



Kasura (Suing as the son, next of kin and legal representative of the Late Solomon Leperes Kasura) v Kioko (Alias Magdalene Mwikali Kasura) & 2 others (Environment & Land Case E014 of 2021) [2023] KEELC 22239 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22239 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E014 OF 2021
CG MBOGO, J
DECEMBER 11, 2023**

BETWEEN

**NOAH PARSIMEI KASURA (SUING AS THE SON, NEXT OF KIN
AND LEGAL REPRESENTATIVE OF THE LATE SOLOMON LEPERES
KASURA) APPLICANT**

AND

**MAGDALENE MWIKALI KIOKO (ALIAS MAGDALENE MWIKALI
KASURA) 1ST RESPONDENT
ANTHONY KIOKO MIGWI 2ND RESPONDENT
JOSEPH GETUUNO NYAGOMCHONGA 3RD RESPONDENT**

RULING

1. Before this court for determination is the Notice of Motion Application dated 26th October, 2023 filed by the plaintiff/applicant and is expressed to be brought under Articles 159 and 50 of the Constitution, Sections 1A, 1B,3A, 18 and 63 (e) of the Civil Procedure Act, Order 8 Rule 3 and Rule 10 (2) and Order 51 of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to grant leave for the plaintiff/applicant to file a further supplementary affidavit.
 4. That the plaintiff's further supplementary affidavit be deemed properly filed.



5. That the 2nd defendant's/respondent further affidavit sworn on 23rd October, 2023 be struck out.
6. That costs be in the cause.
2. The application is premised on the grounds inter alia that the plaintiff's/applicant's supplementary affidavit is fundamental and would assist the court in making a fair and just determination of the pending application.
3. The application was supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that the application seeks to arrest the ruling that was set to be delivered on 2nd November, 2023 for the reason that they have established that the husband to the 1st defendant-deceased has instituted similar proceedings in Nakuru Chief Magistrates' Civil Suit No. 579 of 2023 barring the 2nd respondent and his siblings from disposing the remains of the deceased.
4. The plaintiff/applicant further deposed that the 2nd defendant/respondent who is a party to that suit has withheld from this court the existence of that suit which has a bearing on the outcome of this application for the reason that similar question of law and fact are involved in both matters. Further, that the evidence contained in the supplementary affidavit is fundamental and would assist the court in making a fair and just determination of the pending application. Further, that the 2nd defendant's/respondent further affidavit sworn on 23rd October, 2023 was filed without leave of court and it is prejudicial to him.
5. The application was opposed by the replying affidavit of the 2nd defendant/respondent sworn on 27th October, 2023. In his response, the 2nd defendant/respondent admitted to the existence of a suit filed in Nakuru being Civil Suit No. 579 of 2023 which is based on a concerted family involvement in burying their late mother and not where she will be buried as in the instant application.
6. The 2nd defendant/respondent further deposed that the plaintiff/applicant is out to divert issues of land and marriage which facts can be handled by the respective court's jurisdiction. Further, that the issue of striking out his further replying affidavit is a waste of court's time since the court gave directions as to filing the respective documents.
7. The 2nd defendant/respondent further deposed that despite service of the submissions as well as the further replying affidavit, the applicant chose to wait till the 26th October, 2023 to file the instant application which application is also not premised on the relevant legal provisions to warrant this court to grant the orders sought. Further, that the attachments in the supplementary affidavit have no fore bearing with the issue at hand on account of the jurisdiction of this court. He further deposed that the plaintiff/applicant is now using the application to build up his case having testified instead of waiting for the defence to undertake its part in evidence to enable the court make a finding.
8. The plaintiff/applicant filed a further affidavit in response thereto which was sworn on 3rd November, 2023. The plaintiff/applicant deposed that the affidavit of Richard Migwi vindicates him before any shadow of doubt that the 1st defendant/respondent was married to him and is entitled as his spouse to inter the remains of the deceased at his place of choice. Further, that the estate of the later Solomon Leperes Kasura is yet to identify the rightful beneficiaries and the internment of the deceased is untenable yet her lawful husband has not run short of options on burial place of his deceased wife.



9. The application was canvassed by way of written submissions. On 6th November, 2023, the plaintiff/applicant filed his written submissions dated 3rd November, 2023 where he raised two issues for determination as listed below: -
 1. Whether the further supplementary affidavit meets the threshold set out in Mohamed Abdi Mohamed case?
 2. Whether the further affidavit of the 2nd defendant filed without leave of the court should be struck out.
10. On the first issue, the plaintiff/applicant submitted that the application is not seeking a fresh case but for a determination of the dispute before this court which evidence sought to be admitted is not voluminous and that the 2nd defendant/respondent has not had difficulty in responding to the same. The plaintiff/applicant relied on the cases of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 Others* [2018] eKLR, *Ainu Shamsi Hauliers Limited v Anastacia Ndinda Mwanzia (Suing as Administrator of the estate of Harrison Mwendwa Karili)* [2018] eKLR, *Raila Odinga & 5 Others v IEBC & 3 Others* [2013] eKLR, *John Kiplangat Barbaret & 8 Others v Isaiab Kiplangat Arap Chelogot* [2016] eKLR and *IEBC v Robert Nyengi* [2015] eKLR.
11. On the second issue, the plaintiff/applicant submitted that the 2nd defendant's/respondent's further affidavit sworn on 27th October, 2023 ought to be struck out for the reason it was filed without the leave of the court. Reliance was placed in the case of *Steven Kariuki v George Mike Wanjohi & others* [2013] eKLR.
12. On 8th November, 2023, the 2nd defendant/respondent filed his written submissions dated 7th November, 2023 where he raised two issues for determination as follows: -
 1. Whether the orders for arresting the ruling are warranted at this stage,
 2. Whether the 2nd defendant's further affidavit dated 23rd October, 2023 was filed without leave hence be struck out.
13. On the first issue, the 2nd defendant/respondent submitted that under the legal aspect, the plaintiff's application is premised on legal provisions which are not in tandem with the orders sought and the jurisdictions of an Environment court only revolves in land matters and not civil issues. With regard to the factual aspect, the 2nd defendant/respondent submitted that the plaintiff/applicant has not conceptualized the pleadings in CMCC 579/2023 to enable him come up with the instant application. He submitted that it is a fact that one cannot stop a superior court from carrying out its mandate and the only remedy is to arrest the ruling once it is delivered and properly found to be contradicting the lower court's orders and hence cannot be enforced. The 2nd defendant/respondent relied on the case of *Mary Igoji Mutuaruchu v Johnson Rwigi* in Meru High Court ELC No. 324/2017.
14. The 2nd defendant/respondent further submitted that it is clear that the court directed that each party to file their responses and in doing so, the plaintiff/applicant filed his written submissions and affidavits which he raised new issues which have since been captured in the Further Replying Affidavit.
15. I have considered the application, the replies thereof and the written submissions filed by the 2nd defendant/respondent and the plaintiff/applicant and, in my view, the issues for determination is whether the application has merit.
16. The matter before this court was at the hearing stage when it was brought to the attention of the court on 4th October, 2023, that the 1st defendant is deceased having passed on 26th September, 2023. On the



same date, the counsel for the plaintiff/applicant filed an application dated 3rd October, 2023, seeking injunction orders against the 2nd defendant/respondent from burying the remains of the 1st defendant on the suit property. The court certified the application urgent and granted orders of temporary injunction and also issued directions as to the disposal of the application. On 19th October, 2023, the matter was reserved for a ruling to be delivered on 2nd November, 2023.

17. On 26th October, 2023, before the date of the ruling, the plaintiff/applicant filed the instant application seeking leave to file a further supplementary affidavit and also sought the further affidavit sworn on 23rd October, 2023 to be struck out. From the proceedings, it can be seen that prayer 2 of the application is already spent i.e. the ruling that was set to be delivered was not delivered on 2nd November, 2023. The reasons advanced by the plaintiff/applicant in seeking leave to file a further supplementary affidavit was that he had since established that one Richard Migwi Kangangi, husband to the deceased, had instituted similar proceedings in Nakuru Chief Magistrate Civil Suit No. 579 of 2023 barring the 2nd defendant/respondent and his siblings from disposing the remains of the 1st defendant.
18. I have not come across any provision of the law that allows for filing of additional documents in an application once a matter has been reserved for ruling or judgment. This obviously means that what is before this court is therefore unique and peculiar in its own circumstances to warrant this court to give it a thought. The gap in the law that exists leaves it to this court to engage its own wisdom and discretion to weigh the interests of justice and provide the appropriate remedy to the parties. The discretion has to be exercised on a case by case basis bearing in mind the parties' constitutional right to fair trial as provided for under Article 50(1). In my view, while exercising the discretion, the court must bear in mind that all the circumstances of the case before it are weighed against the need to do justice to all the parties by giving each of them a level plane for conducting a fair trial.
19. In *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, Munyao, J stated as follows:

“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 discovery of a new document,...”
20. In this case, the discovery of the fact that there was a similar matter filed before the subordinate court and orders issued thereof presents itself as one of those exceptional cases. However, I also have in mind that there exists a possibility that the 2nd defendant/respondent may have been aware of this information only that he did not bring it to the attention of this court. This is true because the 2nd defendant/respondent has not denied knowledge of the existence of Civil Suit No. 579 of 2023 filed at the Chief Magistrates' Court in Nakuru.
21. In exercising its unfettered discretion, this court relies on the Supreme Court decision in *Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR,

“The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter.



However, if the evidence...is such as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

22. On whether the 2nd defendant’s/ respondent further affidavit sworn on 23rd October, 2023 should be struck out, I find this an afterthought for the reason that the plaintiff/applicant did not bring it to the attention of the court in time if at all he felt he was prejudiced. This prayer is therefore declined.
23. Arising from the above, this court exercises its discretion and in the interest of justice, the Notice of Motion Application dated 26th October, 2023 is allowed in terms of prayers 3 and 4 as follows:
 - a. Leave is granted to the plaintiff/applicant to file a further supplementary affidavit.
 - b. The plaintiff’s further supplementary affidavit is deemed as properly filed.

The upshot of the foregoing is that the 2nd defendant/respondent is hereby granted leave to file and serve his response to the further supplementary affidavit, if need be. Mention on 21st February, 2024 for further directions. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 11TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

11/12/2023

In the presence of:

CA: Mr Meyoki

