



Redeemed Gospel Church Kwale v Nganga (Environmental and Land Originating Summons E002 of 2022) [2023] KEELC 21019 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2022
AE DENA, J
OCTOBER 26, 2023**

BETWEEN

REDEEMED GOSPEL CHURCH KWALE PLAINTIFF

AND

NORMAN NJUGUNA NGANGA DEFENDANT

RULING

Application

1. The firm of A. O. Aminga & Co Advocates has filed the application subject of this ruling on behalf of the Defendant/Applicant seeking the following prayers;
 1. That leave be granted to the applicant herein to file supplementary list of witnesses and two witness statements as per herewith annexed supplementary list of witnesses and witness statements.
 2. That the supplementary list of witnesses and witness statements annexed to the application herewith be deemed as properly filed upon payments of requisite court filing fees
 3. That upon granting prayers [1] and [2] above the honourable court be pleased to direct that service of the same be effected upon the Plaintiff herein.
 4. That costs be in the cause.
2. The application is supported by the affidavit sworn by Abdulrahman Ondieki Aminga and which in summary states that the Defendant had intimated to his advocate of his desire to have two other witnesses testify but had not presented them for purposes of statement recording. The deponent avers that the Defendant has not been indolent and the failure of the court to sit on 31/10/2022 occasioned the defendants inadvertent failure to file witness statements as dictated under the provisions of order 7 rule 5 of the Civil Procedure Rules 2010. That under order 50 of the Civil Procedure Rules this court



has power to enlarge time to allow documents on record to be admitted as filed. That in the event the application is not allowed the same will occasion a violation of the defendants right to a fair hearing as envisaged under Article 50[1] of *the Constitution*. The court is urged to allow the application for substantive justice to be meted in favour of the Defendant.

Response

3. In opposing the application, George Asisi Omollo a Senior Pastor of the Plaintiff/Respondent swore an affidavit filed on 12/5/2023. It is stated that a mention for pretrial had been issued by the court on 31/10/2022 but the court did not sit on that particular day. Another date for pretrial was subsequently scheduled for 8/11/2022. The matter was then fixed for hearing on 31/1/2023. The case was heard and the plaintiffs case closed on the said date but the defendant did not intimate to court of their intention to have more witnesses.
4. It is stated that the defendants advocate informed court that he had only one witness being Margaret Wambui Njuguna. That the instant application is an afterthought and malicious with the intent to patch up holes in the defendant's case. Further that allowing the application will be prejudicial to the plaintiffs. The respondent states that one of the witnesses in the draft list is Benard Mbire Kihui the husband to the Defendant/Applicant and who has all along been available as a witness but was not presented. That the applicant has approached court with unclean hands by failing to disclose the pretrial date that was set on 8/11/2022. The court is urged to disallow the application.

Submissions

Applicants Submissions

5. The application was canvassed by way of written submissions. The applicant's submissions were filed on 30/5/2023. It is submitted that Order 3 Rule 7 and Order 5 do not set clear-cut consequences for non-compliance. The applicant submits that the court being a shrine of justice is mandated to do justice to all parties and not be strictly bound by procedural technicalities. The court is urged to exercise its discretion in allowing the application and reliance is placed on the case of *Alex Wainaina t/ a John Commercial Agencies v Janson Mwangi Wanjibia* (2015)eKLR. That no new evidence is being adduced by the additional witnesses.
6. It is submitted that the court has powers under Order 18 rule 10 of the *Civil Procedure Rules* as well as section 146 of the *Evidence Act* to recall a witness at any stage of proceedings for further evidence in chief or cross examination with corresponding leave for further cross examination. To buttress this point the applicant cites *Dennis Edmond Apaa and 2 Others v Ethics and Anti-corruption Commission & another* Petition No. 317 of 2012. That the right to admit additional evidence cannot be limited on grounds that pleadings and discovery closed long time ago. That this would infringe the defendants right to fair hearing.

Respondents Submission

7. The Respondent's submissions were filed on 12/5/23. It is stated that the Plaintiff having closed its case allowing the prayers sought will prejudice its case. That the respondent had complied with the provisions of Order 7 rule 5 on what should accompany a defence and counterclaim. That by 8/11/22 both parties had complied with pretrial direction. That discretion of the court can be invoked by party after giving justifiable reason. It is submitted that the applicant's intention is to seal any loopholes in the defence case having heard the testimonies of the Plaintiffs witnesses during the hearing. The court is referred to the case of *David Sugut & another v Mercela Cheptoo Chuma* (2016) eKLR. That



the application is against rules that govern litigation and any party that flouts them should suffer the consequences of breach as held in *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others* (2015)eKLR cited in *George Kimani Njuki v National Land Commission & 2 Others* (2022) eKLR. That it is not enough for the respondent to state that the applicant has the right to cross examine the intended witness.

8. It is contended that it defeats conscious that the respondent needs her husband at this stage of the proceedings when he has been available all along. The proposed witness conceals the spousal relationship in his statement which demonstrates unclean hands.

Determination

9. The applicant brings this application substantively under Section 1A and 1B of the *Civil Procedure Rules* (this should be the Act). These provisions provide as follows; -

1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

10. Be that as it may, the relevant law governing filing of documents by the defence is under Order 7 Rule 5 of the *Civil Procedure Rules*. The same provides as hereunder;

Documents to accompany defence or counterclaim [Order 7, rule 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.

11. The applicant craves leave to introduce a supplementary list of witness which shows an additional two witnesses namely Benard Mbire Kihui and Patrick Mcharo as per the proposed defendants supplementary list of witnesses dated 29/03/23. The attendant witness statement are attached. Mr. Aminga has submitted that the provisions of order 7 Rule 5 do not set out a clear cut consequences of failure to comply neither do they state that such party will be debarred from relying on witnesses or documents which were not furnished. I agree with Counsel on this proposition but it is the invitation to this court to exercise its discretion while ensuring the court does justice that behooves my focus.
12. Mr. Aminga in his supporting affidavit states that sometime on 30/01/23 when the case up for hearing, the defendant had intimated to his office his desire to have two more witnesses testify in this matter. That however the same witnesses were presented only after the Plaintiff closed its case. It is the defendant's case that the matter was fixed for pretrial on 31/10/2022 however the court did not sit. That the failure of the court to sit contributed to the lapse in filing all witness statements as required under the provisions of Order 7 of the *Civil Procedure Rules* 2010. The court is also invited to invoke the provisions of order 50 of the said rules which are on enlargement of time to allow the documents on record to be admitted as filed. It is urged that the interest of justice dictate the application is allowed for substantive justice.
13. I have indeed noted from the court record that there are no proceedings for 31/10/22 when the suit had been scheduled for pretrial directions. However, the court record shows that on 10/11/22 the matter was before court. Mr. Otieno D.O appeared for the defendant where the court noted that the parties had complied. This was compliance with order 11 including order 7 rule 5 above. There was no reaction from Mr. Otieno. The court set down the suit for hearing on 30/01/23. I must respectfully state that the court in being away did not carry the registry with it and the personnel that would facilitate filing of documents. Business was running as usual in the court registry and the witness statements would have been filed then. In the event that the litigant did not present the witnesses he intended to call in good time, the same should not be attributed on the failure of the court to sit. In any event how can the failure to sit be the reason for not filing the witness statements when the disclosure on the additional witnesses was made several months after the suit had commenced. This cannot therefore be a justification on the part of the applicant. There is an attempt by Mr. Aminga to explain the delay stating in the plaintiffs submissions that the applicant resides in Nairobi while the two additional witnesses resided in Kwale and thus the difficulty to get a hold of them. It is also not clear who in the office was given this information. All this is not supported by the applicant's affidavit and I would not place much weight on it. The court is not persuaded.
14. The plaintiff's case is that allowing the application will prejudice its case for reasons that the defendant sat through the entire proceedings and was intent on filling up gaps to strengthen his case. The court notes that on 30/01/23 Mr. Otieno informed the court that he was ready to proceed but with the Plaintiffs case after dealing with another matter before Justice A. Nzei. The hearing proceeded at 1.15 pm where PW1 and PW2 evidence was taken including cross examination and reexamination. With this the plaintiff's case was closed. No intimation was made to the court by Mr. Otieno whether at the beginning or at the close of the plaintiff's case of the defendant's intention to introduce new witnesses. This must be considered in light of Mr. Aminga's deposition that the defendant had on the same day



30/01/23 indicated to his office his desire to have two more witnesses testify in this matter. This in my view cast a doubt on the applicants *bonafides*.

15. But having stated the above, I have read the authorities cited by the applicant. It is clear from the caselaw cited by the applicant that justice would require that the court must consider the import of the introduction of the evidence in other words if the same will cause prejudice to the other party. See *Raila Odinga v IEBC and 3 Others* (2013) eKLR cited by Nyakundi J in *Pinnacle Projects Limited v Presbyterian Church of East Africa Ngong Parish & another* Nyakundi J stated that

When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pretrial- conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with the law’.

16. Justice Oguttu Mboya faced with similar facts in the case of *George Kimani Njuki v National Land Commission & 2 Others* (2022) eKLR cited by the Plaintiffs had this to say;-

43. It is my considered view that the law requiring the filing and exchange of the list of documents was meant to bar litigation by ambush and/or surprise. On the other hand, was also meant to ensure that a party is not ambushed and therefore prejudiced in the course of hearing and trial’

44. Be that as it may, in respect of the subject matter, the plaintiff has testified and closed his case. Consequently, to allow the calling of any new witnesses and production of any new documents, if any, which were unknown to the Plaintiff, at the time of closure of the Plaintiffs case, shall prejudice the Plaintiff’.

51. On the other hand, a party may argue that the court is obligated to render substantive justice and eschew procedural technicalities. But it must be noted that substantive justice cannot be achieved and/or realized, if preremptory procedural rules, which guide the conduct of business in the various courts, are disregarded, ignored and uncared for, with abandoned.’

14. In the case of *Johana Kipkemei Too v Hellen Tum* (2014) eKLR Justice Sila Munyao faced with similar situation stated thus; -

‘The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 Others v IEBC & 3 Others, Supreme Court of Kenya*, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159(2)(d) of *the Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be



introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules. Emphasis is mine.

The learned judge held that:

‘I have to concur with the submissions by Mr. Wafula that the Plaintiffs will be greatly prejudiced if I am to allow this application by the defendant. The plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. it will be unfair to the plaintiffs, if I am to allow the defendant at this late stage of the proceedings ‘

15. Guided and persuaded by the above caselaw I will proceed to interrogate the proposed witness statements alongside the Defendants response to the Plaintiffs Originating Summons herein. Margaret Wambui Njuguna filed a replying affidavit sworn on 7/3/22. My perusal of the same reveals there is no deposition about the engagement of one Patrick Mcharo in 2019 to construct a fence on the suit property neither is there any mention of construction of a fence. This is a new matter being introduced in the proposed Witness statement of Patrick Mcharo (see paragraph 3 and 4 of the statement). This issue also does not feature in the witness statement of the said Margaret Wambui Njuguna dated 27/10/22. The court has also perused the witness statement of Bernard Mbire Kihui and the same makes averments on the issue of the fence at paragraph 5 and 6 of the same. Paragraph 9 appears to me to respond to issues that arose during the proceedings (see the proceedings on the oral testimony of PW2 Eunice Mbatha Kimongo). In my view this is a material departure and goes to support the Plaintiffs concerns that the introduction is meant to bridge gaps in the Plaintiffs case. It indeed goes to the root of the Plaintiffs adverse possession claim.
16. I have noted a witness statement of Norman Njuguna Nganga attached to the application. This I will disregard because it is not attached to the proposed supplementary list of witnesses and based on Mr. Aminga’s deposition that he had intimated that he would only introduce 2 more witnesses. There was no indication he would be the third witness.
17. In the absence of any convincing reasons for introducing the two witnesses and their evidence and based on the observations above the court can safely come to the conclusion that having listened to the evidence of the plaintiff and cross examination the defendant wants to seal loopholes and or strengthen his case after consuming the proceedings during the hearing. This prejudices the Plaintiffs case.
18. The upshot of the foregoing is that the Defendants application dated 29/03/2023 lacks merit and is hereby dismissed with costs to the Plaintiff.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED THIS 26TH DAY OF OCTOBER, 2023

A. E. DENA

JUDGE.

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Kabiario for the Plaintiff/Respondent

No Appearance for Defendant/applicant



Mr. Daniel Disii - Court Assistant.

