



Mubishi & another (Both are Suing as the Estate's Legal Representative of Daniel Mubishi Mwamba alias Daniel Mubichi Mwamba - Deceased) v Nyange & 2 others (Environmental and Land Originating Summons E004 of 2020) [2023] KEELC 20888 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20888 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2020
CK NZILI, J
OCTOBER 18, 2023

BETWEEN

ESTHER KINANU MUBISHI 1ST PLAINTIFF

SAMMY KIRIMI MUBISHI 2ND PLAINTIFF

BOTH ARE SUING AS THE ESTATE'S LEGAL REPRESENTATIVE OF DANIEL MUBISHI MWAMBA ALIAS DANIEL MUBICHI MWAMBA - DECEASED

AND

JULIUS MWAMBA NYANGE 1ST DEFENDANT

ZACHARY MUTUTA M'MAGIRI 2ND DEFENDANT

PIUS MUTUTA 3RD DEFENDANT

RULING

Ruling

1. The hearing of this matter commenced on 7.2.2022 when the plaintiff testified and called one witness. Thereafter, on 28.4.2022, PW 3 & 4 testified. On 29.9.2022, PW 5, 6, and 7 testified, and the plaintiff sought an adjournment to call the last witness. The plaintiff was granted the last chance. When the matter resumed for hearing on 13.2.2023, the court was informed that the 1st defendant had passed.
2. Parties were given time to substitute the deceased 1st defendant. The plaintiff thereafter made an application dated 19.4.2023 to replace and amend the originating summons. The court allowed the said application dated 19.4.2023 on 20.4.2023. Directions were issued for an amended originating summons to be filed and served within seven days, the defendants to file and serve any amended response within 14 days from the date of service of the amended originating summons, and parties to appear before the court for confirmation of compliance on 30.5.2023 and fix a further hearing date.



3. On 30.5.2023, Mr. Muthomi learned counsel appearing for the defendants sought for seven days to file witness statements. Despite the plaintiffs' objections, the court allowed the request and directed that the witness statements be filed within 7 days in default of which the defendants shall not rely on it at the hearing on 21.9.2023.
4. When the matter resumed hearing on 21.9.2023, counsel for the plaintiffs objected to a replying affidavit filed by Zipporah Kiende and a list of documents filed alongside it on 7.6.2023.
5. Counsel sought for the same to be expunged from the court record. The basis was that under Sections 1A and 1B of the *Civil Procedure Act*, parties and advocates must assist the court in expediting and doing justice. Secondly, the plaintiffs submitted that the documents were filed without leave or out of time and without a request to regularize them since the time to comply lapsed on 30.5.2023 and by that date, there had been no compliance and that the seven days' extensions did not include the filing of new or fresh documents.
6. On the merits of the filed documents, counsel for the plaintiff submitted that the court should take notice that the will was made on 1.5.2020, which was a public holiday, and that it could not have been possible to appear before a lawyer. While alive, counsel submitted that the deceased had filed a replying affidavit with a list of documents dated 17.12.2021 and an affidavit dated 1.3.2021, of which he did not see fit to include the documents now being introduced.
7. Counsel submitted that the suit was at the tail end of the plaintiff's testimony, and the documents' introduction would not only be prejudicial but amount to trial by ambush, where justice will not be done, let alone be seen to have been done. Counsel submitted that there would be no prejudice if the documents were struck out, for the defendants would still rely on earlier documents on record.
8. As to the purpose of the order made on 30.5.2023, counsel submitted that if the motive was to include documents to the witness statements, the seven days expired on 6.6.2023, and therefore, since the documents were filed out of time, they should be expunged from the court record.
9. Mr. Arithi learned counsel for the defendants opposed the objection as being misconceived, non-suited, and out to interfere with the determination of the suit. Counsel submitted that the orders of 30.5.2023 were elaborate that compliance be made within seven days, which, in his view, if the documents were struck out from the record, the authority to swear and plead would be affected. Counsel submitted that after the 1st defendant passed on, Zipporah Kiende swore the affidavit and filed an authority to plead on behalf of the remaining defendants dated 7.6.2023 and a further list of documents, including a will and receipts. Counsel submitted that nothing new was included in the replying affidavit since the deponent adopted what had been filed before by the deceased passed on.
10. Counsel submitted that under Order 50 of the *Civil Procedure Rules*, computation of time as per the order given meant that the seven days would run up to 8.6.2023, and therefore, the disputed documents were filed within the time since holidays and Sundays were excluded. Counsel submitted that even if the order did not include the documents, the court should invoke Article 159 of *the Constitution* and embrace the bigger picture of substantive justice rather than technicality, as also set out under Sections 1A & 1B of the *Civil Procedure Act*, this being a family land matter in which the beneficiaries want to take a whole 12 acres of land valued at over Kshs.10,000,000/= to repay a loan of Kshs.300,000/= and lock out the rest.
11. Counsel submitted that the intended evidence and the spirited attempt to lock it out show how such evidence was crucial. Counsel submitted that the plaintiffs have an undoubted right to test the veracity of the evidence through cross-examination.



12. On the authenticity of the will, counsel submitted that a will speaks only after a testator dies, so it could not have been possible for the deceased to file such documents before his demise, and therefore, it would be premature to attack the will before it was put to probate which this court had no jurisdiction to determine. Additionally, counsel submitted that no law bars the writing of a will on a public holiday, and that cannot be used as a basis for attacking it. Counsel urged the court to find the preliminary objection lacking merits and exercise its discretion by allowing the documents for hearing on merits.
13. In a rejoinder, Mr. C.P Mbaabu, Advocate for the plaintiff, urged the court to find Order 50 of the Civil Procedure Rules as inapplicable where there was an express court order, but on timelines set by the rules or statute and that either way computation was done, the seven days expired on 6.6.2023. Counsel submitted that the court order was clear on inadmissibility. As to late filing, counsel submitted that the defendants were disrespecting the court, and as much as the court could enlarge time, this should not apply when the application has just been made after the train had already left the station.
14. Counsel submitted that the court's discretion can only be exercised on facts and material before the court. In this case, there being no explanation of the difficulties the defendants experienced, they were indolent, and lackadaisical and were therefore caught by Article 159 of *the Constitution* and Sections 1A & 1B *Civil Procedure Act* as out to delay justice.
15. On the will, counsel submitted that the court has no jurisdiction to entertain it since the deceased did not allude to it, it would be prejudicial, it raises new issues, Zipporah was not the maker, Mr. Arithi advocate was the witness to the will which is also alien to this matter. Counsel urged the court to find that no leave was granted to file any documents.
16. Further, counsel submitted that the defendants had not raised issues on what prejudice they were likely to suffer compared to the plaintiffs if the court declined to allow the documents. He submitted that Kshs.300,000/= paid in 2007 was equivalent to over Kshs.30,000,000 and that the defendants would still rely on what the deceased had filed before. Counsel urged the court to find that it was not in the interest of justice and the spirit of *the Constitution* to allow the documents in the court file.
17. At the outset of this ruling, the court has set the context of this matter and the circumstances leading to the orders made on 30.5.2023. This court allowed the application dated 19.4.2023 with no objection from the defendants.
18. In the amended originating summons dated 20.4.2023, the plaintiffs introduced three new parties to the suit: Zipporah Kiende Mutea, Florence Gacheri Murungi, and Susan Kanorio Mutula, on top of the 2nd and 3rd defendants. The amendment implied that the plaintiffs sought a substantive relief to declare the deceased's estate, namely LR No. Kibirichia/Ntumburi/375 as held by the defendants in trust for the estate of the late Daniel Mubishi Mwamba alias Daniel Mubichi Mwamba; the legal representatives of the deceased's estate, namely Zipporah Kiende Mutea, Florence Gacheri Murungi, Susan Kanoria Mutua and Catherine Mwari Murithi, be compelled to execute all the necessary transfer instruments and transfer LR No. Kibirichia/Ntumburi/375 to the estate of Daniel Mubichi Mwamba in default, the executive officer to sign it, and the Land Registrar Meru be authorized to dispense with the production of the original title deed.
19. The amended originating summons was served with a fresh affidavit sworn on 20.4.2023 and annexures missing in the application dated 19.4.2023.
20. After introducing new parties, there is no indication if the plaintiffs served the three parties in person or assumed that they were all represented by the firm of Arithi and Co. Advocates. Be that as it may, it is trite law that Order 37 of the *Civil Procedure Rules* has set timelines on which a party to the originating



summons must reply. A party may respond through witness statements or the grounds of opposition or replying affidavits.

21. The amended originating summons introduced new parties who did not participate during the hearing of PW1-PW7. The new parties are being told by the plaintiffs that they should confine themselves to whatever their late father had filed and no more.
22. Substantive reliefs, as indicated above, are being sought against the parties who were never in the suit in the first place and were never privy to the cause of action. In Meru CMCC Misc. Succession Case No. 27 of 2023, the plaintiffs herein introduced the new parties as citees and have now brought them as substantive defendants in this suit.
23. The three new parties ideally are the substantive defendants alongside the 2nd and 3rd defendants. Therefore, denying them from making an equally substantive defense to the claim before the court would fly against the rules of natural justice and fair play.
24. Whereas the plaintiffs raised the issue of the parameters of the directions issued on 30.5.2023, it could not have been the intention of the court to block out parties who had not made a substantive response to the amended originating summons. Even though the directive was on witness statements, it did not expressly bar the new parties from their right to file a substantive response and include any material as their factual and legal basis as to why the amended originating summons should not be sustained against them.
25. The court has already alluded to the nature of the amended originating summons before it. Once the plaintiffs re-opened pleadings and introduced additional defendants, it did not matter that the suit was part heard. The plaintiffs in the affidavit supporting the amended originating summons averred on oath that they wished to call only one witness and close their case. The court was yet to give directions as to the way forward regarding the new parties who had not participated in the suit from inception.
26. The rights of the new parties are equally protected under the law and cannot be wished away in any manner in the name of prejudice or delaying tactic. Once the pleadings were re-opened, the court, as the custodian of law and justice, retains the duty to issue fresh directions with or without the concurrence of the parties. That is not to say that the parties' input should be ignored. On the contrary, as a neutral arbiter, the court must balance the scales of justice and give each party a fair hearing to ventilate their case.
27. As to when the timelines expired, Order 50 Rules 2 and 3 of *Civil Procedure Rules* provide that Sundays and public holidays be excluded, and where the last day expires on such days, the following day offices shall be opened be taken as the expiry time. Section 57b of *Interpretation and General Provisions Act* Cap 2 provides the first and last day of the event Sundays and holidays be excluded unless the contrary intention appears. In *Kyule Makau versus Dominic Ikombo* (2015) eKLR, the court said that because the last day fell on a public holiday and the next two days fell on a weekend, 1.5.2015, the three days were excluded from the computation. In this application, I find the documents as filed within time. As to the veracity, authenticity and probative value of the intended exhibits, this court reserves its observations until they are subjected to the laws of evidence.
28. The upshot is that I find the objection lacking merits. The affidavit and witness statements are deemed as filed on time. Leave is granted to the plaintiffs to file any additional witness statements or documents and if necessary, recall any of their witnesses.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 18TH DAY OF OCTOBER 2023



HON. CK NZILI
ELC JUDGE

