



Moboko Shembekho Ltd v Kiptalam & 2 others; Agricultural Development Corporation (Third party) (Environment & Land Case 43 of 2021) [2023] KEELC 19982 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19982 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 43 OF 2021
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

MOBOKO SHEMBEKHO LTD PLAINTIFF

AND

ROBERT KIPTALAM 1ST DEFENDANT

BENJAMIN KIPKECH KIPKULEI 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

AND

AGRICULTURAL DEVELOPMENT CORPORATION THIRD PARTY

RULING

1. This ruling is in respect of the 1st and 2nd defendants Notice of Motion application dated 9/03/2023 which is expressed to be brought under Order 7 rule 5(d), 18, 20, Rule 3 and 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act* which sought the following prayers:
 - a. That the 1st and 2nd defendant/applicants be granted leave to file additional documents in support of their defence and counterclaim.
 - b. That costs of this application be in this cause.
2. The application was supported by the affidavit of Benjamin Kipkech Kipkulei. The grounds on the face of the application and the supporting affidavit were that the 1st and 2nd defendants have come across documents relating to the acquisition of LR 20591/16 and LR 20591/79 which documents were crucial to their defence; that at the time the matter came up for pretrial, 2nd defendant did not



have some of the crucial documents and so he could not have annexed them in support of his defence; that it is in the interest of justice they be allowed to bring in the new documents for a just and fair determination of the dispute and that the other parties would not be prejudiced in any way if the documents are allowed as the matter is yet to be determined.

3. In response to the application, the plaintiff filed grounds of objection dated 18/04/2023 on the same date which were as follows:
 - a. The Application is tantamount to trial by ambush and is aimed at frustrating the expeditious hearing and conclusion of this suit as no legal justification has been advanced why the documents subject of the application were not filed before close of pleadings and prior to the commencement of the hearing of this suit.
 - b. The Application as crafted is mischievous and contrary to the directions given by the Court to the 1st and 2nd Defendants on 1/3/2023 to file a formal application for admission of the further list of documents dated 10/02/2023 and filed on even dated as it introduces new documents.
 - c. The documents dated 18/7/2022, 4/11/2022 and 9/11/2022 attached to the Application and sought to be admitted as part of the 1st and 2nd Defendants' bundle of documents are inadmissible as their production shall be in breach of the *Evidence Act*, *Access to Information Act* and also contrary to the decision of the Supreme Court of Kenya in the case of *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR.
 - d. The application is frivolous, meritless and a clear abuse of the court process and should thus be dismissed with costs.
 - e. More grounds, arguments and reasons to be adduced at the hearing.
4. The application was canvassed by way of written submissions. The 1st and 2nd defendants filed their submissions dated 9/05/2023 on 11/05/2023 while the plaintiff filed its submissions dated 16/05/2023 on 17/05/2023.
5. The 1st and 2nd defendants in their submissions identified the following issues for determination:
 - a. Whether the applicant has met the threshold for leave to file additional documents;
 - b. Whether an objection as to admissibility is merited at this stage.
6. In their submissions, the 1st and 2nd defendants relied on Order 7 Rule 5(d) of the *Civil Procedure Rules*, Articles 50 and 159(2)(d) of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, the case of *Wadhwa (As legal representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 Others* (Civil Appeal 33 & 148 of 2019(Consolidated) [2022] KECA 25 (KLR) (21 January 2022) among other cases.
7. On the first issue, the 1st and 2nd defendants submitted that the documents that they are seeking to produce directly relate to the ownership of the suit properties and go to the root of the present matter. The first document is a judgement delivered in *Anne Naanyu Kilele vs Stingray Limited & 4 others* [2019] eKLR which is relevant as it showed the date of the demise of the late Dr. Walter Kilele which is substantially in issue on account of documents purportedly signed by him posthumously. The second set of documents were gazette notices which were relevant in determining whether Grace Nekoye Namachanja executed the ownership documents relied on by the plaintiff. The third set of documents contained two letters dated 18/07/2022 and 04/11/2022 which relate to the mother title that was recalled by the 3rd party during the pendency of these proceedings. The other document was a letter



written on behalf of the Director Criminal Investigations dated 9/11/2022 which referred the letter dated 23/09/2022 filed by the Attorney General as a product of inconclusive investigations. The 1st and 2nd defendants submitted that the said documents were not in their possession by close of pleadings as some had dates post close of pleadings.

8. On the second issue, the 1st and 2nd defendants submitted that the issues of admissibility of documents was premature at this stage. They relied on the cases of *Attorney General vs Torino Enterprises Limited* [2020] eKLR and *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR and submitted that admissibility of documents cannot be determined at this stage as the plaintiff is merely being given notice that the 1st and 2nd defendants intend to rely on the said documents in their defence. The 1st and 2nd defendants then sought that their application be allowed as prayed.
9. The plaintiff in its submissions identified only one issue for determination which was whether the 1st and 2nd defendants have met the threshold for the exercise of the court's discretion in their favour and allow them to file the additional documents attached to their application. The plaintiff submitted that Order 7 Rule 5 of the Civil Procedure Rules requires every party to a suit to furnish their evidence in advance before the commencement of every trial. The plaintiff also submitted that under Order 11 Rule 7, parties can only file documents with leave of court. It was the plaintiff's submissions that in the present matter, parties had exchanged their pleadings and documents in support of their respective cases and the case proceeded for hearing on 22/11/2022 where the plaintiff's director testified and therefore the application by the 1st and 2nd defendants was tantamount to a trial by ambush considering that they had a counterclaim on record.
10. The plaintiff relied on the cases of *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR, *Raila Odinga & 5 Others v IEBC and 3 others* Supreme Court of Kenya, Petition No. 3, 4 and 5 of 2013 eKLR, *Johana Kipkemei Too vs Hellen Tum* [2014] eKLR and submitted that it is only in exceptional circumstances that the court can exercise its discretion in favor of a party. The plaintiff also submitted that the 2nd defendant in his supporting affidavit did not bring up any exceptional circumstances to warrant the court to exercise that discretion in their favor. The plaintiff concluded its submissions by submitting that the documents dated 18/07/2022, 4/11/2022 and 9/11/2022 which are sought to be admitted as part of the 1st and 2nd defendants' documents are in breach of the *Evidence Act*, Access to Information and the case of *Njonjo Mue & another versus Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR and the 1st and 2nd defendants' application should therefore be dismissed with costs.

Analysis and Determination

11. After considering the application, the response thereto and the submissions, the only issue that arises for determination is whether the 1st and 2nd defendants should be granted leave to file additional documents.
12. The 1st and 2nd defendants are seeking leave to file additional documents in support of their case on the grounds that the said documents were not available to them at the close of pleadings and since they are necessary in determining the rights of the parties in the present matter, it would be in the interest of justice that the documents be allowed as filed.



13. The plaintiff opposed the said application and stated that the 1st and 2nd defendants' application was tantamount to trial by ambush and was only meant to frustrate the expeditious hearing and determination of the matter. Order 2 rule 13 of the [Civil Procedure Rules](#) provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”

14. Order 7 Rule 5 of the [Civil Procedure Rules](#) provides as follows:

“5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses except expert witnesses; and
- (d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

15. The court in the case of [Alois Oceano D'sumba v Rajnikant Narshi Shah & another](#) [2017] eKLR held as follows:

“10. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is the one of the purposes for the directions that a court gives under the provisions of Order 11 of the Civil Procedure Rules. Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case.”

16. The court in the case of [P.H. Ogola Onyango t/a Pittsconsult Consulting Engineers v Daniel Githegi t/a Quantalysis](#) [2005] eKLR held as follows:

“Indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has began...”

17. A perusal of the court record indicates that the 1st and 2nd defendants were given fourteen days to file their list of documents on 26/01/2022. PW1 gave his evidence on 22/11/2022 but was stood down so that he could avail the original documents he had relied on. It was after PW1 was stood down that the 1st and 2nd defendants filed the present application seeking for leave to file additional documents.

18. The 1st and 2nd defendants are seeking to file documents that include a judgement delivered on 20/12/2019 in the case of [Anne Naanyu Kilele vs Stingray Limited & 4 others](#) [2019] eKLR, Kenya Gazette Vol CVI – No. 18 of 20/02/2004, letter dated 9/11/2022 from the Director Criminal Investigations addressed to the Attorney General, a letter dated 18/07/2022 written by the Agricultural Development Corporation addressed to Cheptumo & Co. Advocates.



19. The 1st and 2nd defendants alleged that the said documents were not in their possession before the close of pleadings and that is why they were not filed on time. It is my view that the plaintiff will not be prejudiced in any way if the 1st and 2nd defendants are allowed to file the Kenya Gazette Notice mentioned. However, I have not been shown that before or at that date of filing suit, the applicants were not in possession of the judgment in the case cited or any other evidence of the date of demise of Mr. Kilele. The hearing of the present suit has already commenced and it would prejudice the plaintiff to have to go back to the drawing board perchance the applicants are permitted to file the said documents and that course of events may entail considerable delay in the disposal of the present suit.
20. Besides the risk of delay aforementioned, it is noteworthy that the letters dated 9/11/2022 and 18/7/2022 were made after the suit had been filed. Thought that may not be the intent of any of the parties in the present instance, this court must be wary of and thwart any attempts by any party to influence the course of litigation by way of production of documents made after the hearing has commenced. In this case, it cannot be that the applicant's case was so hopeless before the new said letters were made that it could not succeed. It must be the evidence that the defendant had before the pleadings closed, which predated the date of filing of suit, that they relied on for the ultimate success of their defence. Indeed, this is a case whose ultimate determination is purely predicated on events happening prior to the filing of the suit. The likelihood of amendment triggered by those documents may have been a consideration by this court, but the documents sought to be filed and produced are not in any way likely to change the contents of the plaint or defence, including the prayers therein, and no amendment has been sought to accommodate them in any way.
21. Having stated as before, I find no justification for allowing the applicants to file any other documents save the Gazette Notice No. Vol. CVI – No. 18 of 20/2/2004 which is a public document. A supplementary list and bundle of documents comprising only of that Notice shall be filed and served within 14 days from today.
22. Consequently, the 1st and 2nd defendants' application dated 9/03/2023 is hereby deemed partially successful, but each party will bear its own costs thereof. Parties will appear before the court virtually on 18/10/2023 for taking of further directions as to hearing.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

