



Kenya Anti-Corruption Commission v Gachanja & 4 others (Environment & Land Case 33 of 2008) [2023] KEELC 20192 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 33 OF 2008
CA OCHIENG, J
SEPTEMBER 26, 2023**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

WILSON GACHANJA 1ST DEFENDANT

SIMON MBWIKA 2ND DEFENDANT

JONES KAVIVYA NZAU 3RD DEFENDANT

JOHN WABOI MWANGI 4TH DEFENDANT

MARTHA WANJUMBI WABOI 5TH DEFENDANT

RULING

1. What is before court for determination is the 2nd – 5th defendants'/applicants' notice of motion application dated the April 3, 2023 where they seek the following orders:
 1. Spent
 2. That this honourable court be pleased to grant the applicant leave to file supplementary list of witnesses, witness statements and consolidated list of supplementary list of documents out of time.
 3. That upon grant of prayer above the said supplementary list of witnesses, witness statements and consolidated list of supplementary list of documents be deemed to have been duly filed.
 4. That the costs of this application be provided for.
 5. That the court be pleased to make such other and further orders that would be necessary to further the ends of justice.



2. The application is premised on the grounds on the face of it and the supporting affidavit of Benard Muteti Mung'ata advocate who is in conduct of the matter on behalf of the applicants, where he deposes that he recently took over conduct of this suit from his associate advocate who had been handling it. He explains that upon perusal of his file and the court file, he discovered that key documents for the defence and witness statements were missing or, had not been duly filed. Further, that the filing of pleadings had closed and hearing of the matter recently commenced. He confirms that at the said hearing the defendants noticed that some of key documents and witness statements were not on record. Further, upon such realization the applicants herein sought leave orally to be allowed to file the said documents and any other documents they wished to rely on but the court directed him to make a formal application. He reiterates that the omission of the said documents was occasioned by the counsel who was previously on record and the lands registry. He insists that mistakes of the advocate should not be occasioned upon on the client. Further, that the intended application will offer a fair ground to the defendants to defend their suit as they have arguable grounds and case. He reiterates that the supplementary list of witnesses, witness statements and supplementary list of documents be marked as duly filed. further, that no prejudice will be occasioned to the plaintiff if this application is allowed as it will be granted an opportunity to cross-examine and interrogate the said witnesses and documents.
3. The plaintiff opposed the instant application by filing a replying affidavit sworn by Dedan Okwama its investigator where he deposes that the plaintiff pursuant to its constitutional and statutory mandate, investigated allegations that land reserved for the prisons department in Machakos had been illegally alienated and titles issued to third parties. He confirms that upon conclusion of investigations and in line with its mandate, the plaintiff instituted thirteen (13) suits in the High Court at Machakos. Further, each suit is premised on a concise plaint setting out the cause of action and seeking prayers to recover specific properties in which titles had been issued. He avers that before this suit was fixed for hearing, there was pre-trial conference where parties were given an opportunity to duly comply with order 11 of the [Civil Procedure Rules, 2010](#). Further, as at February 10, 2022, all parties had confirmed complying with order 11 of the [Civil Procedure Rules, 2010](#). He contends that as at February 4, 2022, the plaintiff had duly served all the parties with its consolidated list of witnesses and plaintiff's bundle of documents. Further, on February 28, 2023, he testified on behalf of the commission and during examination in chief the applicants sought to rely on some documents which they had not filed, which was opposed and thereafter they sought leave to file additional documents on the ground that they had just acquired them as they had not previously been in their possession. He insists that on perusal of the supplementary witness statements and supplementary list of documents, it shows that the 2nd – 5th defendants have always being in possession of the relevant information and documents but only waited to hear the plaintiff's key witness before filing them. He argues that the 2nd – 5th defendants have introduced new evidence of the District Allocation Committee approving the subdivision and allocation of Machakos Town Block 1/30. Further, that the 2nd – 5th defendants state that the allocation was approved on July 27, 1994 and by introducing the above stated new evidence, they are attempting to reopen investigations in the matter. He reiterates that this new evidence is being raised more than fifteen (15) years since the institution of the suits by the plaintiff. He reaffirms that the 2nd – 5th defendants are introducing new evidence and/or issues via supplementary witness statements and this will highly prejudice the plaintiff as it will not have an opportunity to rebut the new evidence. Further, that cross-examination alone will not be enough to rebut this new evidence. He contends that the supplementary witness statements introduces new aspects in the matter which was not pleaded in the defence and this is an attempt by the defendants to amend their defence by way of witness statements. Further, no justifiable reason has been given to explain the inordinate delay in filing the requisite documents. He states that all along the 2nd – 5th defendants have always been represented by



the firm of B.M Mung'ata and therefore the issue of Benard Muteti Mung'ata taking over conduct of the matter from his associate does not suffice. Further, that it is not always that advocate's mistakes cannot be visited on a litigant and that the mere citing of inadvertence or mistake is not sufficient excuse for failure to comply with order 7 rule 5 and order 11 of the [Civil Procedure Rules 2010](#).

4. The instant application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant notice of motion application including the respective affidavits as well as rivalling submissions, the only issue for determination is whether the 2nd to 5th defendants should be granted leave to file supplementary list of witnesses, witness statements and supplementary list of documents out of time.
6. The 2nd to 5th defendants in their submissions reiterated their averments as per the supporting affidavit and contended that the court has discretion to grant them leave. To support their averments, they relied on the following decisions: [Esther Mukulu Mutuku v Rahab M'kiama & 2 others](#) (2022) eKLR and [Philip Kiptoo Chemwolo & another v Augustine Kubende](#) (1986) eKLR.
7. The plaintiff in its submissions provided a background of this application, reiterated its averments as per the replying affidavit and argued that it is legally unacceptable for the mistake of an advocate to be allowed as an excuse for the violation of express provisions of a statute. Further, that the defence of mistake of counsel unless proven by cogent and credible evidence should not be used as a tool to influence the judicial discretion of the court. It contended that the 2nd - 5th defendants have brought the application under the wrong provisions of the law as sections 27 and 28 of the [Limitations of Action Act](#) is inapplicable. Further, that the said provisions of the law deal with institution of suits after the expiration of the limitation period provided for different cause of action. It insisted that the 2nd - 5th defendants have introduced new evidence, fifteen (15) years after institution of this suit, of the District Allocation Committee approving the sub-division and allocation of Machakos Town Block 1/30 and by doing so, they are attempting to reopen investigations in the matter as this will be prejudicial to the plaintiff as it will not have an opportunity to rebut the new evidence. Further, that cross-examination alone will not be enough to rebut this new evidence. It reaffirmed that the new issues in the witness statements were not pleaded in the defence and is an attempt by the 2nd – 5th defendants to amend their defence, and this will highly prejudice it. The plaintiff further submitted that as at February 10, 2022, all parties had confirmed complying with order 11 of the [Civil Procedure Rules 2010](#). Further, that the instant application has been filed more than one (1) year since the suit was confirmed ready for hearing and no justifiable reasons have been given for failure to file requisite documents within the stipulated timelines. To buttress its averments, it relied on the following decisions: [Mariam Mohamed Mbaruku v Hamisi Mzee Ali](#) [2021] eKLR; [Dilpack Kenya Limited v William Muthama Kitonyi](#) [2018] eKLR; [Johana Kipkemei Too v Hellen Tum](#) [2014] eKLR and [Sedy Kenya Freight Limited v Multiple Solutions Limited](#) [2021] eKLR.
8. The 2nd – 5th defendants have sought for leave to file supplementary list of witnesses, witness statements and supplementary list of documents out of time. The deponent who is their advocate explains that his associate failed to file the documents and mistake to counsel should not be visited upon the clients.
9. Section 3A of the [Civil Procedure Act](#) provides that:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."



10. From the court record, I note the pleadings closed and on May 23, 2022 all parties confirmed they had complied with order 11 of the Civil Procedure Rules. Further, the matter proceeded for hearing on the February 28, 2023 where the plaintiff's witness testified and the defendants' counsel proceeded to cross-examine him. The issue of filing additional documents including witness statements only arose during the cross-examination.

11. In the case of Sendy Kenya Freight Limited v Multiple Solutions Limited [2021] eKLR, the court held that:-

"Thus pre-trial disclosure is not just a procedural edict; it is anchored in article 50(2) of the Constitution and is therefore a cardinal requirement that ought not to be taken lightly, as counsel for the defendant appeared to do. The significance of pre-trial disclosure was emphasized by the Supreme Court in Raila Odinga & 5 Others v IEBC and 3 Others [2013] eKLR thus:"

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...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." Emphasis mine

12. See also the case of Samuel Kiti Lewa v HFCK (2015) eKLR and Andrew Kariuki Njoroge v Paul John Kimani (2022) KECA 1888 KLR.

13. Based on the facts before me while associating myself with the decisions I have quoted, insofar as the plaintiff has vehemently opposed the instant application, I have had a chance to peruse the annexed witness statements including documents and it is my considered view that since the plaintiff's first witness had not finished testifying, filing of the same will not be prejudicial to it, as claimed. From the explanation granted by the deponent, insofar as I do not find it conclusive since the deponent is the owner of the law firm but it is trite that the mistake of counsel cannot be visited upon their clients. In the interest of justice, I opine that it is pertinent for the 2nd - 5th defendants to be allowed to file the witness statements including supplementary documents which are attached to the supporting affidavit. To my mind, I find that the plaintiff will not be prejudiced if it is allowed to file additional documents as well as witness statements and also adduce additional evidence if need be.

14. In the circumstances, I find the instant notice of motion application merited and will allow it and grant costs to the plaintiff.

15. I direct that the 2nd – 5th defendants do file and serve their witness statements including list of documents as annexed to the instant application within seven (7) days from the date hereof. Further, the plaintiff and the 1st defendant are granted leave of twenty-one (21) days to file additional documents including witness statements if need be.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2023

CHRISTINE OCHIENG



JUDGE

