Kanda & another v Kilimo & 2 others (Environment & Land Case 51 of 2018 & Enviromental and Land Originating Summons 67 of 2019 (Consolidated)) [2023] KEELC 22331 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22331 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 51 OF 2018 & ENVIROMENTAL AND LAND ORIGINATING SUMMONS 67 OF 2019 (CONSOLIDATED)

FO NYAGAKA, J

DECEMBER 21, 2023

BETWEEN

THOMAS RUTO KANDA ..... PLAINTIFF

AND

WALTER TOROITICH KILIMO ..... 1ST DEFENDANT

MOSES KIPLAGAT ..... 2ND DEFENDANT

AS CONSOLIDATED WITH

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 67 OF 2019

BETWEEN

WALTER KILIMO TOROITICH KILIMO & 2 OTHERS ..... PLAINTIFF

AND

THOMAS RUTTO KANDA ..... DEFENDANT

RULING

1. The Defendants filed a Notice of Motion dated 22/09/2023. They brought it under Sections 63(e) and 95 of the *Civil Procedure Act* and Order 50 Rules 6 of the *Civil Procedure Rules*, 2010. They sought the following orders:

    1. That this honourable court be pleased to grant the applicants leave to file out of time two certificates in regard to electronic photographs taken by Simiyu Edmonds David Wekesa and

Oscar Toroitich alias Malaki and some whereof have been marked for identification as DMFI 3(a)-(g) and others are yet to be testified on.

2. That this Hon. Court be pleased to grant the applicants leave to file the surveyor's report dated 15/11/2018 out of time. A photograph which is part of that Report, was annexed to the supporting affidavit of the 1st defendant.

3. That cost be in the cause.

2. The Application was based on six (6) grounds. They were that before he filed the Originating Summons on 14/11/2019 he engaged a surveyor, namely, Simiyu Edmunds David Wekesa to do a ground report on the land comprised in Suwerwa Settlement Scheme parcel No. 25 and he indeed perfected the instructions. Further, that although the satellite photograph which the surveyor generated were annexed to the 1st Applicant's Affidavit in support of the originating summons, the report was inadvertently left out. Lastly, that the Respondent had the satellite image generated by the surveyor and will not be prejudiced by the orders if granted.

3. One Walter Toroitich Kilimo swore, on his own behalf and that of the others two Defendants, the Supporting Affidavit before a Commissioner for Oaths on 22/09/2023. Besides the contents of the grounds of the application which he deposed to as facts, the deponent stated that after the filing the instant suit, they engaged the surveyor, one David Wekesa, to do a ground report of the suit land. The said surveyor generated a report but it was inadvertently omitted from being annexed to the supporting affidavit to the Originating Summons. Further, that to the List of Documents marked as WTK1 & 2 he had annexed a copy of a photomap of the ground layout. He annexed a copy of the Report and marked it as WTK3. He deponed that the Registry Index Map had already been produced as Exh. No. 8 and the mutation form as Exh 7. Lastly, he swore that the certificates, which he marked herein as WTK 4 and 5, on the digital photographs by Oscar Toroitich alias Malaki had not been prepared by the date of fling the Originating Summons.

4. The Plaintiff, Thomas Rutto Kanda, opposed the Application through a Replying Affidavit sworn by him on an unknown date but filed on 11/10/2023. He deponed that he had been given legal advice that the Rules of Practice did not permit introduction of additional/or evidence for removing lacuna or filling gaps in a party's evidence. He deposed that the Application was devoid of merits as it was brought in bad faith as it was intended to advance new grounds of defence. He stated further that as a matter of principle the Court could allow additional evidence on a case by case basis but with abundant caution.

5. The Respondent deponed that on 15/11/2018 when he testified, the Surveyor's Report was already compiled hence the Applicant was reasonably expected to be aware of it hence he should have gotten it before certifying that he was ready for hearing. Further, that to take the Report as evidence after he had closed his case would be unfair to him and contrary to Article 50 of the *Constitution* of Kenya, 2010. He stated further that the Applicant was attempting to patch up weak point in their case and teal a match over him in view of the cross-examination conducted by his Advocates.

6. His further deposition was that the Applicant did not explain in the supporting Affidavit how with due diligence he could not have obtained the report before the Respondent testified and closed his case yet the maker of the Report was still alive and his attendance could have been easily procured.

7. He swore that certification of photographic contents or electronic contents is a legal requirement which is in the knowledge of legal counsel hence to grant the party to file the certificates as required under Section 106(B) of the *Evidence Act* will fortify ignorance of the law. He deponed that the objection by his learned counsel against the production of uncertified photographs during the trial of the Defence was "legitimized" by the Court and that is why the instant Application was brought. He

then deponed that failure to file the Certificates under Section 106(B) of the Act was a mistake that could not be cured by the aid of equity.

8. He then deponed that parties were bound by their pleadings hence the move to adduce new evidence in the form of a surveyor's Report was prejudicial. He summed it that the Application was intended to obstruct justice by delaying the matter which was a 2018 one hence frustrating the overriding objective of the Court which is to the effect that matters be dealt with expeditiously and without unreasonable delay.

Analysis And Determination

9. This suit was filed on 10/05/2018. The Defendants entered appearance on 30/05/2018. Thereafter he filed the Defence albeit out of time, that is on 28/02/2019. The issue of delay was addressed by the consent of the parties entered on 06/12/2018. The Court gave parties to comply. By the 11/02/2019 the Plaintiffs had not complied with Order 11 of the Civil Procedure Rules. They had not even filed their Reply to Defence hence they sought time to do so.

10. By the 28/02/2019 they complied but did not file a Reply to the Amended Defence. Ultimately, after a number of mentions or adjourned hearings, a consolidation of the suit with Kitale ELC No. 67 of 2019 (OS) and the taking of directions, the suit proceeded to hearing for the first time on 15/11/2021. The Plaintiff testified as PW1. By that date, the Plaintiff had not served his documents. Although he had a last adjournment, having applied for many adjournments before, he still made an Application to be stood down and leave to file and serve a List of Documents. The Defendants indulged him, in the interest of justice.

11. The Court too indulged him and granted him leave to file and serve his documents within 14 days. The suit was adjourned to 20/01/2022. On that date only, the Plaintiff attended. He was ready to proceed but he had served only the documents he was granted leave to file but neither served the Replying Affidavit to the Originating Summons consolidated nor the witness statement he had filed. Once again, the Defendants indulged him rather than applying to expunge the documents not served. The Court once more adjourned the matter but marked the adjournment a last one. It gave him seven (7) days to serve the documents not served.

12. On the subsequent hearing date, the Plaintiff called the Land Registrar as PW2 as the first witness to testify. Then he was recalled for further examination and cross-examination. Upon him completing his testimony in-chief the cross-examination could not continue because the judge had to attend a Court Users Committee meeting that afternoon. The Plaintiff was stood down and closed his testimony on 04/10/2022. Then for a number of reasons the matter was adjourned to 03/07/2023 when Defendants started their testimony, with the 1st Defendant testifying as DW1.

13. It was upon completion of the 1st Defendant's testimony that the instant Application is made. I decided to give the summary of the history of the proceedings herein so that it may be clear as to whether the Applicant is guilty of delay in bringing the Application as asserted by the Respondents.

14. Before I turn to the analysis and determination of the Application, it is worth of note that only the Applicants filed submissions on the Application. As for the Respondents, when the Court heard the Application on 26/10/2023, the Respondents indicated to the Court that they had filed their submissions on 16/10/2023. Whereas the hard copy was not in the Court file, it believed the Respondents and gave the Ruling date herein, hoping they would place them in the file. Up to the time of preparing the Ruling none were in the file.

15. The judge decided to verify with the Court filing system to see if he could get the said documents. He found that there were no submissions filed on the material date. Instead he made a request on 17/10/2023 for billing for the filing. The Court Registry invoiced him and that was the last activity regarding the payment.

16. While the absence of the submissions by the Respondent is not an issue that would go to the determination of the merits of the instant Application, it is worth of note that the Respondents seem to be plagued with either delays or omissions in regard to various steps or actions in this matter, and it is not a good show on their part.

17. That said, the only issue in this application is whether or not it is merited. Attendant to it is who to bear costs of the Application. As deponed rightly by the Respondent, the determination as to whether the Court should grant an applicant leave to file additional evidence or not equity plays a role, and the determination is on a case by case basis. That means that the circumstances of each case will be looked at separately vis-à-vis the law. I therefore consider the instant application based on the circumstances of the instant case whose history I summarized hereinabove.

18. The Rules Committee adopted the *Civil Procedure Rules*, 2010 which detail the procedure regarding the filing of documents by parties in preparation for a trial. This is in addition to the procedure of discovery in the *Evidence Act*, Chapter 80 of the Laws of Kenya which is the parent law in regard to adduction of evidence and proof of facts in issue. In regard to the Environment and Land Court, the procedure is supplemented by The Environment and Land Courts, and on Proceedings Relating to the Environment and he Use and Occupation of, and Title to Land and Proceedings in Other Courts (referred to herein as the *Mutunga Rules*), published in Gazette No. 5178.

19. The procedure adopted by the Rules Committee is governed by Order 3 Rule 2 of the *Civil Procedure Rules* for the case of a Plaintiff, Claimant or Petitioner, and Order 7 Rule 5 of the *Civil Procedure Rules* for the cases of Defendants or Respondents. Order 11 of the *Civil Procedure Rules* then obligates the Court and parties to take directions and certification that the matter is ready or not for hearing, granted that parties shall have followed the steps required under the previous provisions.

20. Order 11 Rule 7(3) of the Rules stipulates the consequences of failure to comply with the procedure. It provides that any party or Advocate not in compliance shall be deemed to have violated the overriding objective as provided for in Sections 1A and 1B of the *Civil Procedure Act*. Reading these provisions with the above cited decisions, the objective is the facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the *Act*. The sanction provided for in case of such a violation is the payment of costs by the defaulting party or Advocate. It does not bar the court from granting orders to further the ends of justice. The court may grant the order but the consequence of payment of costs left for the Court to determine.

21. In strengthening the process of hearings and making even the taking of evidence easier and faster in the Environment and Land Court Committee formulated the *Mutunga Rules*. Rule 28 (b) thereof provides that;

> " In addition to the matters contained in Order 11, Rule 3 of the *Civil Procedure Rules,* 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference: (b) The issuance of an Order striking out pleadings or imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines."

22. Under Order 11 Rule 3 of the *Civil Procedure Rules,* 2010 the law provides for further sanctions than costs. They include striking out of pleadings or similar sanctions. But in regard to the steps prior

to the application of Order 11, there are procedural provisions that govern filing and exchange of evidence whether by way of written statements or documents in preparation for a trial. This is to avoid ambushing a party with evidence hence rendering the trial unfair.

23. In regard to the requirement of filing of documentary evidence, Order 7 Rule 5 (d) of the Rules provides that at the time of filing a Defence or Counterclaim a party should file with it copies of the documents he/she will rely at the trial. The Sub-rule does not provide for the consequence of failure to file them simultaneously with the pleadings. But since the Sub-rule which provides for the filing of witness statements to be filed at least fifteen (15) days before the hearing, this Court is of the view that under ordinary circumstances copies of such documents ought not to be filed later than the pleadings.

24. The above notwithstanding, the question is, what was the purpose of the Rules of procedure? They are to facilitate the just and expeditious disposal or resolution of disputes. They ought to be facilitative rather that prohibitive of the administrative of justice. But they should not be abused. In *Inland Beach Enterprises Ltd v Sammy Chege & 15 Others* [2012] eKLR where he held, *inter alia*:

> " ...in my view, with the cardinal principle of procedure that rules are handmaids of justice not mistresses; the rules must serve the justice of the case as the court may determine in the circumstances of the proceedings."

25. Similarly, in *Shashikant C. Patel v Oriental Commercial Bank* [2005] eKLR Maraga J (as he then was) held inter alia:-

> " ...we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice."

26. Additionally, Article 159 (2) (d) of the *Constitution* empowers this Court to 'administer justice without undue regard to procedural technicalities.' Thus, while this Court is enjoined to enforce rules of procedure, it should not unnecessarily place procedure over substance. Its view is that only in rare cases should a party be permitted to file documents after he/she has filed (previously) a Defence or Counterclaim. He has to explain sufficiently and to the satisfaction of the Court to a higher degree than a balance of probabilities that he has good reason for failure to comply with the law on that issue.

27. In the instant case, the record shows that the Court did not give any such sanctions at the time of taking directions. In any event the same record shows that the Defendants accommodated the Plaintiff severally in regard to late filing and service of documents, even to the time of hearing. In addition, the parties herein have, up to the time of making the Application, participated in examination, cross-examination and re-examination of the witnesses of the Plaintiff who had closed his case and taken the evidence the 1st Defendant.

28. Therefore, as much as the Rule provides for striking out of the pleadings of a non-compliant party the Plaintiff did not move the Court to make such an order. All he wants is an order refusing the grant of the prayers sought. This therefore turns me to considering whether or not to grant leave to file the Surveyor's Report dated 15/11/2018 and certificates required under Section 106(B) of the *Evidence Act*.

29. In considering the Application before me, my humble view is that the Court has to balance between two competing rights. These are the right to fair trial and the right to be heard. These are attendant to the Plaintiff who has already testified and closed his case as compared with that of all the Defendants

who plead for the Court to exercise discretion in their favour and order the filing of a Certificate as provided under Section 106(B) of the *Evidence Act* and file the Surveyor's report dated 15/11/2018.

30. It is not in dispute that the maker of the Report the Defendants seek to file as part of the List of Documents has not testified. What is in contention is that the Defendants ought to have explained why they would not, with due diligence, file the Report as required by law. By the law here it is the Court's understanding that the Plaintiff refers to Order 7 Rule 5 of the *Civil Procedure Rules* as read with Section 28 of the Mutunga Rules, 2013. This requires the Court to analyze the provision and the facts herein.

31. For this Court to balance the rights mentioned above it has to analyze the basic tenet on right to fair hearing and that of being heard. The right to be heard is a principle of natural justice which Article 22 (3) (d) of the 2010 *Constitution* obligates the Court, while enforcing the Bill of Rights, to draw on as it applies the rules the Chief Justice is supposed to make for the conduct of proceedings. The Court is not to be so much restricted by procedural technicalities as it administers justice.

32. However, the right to be heard is not the same as the right to fair hearing. Thus, in *Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 others* Petition no. 18 of 2014 as consolidated with Petition No. 20 of 2014 [2014] eKLR, Justice Njoki SCJ in her concurring opinion stated about fair hearing as follows:-

> "(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that "although the necessity of hearing is well established, its scope and contents remain unsettled."

33. On the other hand, the learned Judge stated in the same *Petition of Kidero & 4 Others* (supra) regarding the right to be heard as follows:

> "(258) What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v. Union of India & Others*, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others*, AIR 1962 Cal. 460).
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> (259) That Court in Union of *India v. J.N. Sinha & Another*, 1971 SCR (1) 791 and C.B. Boarding & Lodging v. State of Mysore, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In *Mineral Development Ltd. v. State of Bihar*, 1960 AIR 468, 160 SCR (2) 909 the Court further observed that the concept of fair hearing is an elastic one and "is not susceptible of easy and precise definition."

34. Also, in Union *Insurance Co. of Kenya Ltd. v. Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998 the Court of Appeal held that:

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

35. In this case the Respondents argue that their right of fair trial would be violated if the Court grants the order for filing the Report and certificates. Their worry is not on the possible denial of the right to be heard. The question is: how will the leave to file the documents and their use in evidence impact the right to fair trial? Starting from the point where the Plaintiff argues that the Defendant had advanced no reason for the delay in failing to file the documents in time as required by law and before him testifying, it would be recalled that the Plaintiff himself did not comply with the Rule. He had to be indulged severally to the extent of the Court adjourning the matter severally, and the Defendants extended an olive branch that much. Now they are on the receiving end and the Respondent cannot extend grace to them.

36. Be that as it may, the actions of the parties in relation to past delays have no role to play in the application before me. Each case or situation is to be looked at on its own merits. In the instant Application, and grounding my finding on the interpretation I have given Order 7 Rule 5 of the Civil Procedure Rules as read with Article 159(2)(d) of the *Constitution* and the authorities cited, I am of the view that Defendants have given sufficient and satisfactory reasons for the delay in filing the copies of the documents outside of the time required. I do not find deliberate inaction on the part of the Defendants in failing to file the documents on time.

37. Moreover, it is my humble view that the Plaintiff would suffer little or no prejudice at all by granting leave to file the documents sought to be filed herein and relied on by the Applicant. Further, I am persuaded that the wider interests of justice obligate this Court to grant the instant orders. Any prejudice that may be occasions can be remedied by the Plaintiff being permitted to cross-examine the respective makers of the documents.

38. In *David Kipkosgei Kimeli -v- Titus Barmasai* [2017] eKLR, Odeny J held as follows:-

> " Kasango J. in the case of *Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another* [2015] eKLR referred to a Ugandan High Court, Commercial Division case of *Simba Telecom -v- Karuhanga & Anor* (2014) UGHC 98 which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred to an Australian case *Smith -versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held that:

> " If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against

the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

It should be noted that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be an exercise in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative then the discretion should not be exercised in the applicant's favour."

39. The upshot is that the Application dated 22/09/2023 is allowed in terms of Prayers 1 and 2. The Applicants to file and serve the documents referred to, not later that 18/01/2024. The matter shall be mentioned on 30/01/2024 for further direction. The costs shall be in the cause.

40. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 21ST DAY OF DECEMBER, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE