



**Haji & 4 others v Ngenya & 8 others (Environment & Land Case
34 of 2021) [2023] KEELC 22650 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 34 OF 2021**

AE DENA, J

NOVEMBER 14, 2023

BETWEEN

**MOHAMED ABDALLA DAGO 1ST PLAINTIFF
OMARI HASSAN DAGO 2ND PLAINTIFF
KIBWANA MOHAMED DAGO 3RD PLAINTIFF
MWANASHA MWALIMU DAGO 4TH PLAINTIFF
MUJTABA AMIRALI HAJI 5TH PLAINTIFF**

AND

**HASSAN ALI NGENYA 1ST DEFENDANT
ABDUL HUSSEIN OMAR KLALO 2ND DEFENDANT
OMAR A AZANI 3RD DEFENDANT
MOHAMED MWACHIMBUGWA 4TH DEFENDANT
SULEIMAN KOI 5TH DEFENDANT
JUMA MWABORI 6TH DEFENDANT
SADIC MWACHARO 7TH DEFENDANT
BAKALI NASSARO NYUNI 8TH DEFENDANT
BASHIR KILALO 9TH DEFENDANT**

RULING

1. Before me is a Notice of Motion dated 24/4/2023 by the Plaintiffs/Applicants. The following orders are sought;



1. That this Honourable court be pleased to grant leave to the Plaintiffs/Applicants Advocate to include some documents as per the proposed further list of documents annexed to the affidavit in support of the instant application.
 2. That the proposed further list of documents be deemed as duly filed upon payment of the requisite court fees.
 3. That the Defendants/Respondents be at liberty to respond thereto within fourteen [14] days from the date of service.
 4. That the cost be in the cause.
2. The application is based on the following grounds;
1. That it is necessary to include the documents in the suit since they have been mentioned in the witness statement and plaint.
 2. That the additional documents will not prejudice the defendants/respondents as they shall have an opportunity to respond thereto and cross examine on the same.
 3. That the instant application does not introduce any new fact
 4. That it is fair, just and in the interest of justice for the instant application to be allowed.
3. The application is further supported by an affidavit sworn by Naliaka E Nanjali Advocate. It is averred that the firm of Nanjali& Kirui Advocates took over the matter from the firm of Ndegwa Muthama & Katisya Advocates. That at the time of filing a list of witnesses and documents, Counsel discovered she had not included all the documents as she had not received the original file from the firm of Ndegwa Muthama & Katisya Advocates. That the file has since been given to them hence the instant application. The court is urged to grant the prayers as sought.
4. The court notes that there is no replying affidavit on record filed by the respondents. As it stands the application is seemingly unopposed. However, going by the record on proceedings, when this matter came up for further hearing on 17/4/2023, the court took the evidence of PW2 and PW3. It was expected that the Plaintiff's case would then be closed. However, the Plaintiffs counsel made an oral application to be allowed to file a further list of documents, the same was vehemently opposed by the defendant's counsel who stated that it would be unprocedural. In quick rejoinder the plaintiffs counsel asked to put in a formal application, which prayer was allowed by court hence the instant application.
5. By consent of both parties the application is dispensed by written submissions. The Plaintiff/Applicants submissions are filed before court on 30/5/2023 while the Defendants submissions are filed before court on 19/6/2023.
6. The Court has carefully read through the Application, the affidavit in support, the submissions thereto by the parties. I find that the only issue for determination is:
Whether the Applicants have met the threshold for the exercise of discretion in their favour.
7. Order 3 Rule 2 of the [Civil Procedure Rules](#) provides as follows:
- All suits filed under Rule 1(1) including suits against the government, except small claims, shall be accompanied by-
- a. The Affidavit referred to under Order 4 Rule 1(2);
 - b. A list of witnesses to be called at the trial;



- c. Written statements signed by the witnesses excluding expert witnesses; and
- d. Copies of documents to be relied on at the trial including a demand letter before action.

Provided that the statement under sub rule (c) may with the leave of the Court be furnished at least fifteen days prior to the trial conference under Order 11.

8. Order 7 Rule 5 of the Rules gives similar requirements where parties file their Defences and/or a counterclaim. The same provides as follows;

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.

9. 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.

10. It is a requirement under*Order 11 Rule 3 of the Rules for parties to file and serve the pre-trial questionnaire as provided in Appendix B to the Rules, 10 days after the closure of the pleadings. The Court can also make directions to ensure that parties comply with procedural requirements before commencement of hearings.

11. Having outlined the above the most critical consideration should be to ensure justice. In the case of Johana Kipkemei Too v Hellen Tum (2014) eKLR Justice Sila Munyao persuasively 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.

12. In the case of *Anne Mumbi Hinga v Gaitbo Oil Limited* (2013) eKLR, where Nyamweya J stated as follows: -

I would like to add that the provisions of the *Civil Procedure Rules* are not cast in stone and the Court is enjoined by Article 159 of the *Constitution* and Sections 1A and 1B of the *Civil Procedure Act* to ensure that in implementing the rules we dispense substantive justice, and ensure that there is just, expeditious proportionate and affordable resolution of civil disputes. To this end, this Court is given inherent power under Section 3A of the *Civil Procedure Act* to make such orders as may be necessary for the ends of justice.

13. This Court cannot therefore prevent the Plaintiff from stating its case, even if the effect as alleged by the Defendant is to fill holes that may have arisen from cross-examination. It is the Plaintiff's right to fill such holes as she seeks substantive justice from this Court.

The only limitation to the exercise of this right would be if there was prejudice to be caused to the Defendant in allowing the Plaintiff to file additional witnesses and documents. It is my view that as the Plaintiff is yet to close her case, the Defendant will have the opportunity to cross-examine any additional witnesses she calls, to recall any witnesses who have already given evidence for further cross-examination, and to file any additional statements and documents in response.....”.

14. The question therefore is whether these additional documents will cause any prejudice to the Defendants if allowed on record. The same as listed include a sale agreement dated 21/7/2014 together with the registration receipt issued by the lands office, copy of the title, rates payment and clearance certificate, searches, certified copy of the green card post registration ,certified true copy of the green card, certified true copy of the application for the consent of Land Control Board, certified copy of the letter of consent, certified true copy of the transfer instrument, receipts issued for the registration of the transfer, stamp duty declaration & pay slip and a National Bank stamp duty pay in slip.

15. I have looked at the prayers being sought by the applicant. The Further Amended Plaintiff filed on 18/3/2019 states that the suit property was allocated to one Abdalla Mohamed Dago by way of adjudication. The plaintiffs pray for judgement against the defendants for a declaration that the defendant's actions over the suit property are contrary to the plaintiffs' constitutional rights over property. The plaintiffs further seek for eviction of the defendants and a permanent injunction against them. The Amended Statement of Defence and Counterclaim filed on 19/8/2020 denies the averments raised in the plaint and state that the suit property was wrongfully and illegally allocated to Abdalla Mohamed Dago as the land belongs to the Mwaembe Community and the land was to be allocated to them for construction of a mosque and which mosque currently stands on the land.

16. In answering the question as to whether the admission of the supplementary documents will cause any prejudice to the Defendants. I'm inclined to take cognizance of the fact that the defence case is yet to commence and neither have the Plaintiffs closed their case. As such it cannot be stated that litigation of this case is at an advanced stage in a way that could cause any prejudice to the Defendants. The Defendant through Counsel on record will have the opportunity to cross examine on the contents of the said documents. The further Supplementary List and Bundle of Documents would therefore not be prejudicial to the Defendants. The issues raised by both parties in the pleadings are weighty, and



as such the court opines that the documents alluded to as listed above will shed the necessary light in determining the history and ownership of the suit property.

17. The overriding objective of this court as stipulated under Section 3 of the *Environment and Land Court Act* is to facilitate the just, expeditious, proportionate and accessible resolution of disputes. The court is duty bound to do justice to all parties. I am guided by the sentiments of Honourable Justice Kanyi Kimondo in *Steven Kariuki v George Mike Wanjohi & 2 Others* (2013) eKLR: -

Once seized of the dispute, the Court is enjoined by Article 159(2) (d) of the *Constitution* to do substantial justice to the disputants expeditiously and without undue regard to technicalities. Rules of procedure have aptly been described as handmaidens of justice: not mistresses. See *Edward Steven Mwiti v Peter Irungu & 2 Others (No. 2)* Nambi High Court ELC 105 of 2011(2012) eKLR. This overriding principle is a guiding beacon of the Court.

“The principal aims of the overriding objective includes the need to act justly in every situation; the need to have regard to the principal of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable, to place the parties on equal footing.”

18. The basic principles on independence of the judiciary dictate that matters before court are decided impartially and in accordance with the law. Impartiality in my humble opinion enjoins the provisions of Article 159[2][d] of the *Constitution* and which dictates that each party is given an avenue to ventilate their case regardless of the procedural technicalities that might arise. In *Esther Wambui Njenga v Harrison Mwangi Nyota & 2 others* [2018] eKLR the court opined that it is fair to allow each party to fully ventilate their case if for no other reason but so that the whole truth is revealed.
19. Based on the foregoing, the supplementary list of documents by the Plaintiffs is allowed. The Defendants will have the costs of the application.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2023

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A. E. DENA

JUDGE.

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

No Appearance for the Plaintiffs/Applicants

No Appearance for the Defendants/Respondents

Mr. Daniel Disii – Court Assistant

