



**Mazera v Mwambonga & another (Environment & Land Case
146 of 2021) [2023] KEELC 22001 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 146 OF 2021
LL NAIKUNI, J
DECEMBER 5, 2023**

BETWEEN

JUMA ALI MAZERA PLAINTIFF

AND

PATRICK MWASHIGHADI MWAMBONGA 1ST DEFENDANT

LAND REGISTRAR, MOMBASA 2ND DEFENDANT

RULING

I. Introduction

1. The Ruling by this Honourable Court relates to a Notice of Motion application dated 22nd March, 2023 by Juma Ali Mazera, the Plaintiff/Applicant. It was brought under the provision of Sections 1A and 3A *Civil Procedure Act*, Cap 21 and Order 11 Rules 3 and 7 of the *Civil Procedure Rules*, 2010.
2. Upon service of the application, the Defendants filed grounds of opposition dated 31st May, 2023 opposing the application.

II. The Plaintiff/Applicant's Case

3. The Plaintiff/Applicant sought the following orders:-
 - a. That the Further List of Documents and Witness Statements filed on record for the Plaintiff alongside this motion be allowed as part of the material the Plaintiff will rely on at the trial.
 - b. That the Defendants to be at liberty to file such documents and/or statements in response as may be necessary to obviate any prejudice.
 - c. That the costs of this application be in the cause.



4. The Application was based on the grounds and averments made out under the 9 Paragraphed Supporting Affidavit sworn by Juma Ali Mazera, the Plaintiff/Applicant herein date 22nd March, 2023. He averred that:-
- a. He was the Plaintiff/APplicant herein and hence conversant and competent to swear this Affidavit.
 - b. He is the one who filed this suit herein and which was confirmed for hearing on 3rd April, 2023.
 - c. However, subsequent to the mention at which the hearing date was set, and following investigation instigated by a complaint made to the police at Kadzandani Police Station, it came to light that the holder of the national identity card bearing numbers 26236987 was indeed one Juma Mazera, who Apparently shares the same names as the one by the Plaintiff/APplicant hereinu.
 - d. The said person was traced to his home in the County of Kwale. He as arrested whereupon he confessed to knowing nothing about the suit property or the alleged sale of land thereto to the 1st Defendant as claimed.
 - e. Information from the police officer pursuing the matter, one Mr. Kennedy Opiyo, that upon inquiry from the Kenya Revenue Authority, the said state institution had confirmed that the Personal Identification Number (PIN) appearing in the Transfer document conveying the property to the 1st Defendant and which PIN number appeared in the transfer filed by the 1st Defendant was fake and/or never existed. This information appeared from the letter from the officer by the Kenya revenue Authority a copy whereof he had filed in the application.
 - f. The Juma Mazera's PIN Number was as appears in the copy of his PIN Certificate attached with the Further List of Documents that he had filed herein.
 - g. All the foregoing matters were not available at the time of the last mention when the hearing date was fixed.
 - h. The grant of the orders sought from this application would not in any way occasion any inconvenience and/or prejudice upon the Defendants as may not be redressed by their being allowed to file responses thereto.

III. Submissions

5. On 23rd May, 2023, while all parties were present in Court, the Honourable Court directed that the parties to file their replies and written submissions. Pursuant to this on 19th September, 2023 the Honourable Court reserve a ruling date on notice. However, by the time of penning down the Ruling none of the parties had filed any replies nor submissions as dictated by law and/or directed by Court and hence the Ruling will be based on the merit of the case.

IV. Analysis and Determination

6. I have considered the application and the provisions relied upon. There are only two (2) rather straight forward issue for Courts consideration. These are:-
- a. Whether the Notice of Motion application dated 22nd March, 2023 by the Plaintiff//Applicant herein has merit.
 - b. Who will bear the costs of the application.



Issue No. a). Whether the Notice of Motion application dated 22nd March, 2023 by the Plaintiff// Applicant herein has merit.

7. Technically speaking, this application pertains issue of strict rules of procedure in filing documents by parties herein. Precisely, the Court has been called to make a determination on whether to grant leave to file further documents after conducting of the final Pre – trial conference under order 11 of the Civil Procedure Rules, 2010.
8. The relevant provisions of law for the introduction of new documents after holding of the Pre – Trial session are found under the provision of Order 3 (2), (7) Rules 5 and 11 of the Civil Produce Rule 2010. Order 3 Rule 2 provides.

“2. All suits filed under rule 10 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 statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”

9. It is only with the leave of court that documents may be supplied later. However, this should be at least within 15 days before the Pre -Trial conference contemplated under Order 11 Rule 7 of the Civil Procedure Rules, 2010. The provisions of Order 3 Rule 2 and Order 7 Rule 5 are meant to pre-empt trial by ambush of parties.
10. The provision of Article 25 (c) and 50 (1) and (2) of the Constitution of Kenya 2010 provides that every party deserves “.....a fair trial and adequate time and facilities to prepare a defence” . Thus, this honourable Court observes that it is contestable that a trial will not be fair if a party is allowed to introduce evidence during re – examination period. As already alluded to the court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from producing evidence without complying with the provisions of Order 3 Rules 2 and Order 7 rule 5 of the Civil Procedure Rules 2010.
11. However, the court is not only a shrine but temple of justice and has the power to do justice to all the parties and not to be strictly barred by procedural technicalities. This assertion derives legal favour from the provisions of Article 159 (2) (a), (b), (c), (d) & 9 (e) of the Constitution of Kenya 2010 that provides:-

“2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles

- a. justice shall be done to all, irrespective of status;
- b. justice shall not be delayed;



- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3);
 - d. justice shall be administered without undue regard to procedural technicalities; and
 - e. the purpose and principles of this Constitution shall be protected and promoted.”
12. Specifically, and as directly pertains the instant application, in applying Article 159 (2) of the Constitution 2010, the Court should consider the Prejudice to be suffered by the other party. The court should also consider the value added onto the discovery of the new document to be produced, the stage of proceedings and other factors as the reasons are not limited as it depends on each case.
13. Currently, the position of the suit is that it has not as yet been heard. Indeed, it was scheduled to have commenced in earnest on 3rd April, 2023 but due to this pending application, it never took place. The matter has a date in due course. From the records, I do find that the Pre - Trial conference under the provision of Order 11 of the Civil Procedure Rules, 2010 was conducted sometimes on the 3rd November, 2022 when a hearing date was given to be on 3rd April, 2023. Ideally, there is no law that bars a party from obtaining evidence after suit is filed in court. This is so because some evidence come to the attention or knowledge or possession of parties even after the hearing of the suit. The Plaintiff has argued that no prejudice would be occasioned to the Defendants if the leave sought is granted. The Defendants did not tender any evidence of prejudice or delay in their response.
14. Guided by the principles of natural Justice, Conscience and Equity, unless otherwise stated, it is the duty of this court to accord all the parties full opportunity to be heard to ventilate their grievances. In this regard, to file the documents that they intend to rely on during the hearing, before the hearing commences, unless it is demonstrated that the request is frivolous or intended to delay the just and expeditious determination of the suit.
15. In this case, the Plaintiff filed and served the intended documents upon the Defendants beforehand and only sought for validation of the filing and service of the filed documents. There is no evidence to show that the Plaintiff intended to delay or frustrate the just determination of this suit as its witness was present in court virtually and ready to give evidence.
16. None of the parties had been heard on the main suit and neither had the Plaintiff nor the Defendants closed their respective cases when the application was made. Furthermore, even under the provision of Order 18 Rule 10 of the Civil Procedure Rules, 2010 the court may allow a party to recall any witness at any stage of the proceedings. In addition, the provision of Section 146 of the Evidence Act, Cap. 80 provides that the court may permit a witness to be recalled either for further evidence - in chief or for further cross examination and if it does so, the parties have the right of further cross examination respectively. Besides, the Defendants will also be granted corresponding leave to file and serve any further documents they may deem fit and suitable responding to the new issues raised by the Plaintiff.
17. Under the provision of Order 11 of the Civil Procedure Rules, 2010 even after the Pre - trial conference and the matter is set down for hearing, depending on the facts of the case, nothing prevents the court from exercising discretion and allowing parties to call further witnesses or filing further documents as stipulated in Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the Evidence Act, which provisions are intended to ensure that each party is afforded a fair hearing as guaranteed under the provision of Article 50 (1) and (2) of the Constitution of Kenya, 2010 and an opportunity to



present or defend their cases fairly. See the case of:- “*Raila Odinga & others – Versus - IEBC & 3 Others* Supreme Court of Kenya Presidential Petitions Nos 3, 4, 5/2013 [2013] eKLR”, where the Supreme Court considered whether to allow additional evidence filed outside the contemplation of the rules in a Presidential Election Petition and set the principles applicable as-materially:

“The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

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 or 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 new material is so substantial involving not only a further affidavit but massive additional evidence, so 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.”

18. In the instant case, I have seen the documents in issue. They are not bulky, complicated nor complex. There is therefore no difficulty in pursuing and or responding to such a letter and neither is there trial by ambush as the defendant is made pretty aware of the documents in question. The suit has also not been heard. Further, in the instant case, should the plaintiff be allowed to file the documents objected to, the said documents are still subjected to the rules of evidence at the hearing. For example, the Plaintiff may be required to call the markers of the stated documents to testify and produce the impugned document, if its production by the Plaintiff becomes contentious.
19. For the above reasons, I hereby exercise unfettered discretion of this Honourable Court as stated out in the case of “Shah – Versus – Mbogo (1968) EA. Page 93” and proceed to invoke the principles of Overriding objective of the law in civil cases as stipulated in provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21; Sections 3 & 13 of the *Environment and Land Act*, No. 19 of 2011; Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, no. 6 of 2012 and Article 159(1) and (2) of the *Constitution* of Kenya, 2010 allow the application by the Plaintiff to have the documents filed on 28th March, 2023 deemed as filed and served and forming part of the documents that the Plaintiff shall rely on at the substantive hearing of this suit. For these reasons, therefore, by all means the application is meritorious and the reliefs sought should be granted thereof.

Issue No. b). Who will bear the Costs of the Application

20. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27(1) of the *Civil Procedure Rules* Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “*Harun Mutwiri – Versus - Nairobi City County Government* [2018] eKLR and “*Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another* [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “*Hussein Mubumed Sirat – Versus - Attorney General & Another* [2017] eKLR, the court



stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

21. In the present case, the Honourable Court elects not to award costs as apart from the Applicant no other party participated in the Notice of Motion application.

V. Conclusion and Disposition

22. In long analysis, the Honourable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

- a. That the Notice of Motion application dated 22nd March, 2023 be and is hereby found to have merit and hence it is allowed.
- b. That accordingly, the further list of documents and witness statements filed on 28th March, 2023 are hereby admitted as documents to be relied on at the trial by the Plaintiff who may also call the makers thereof to produce the said documents in which case, the said maker shall be listed as a witness in the matter.
- c. That the Defendants too are granted corresponding leave to file any supplementary or further list of documents within the next 14 days of this ruling.
- d. That for expediency sake, the matter is rescheduled for hearing to 25th March, 2024 from the earlier fixed hearing date. There shall be mention on 7th February, 2024 to ascertain full compliance and confirmation on the Pre – Trial Conference conditionalities under Order 11 of the *Civil procedure Rules*, 2010.
- e. That there shall be no orders as to costs.

It is so ordered accordingly.

**RULING DELIVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO ALL PARTIES,
SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF DECEMBER 2023.**

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HON. JUSTICE L.L. NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT MOMBASA.

