honourable court.

18. First and foremost, Learned counsel for the Respondent has submitted that though the instant suit was filed in the year 2005, the Applicant herein has never found it fit and/or appropriate to set down the suit for hearing and disposal.

19. Furthermore, counsel has contended that to the contrary the Applicant herein has engaged and/or indulged in filing of a plethora of applications pertaining to and concerning the subject dispute, with a view to delaying and/or defeating the effectual determination of the dispute.

20. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein has not tendered before the court evidence pertaining to a lawful agreement, which was duly entered into and or executed by the Parties, to warrant the invocation and application of the provisions of Order 25 Rule 5 of the Civil Procedure Rules 2010.

21. In this regard, Learned counsel has thus contended that the subject Application has not met the statutory threshold set under the law, if at all, to warrant entry and/or endorsement of a compromise, either in the manner sought or at all.

22. Thirdly, Learned counsel for the Respondent has submitted that the various correspondence that have been alluded to by the Applicant and upon which same seeks to implore the court to find and hold that there exists a lawful agreement, are far from establishing a lawful agreement, either as known to law or at all.

23. Lastly, Learned counsel for the Respondent has submitted that in any situation where the Parties reach and/or arrive at a compromise, such compromise must be reduced down into writing and thereafter executed by the Parties . However, in respect of the instant matter, no such compromise has ever been crafted and/or been executed by the Parties herein.

24. Consequently and in the absence of a compromise, Learned counsel for the Respondent has submitted that this court cannot now be called upon to generate and/or create a compromise for the Parties, albeit without the consent of the Defendant/Respondent.

25. In the premises, Learned counsel for the Respondent has submitted that the subject Application is thus devoid of merits and therefore ought to be dismissed with costs to the Respondent.

Issues For Determination:

26. Having reviewed the Application beforehand and the Response thereto; and upon consideration of the oral submissions made by and/or on behalf of the Parties, the following issued do emerge and are thus worthy of determination.

    i. Whether the annexures attached to the Supporting affidavit are compliant with the Provisions of Rule 9 of the Oaths and Declaration Rules and if not, what is the legal implication attendant thereto.

    ii. Whether the Applicant herein has met and/or satisfied the threshold set/envisaged vide the provisions of Order 25 Rule 5 of the Civil Procedure Rules, 2010, as pertains to Compromise?

iii. Whether the Application herein has been made without unreasonable and inordinate delay or otherwise?

Analysis And Determination

Issue Number 1.Whether The Annexures Attached To The Supporting Affidavit Are Compliant With The Provisions Of Rule 9 Of The Oaths And Declaration Rules And If Not, What Is The Legal Implication Attendant Thereto.

27. Before venturing to interrogate and address the issue herein before mentioned, it is imperative to take cognizance of the provisions of Rule 9 of the Oaths and Statutory Rules and more pertinently, it is appropriate to reproduce same, for ease of understanding and reference.

28. In this respect, the provisions of Rule 9 (supra) are reproduced as hereunder;

> 9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.

29. From the contents of Rule 9 (supra), what emerges is to the effect that any exhibits and/or annexures to an affidavit is required to be securely sealed thereto with the seal of the commissioner of oaths. For good measure, the seal of the designated commissioner of oaths and the attendant signature thereof, are by law required to be affixed on the exhibit in question and not otherwise.

30. Additionally, there is no gainsaying that the terms of the rule in question are so explicit and devoid of ambiguity, to the extent that one, the Applicant herein not excepted, cannot devise, invent and/or improvise a mechanism for securing the annexures/exhibits in a manner other than the one prescribed under the law.

31. Nevertheless, in respect of the instant matter, what the Applicant and by extension his counsel has done is to cause the seal of commissioner of oaths and the requisite signature to be affixed on a trendy and blank piece of paper, which precedes the annexures, in question. Instructively, the seal of the commissioner and the attendant signature are not securely embossed on the exhibit and/or annexure.

32. Simply put and quite clearly, the seal is not securely affixed thereto, (on the annxture/ Exhibit), as demanded by the law.

33. Consequently and in the premises, the question that then arise is why the Applicant chose to improvise, invent and/or device a mechanism for serializing the annexures, albeit in a manner contrary to and in contravention of the legal prescription.

34. Put differently, the question that does arise is what was/is the difficulty that the Applicant herein may have faced and/or encountered, that made it difficult, nay, impossible to have the commissioner's seal securely affixed on the annexures.

35. To my mind, no reason has been adverted to and no explanation has been proffered. Nevertheless, the Applicant and his legal counsel have chosen not to abide by and/or follow the law.

36. In my humble view, the law and the Rules of procedure made thereunder; are made to be followed and/or complied with; and no Party, the Applicant not excepted, is at liberty to disregard the rules as prescribed and thereafter create a different set of rule, that is not prescribed by and/ or under the law.

37. In any event, where there is failure to comply with and/or abide by the Rules of procedure and more particularly, where such procedure is intertwined with the substance of the case, then it behooves the

Party at fault to explain and/or avail explanation for the default to comply with the prescription of the law.

38. Absent any explanation, the adverse inference to be drawn is that the concerned Party, in this case, the Applicant, was merely intent on disregarding the law or better still, paid scant respect to the applicable law. Consequently and to this end, the Party at fault must then suffer the legal consequences attendant to the failure to comply with and/or abide by the prescription of the law.

39. To buttress the foregoing position, I beg to adopt and reiterate the holding of the court in the case of Lalji Bhimji Sanghani Builders & Contractors Versus City Council Of Nairobi[2012]eKLR, where the court stated and observed as hereunder;

> "A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of the procedure the Court may well be entitled to conclude that the failure to comply therewith was deliberate."

40. Furthermore, the importance and significance of the provisions of Rule 9 of the Oaths and Statutory Declaration Rules, was highlighted, underscored and elaborated upon in the case of Solomon Omwega Omache & another versus Zachary O Ayieko & 2 others [2016] eKLR, where the court held thus;

16. "Rule 9 of the Oaths and Statutory Declarations Rules requires that annextures to affidavits should be sealed and stamped. The rule reads;-

> "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification."

Hon. J. B Havelock J. (as he then was) in the case of Fredrick Mwangi Nyaga –vs- Garam Investments & Another [2013] eKLR had occasion to consider the application of the above Rule 9 of the Oaths and Statutory Declarations Rules. The judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by Hayanga J. (as he then was) in the case of Abraham Mwangi –vs- S. O Omboo & Others HCCC No. 1511 of 2002 where the judge had held thus:-

> "Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected...".

41. In my humble view, time is ripe for all and sundry, to appreciate that the Rules of procedure were enacted, proclaimed and/or promulgated to aid in the administration of justice and to bring orderliness in the dispensation of justice; and hence same ought not to be disregarded with abandon or better still, at the pleasure of the litigants and/or their Legal counsel.

42. Finally, it is also worthy to underscore and reiterate the dictum of the Court of Appeal in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court of appeal stated and observed as hereunder;

> " A five-judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows;
>
> > "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

43. Arising from the foregoing, I come to the conclusion that the various annexures and/or exhibits, which have been attached to the supporting affidavit of the Applicant herein and which documents anchor the request/reliefs sought, are clearly incompetent and devoid of probative value, for being in contravention of the provisions of Rule 9 of the Oaths and Declarations Rules.

44. Additionally, having struck out and expunged the various annextures for being incompetent, it then means that the paragraphs relative to and in respect of which the annextures were attached, are rendered dysfunctional and are also expunged from the record of the court for lack of legal anchorage.

45. Furthermore, it is not lost of this court that part of the impugned annexures, which had been exhibited without due compliance with Rule 9 of Oaths and Statutory Declaration Rules, are photographs, which have not be indorsed with the requisite electronic certificate in terms of the provisions of Section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya.

46. In a nutshell, the impugned annexures/ exhibits attached to the supporting affidavit clearly deserves to be struck out and/or expunged. Consequently and in this regard, same be and are hereby expunged from the record of the court, together with the paragraphs, which anchored same.

Issue Number 2.Whether The Applicant Herein Has Met And/or Satisfied The Threshold Set/ envisaged Vide The Provisions Of Order 25 Rule 5 Of The Civil Procedure Rules, 2010, As Pertains To Compromise Of Suits?

47. Instructively, the current application is anchored and/or premised on the provisions of Order 25 Rule 5 of the Civil Procedure Rules, 2010; which mandates a court of law to enter and endorse on the record of the court a compromise affecting a particular suit between the Parties.

48. Given the significance of the provisions of Order 25 Rule 5 (supra) in the determination of the instant Application, it is appropriate and paramount that the contents thereof be reproduced.

49. In this regard, the named provisions are reproduced as hereunder;

(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

50. My reading and understanding of the import and tenor of the named provisions drives me to the conclusion that whereas a court of law is clothed and/or bestowed with the Jurisdiction to enter a compromise as pertains a particular suit, it is imperative that before such a compromise can be entered and/or endorsed, it must be established and/or demonstrated that there does exists a compromise or a lawful agreement entered into by the Parties, to warrant the endorsement of the compromise of the suit.

51. Informed and guided by the salient features of the provision of Order 25 Rule 5 of the Civil procedure Rules, it is imperative to interrogate the totality of the averments placed before the court and thereafter determine whether there does exists a compromise and/or lawful agreement, capable of meeting/ satisfying the threshold set by the law.

52. To start with, it is not lost on the court that the various annexures and/or exhibits, which the Applicant intended to rely upon and/or utilize in persuading the court that there is in existence a lawful agreement, to warrant the entry of the compromise; have all been expunged and struck out from the record of the court, for being in contravention of the Provisions of Rule 9 of the Oaths and Statutory Declaration Rules.

53. Having expunged and struck out the impugned annexures, the resultant situation is that this Honorable court is left with no document and/or evidence upon which to discern and/or decipher the existence of a lawful agreement or at all. Consequently and to this extent, the court suffers from a debilitating handicap.

54. Secondly, even assuming for the purpose of arguments that the impugned annexures were still on record (which is not the case); it is important to point out and/or state that the agreement for sale which was (sic) entered into by the Parties herein on the 26th February 1992; and which primarily is being relied upon, appears (I mean appears) to suffer from some legal infinity, taking into account the provisions of Section 4(1) of the *Limitation of Actions Act*, Chapter 2022 Laws of Kenya.

55. Nevertheless, I must point out that what is before me is an interlocutory application and therefore it is not within my competence to determine with finality and/or substantively, the issue as pertains to the law of limitation at this juncture. Clearly, that is an issue that can only be resolved by the trial court upon undertaking a plenary hearing, which stage is yet to be arrived at.

56. Thirdly, there is also no gainsaying that the letter dated 1st of March 2017, which counsel for the Applicant adverted to and relied upon, together with the attached bankers cheque relates to a completely different matter. For good measure, the impugned letter refers to Civil Appeal No. 73 of 2008; Between Kairu Enterprises Ltd vs Charles Okello.

57. Invariably, the suit before this court and wherein the compromise is sought to be entered and/or endorsed is ELC No. 617 of 2005; between Charles A Okello vs Kairu Enterprises Ltd. Simply put, there is no debate that the correspondence alluded to does not relate to and/or concern the subject matter.

58. Furthermore, even if the Applicant herein would wish to contend that there is some relationship between the Parties in Civil Appeal No. 73 of 2008 Between Kairu Enterprises Ltd vs Charles Okello; and the current suit, such relationship, if any, has not been adverted to, established and/or clarified.

59. In any event, the dichotomy between Civil Appeal No. 73 of 2008, wherein the payment of Kes.120, 000/= only, was being made and the current suit, constitutes a triable issue; which can only be resolved after plenary hearing and not otherwise.

60. Taking into account the foregoing observations, I am afraid that the Applicant herein has not placed before this court sufficient and credible evidence to prove that the suit beforehand has been duly compromised, either has envisaged under the law or at all.

61. Finally, it is worthy to reiterate that the burden of proving that a suit has been duly compromised, rests upon the Applicant and not otherwise. Consequently and in this regard, it behooved the Applicant herein to place before the court plausible evidence in satisfaction and/or discharge of the burden of proof. Unfortunately, the requisite burden has not been discharged. See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.

62. Insofar as the Applicant herein has failed to discharge the Burden of proof, there is no gainsaying that the reliefs sought at the foot of the current Application cannot thus be granted. In any, I must state and reiterate that the Application herein has been made in vacuum.

Issue Number 3.Whether The Application Herein Has Been Made Without Unreasonable And Inordinate Delay Or Otherwise

63. Other than the issues which have been adverted to and discussed in the preceding paragraphs, there is yet another issue which is puzzling, if not startling. For clarity, the issue herein relates to the time lapse between the 1st March 2017, when the sum of Kes.120, 000/= only, (which is contended to have been the balance of the purchase price), was paid to the date of the filing of the current application.

64. Quiet clearly, it has taken the Applicant before the court more than 6 years and 3 months before crafting and filing the current application, whose import and tenor is to effectuate (sic) what is deemed/ contended to be an agreement arising out of the named correspondence.

65. To my mind, the duration that has been taken prior to and before the filing of the current application was grossly unreasonable and in any event inordinate. In this regard, I hold the view that if the Applicant herein believed that the impugned correspondence and the letter dated the 27th January 2017; truly constituted a binding compromise, then the Applicant ought to have exercised due diligence and dispatch, in approaching the Honourable for appropriate intervention.

66. Additionally, there is no gainsaying that "Equity aids the vigilant and not the indolent". Consequently, it behooved the Applicant, who propagates the position that there was a compromise to move the court with due and necessary expedition.

67. Lastly, where there is a delay in performing and/or undertaking any act provided under the law and/ or deemed necessary by a Party to a suit; it is incumbent upon the Party, like in the instant case, the Applicant, to account for and/or explain the delay in moving the court. Further, the reasons for delay, if any, must be plausible, cogent and credible.

68. Be that as it may, in respect of the instant matter, the Applicant herein has neither availed nor supplied any iota of explanation, to account for the delay amounting to 6 years 3 months; before filing a current application.

69. Quite clearly, the failure to account for the delay and/or place before the Honourable court cogent, plausible and credible explanation sets in motion the application of the Doctrine of Latches, which by its nature and tenor frowns upon an Application being made after a long and inordinate delay.

70. In short, my answer to issue number three is to the effect that the current Application, which no doubt, has been filed with unreasonable delay; is defeated by the doctrine of Latches.

Final Disposition:

71. From the discourse alluded to and elaborated in the preceding paragraphs, there is no gainsaying that the subject Application does not meet and/or satisfy, the legal threshold envisioned under Order 25 Rule 5 of the Civil Procedure Rules, 2010.

72. Further and in addition, it is also important to recall that the annexures/exhibits, which would have provided some legal anchorage to the Application beforehand, were also struck out and thus the application was bare; and without the Evidentiary backing.

73. Consequently and in view of the foregoing, the Application dated the 22nd June 2023; is devoid and bereft of merits; and same be and is hereby Dismissed with costs to the Respondent.

74. Before terminating this Ruling, it is important to implore the Parties to this suit to comply with the requisite pre-trial directions and thereafter ready the suit for hearing. Instructively, the instant suit remains an eyesore on the face of the Judiciary; which is exposed to accusation of delaying the hearing and disposal of the suit, yet the true cause of the delay lies elsewhere with the Plaintiff/Applicant.

75. Other than the foregoing, the substantive disposition are in terms of paragraph 73 hereof, where the impugned Application has been Dismissed with costs.

76. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023.

OGUTTU MBOYA,

JUDGE.