



Njoroge (suing as the personal representative of the Estate of Loise Nyambura Njoroge) v Rugu & 5 others (Environment & Land Case 213 of 2015) [2022] KEELC 2250 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 213 OF 2015**

**JA MOGENI, J
MAY 19, 2022**

BETWEEN

KENNETH KAMOCHE NJOROGE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF LOISE NYAMBURA NJOROGE) APPLICANT

AND

**GEORGE MWANIKI RUGU 1ST RESPONDENT
LAND REGISTRAR THIKA 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
RACHEL WANJA MWAURA 4TH RESPONDENT
JULIUS WAHOME WAWERU 5TH RESPONDENT
DANIEL NDUTIRE GATAMA 6TH RESPONDENT**

RULING

1. The 1st Respondent, George Mwaniki Rugu, has made an application through his counsel, Mr. Mbichire, to be granted leave to file and adduced further evidence also to be granted leave to adduce a supplementary list of documents not initially provided in his list of documents. His reasons for the application are that since the 1st Respondent was granted to be recalled to be cross-examined on the documents produced by the 2nd and 3rd defendants he therefore needs to file supplementary documents after perusal of the documents produced by the 2nd and 3rd defendants. This application has been strenuously opposed by Ms. Amelia Chesinya Counsel for the 3rd Respondent.
2. This is a part heard matter where all the parties have closed their cases both the plaintiff and the defendants. It is only the 3rd Defendant/Respondent's Counsel who made an application on January



19, 2022 to have a date reserved to enable her last witness, the Land Registrar to be given an opportunity to present her evidence. The witness was not able to attend court on the date of the hearing since they were sitting an exam and this evidence was provided. In an earlier application made orally on the same date, January 19, 2022 I gave orders for recalling of the 1st Defendant to be cross-examined on the six documents that the court established had not been served on the 1st Defendant. This recall was subject to cross-examination of the 1st Defendant only on the six documents.

3. The plaintiff and the defendants filed their statements and supporting documents in compliance with the provisions of the *Civil Procedure Rules*. In the case originated by Kenneth Kamoche Njoroge as the administrator of the late Loise Nyambura Njoroge (deceased), George Mwaniki through his Counsel indicated his readiness to have this suit heard way back on November 25, 2021. The suit was heard on 2/12/2021 and all counsels and parties were present in court. The Plaintiff tendered their evidence and called one two witnesses and an application to have summons to issue for the Land Registrar of Thika. They therefore did not close their case. There was also time for the 1st defendant to testify and finally close their case. There was no indication that the 1st Defendant wanted to produce a further supplementary bundle of documents until this application was filed.
4. The issue before me is whether or not the defendant ought to be allowed to recall the 1st Defendant and file a list of supplementary documents at this point. It will be noted that prior to the filing of the application dated 28/02/2022 the plaintiff had already presented their witnesses and closed their case. The 1st defendant had also testified and had been cross-examined and closed his case. Prior to this Application there was an oral application made on 19/01/2021 where the court pronounced itself on the recall of DW1 to be cross-examined on the six documents that they had not been served with. It therefore follows that this application for recall of DW1 is res judicata because it was already determined. The only issue therefore I need to address with whether the 1st Defendant's should be allowed to file a supplementary bundle of documents.
5. Order 3, Order 7 and Order 11 of the *Civil Procedure Rules* require that parties to a suit should furnish their evidence in advance before the commencement of the trial.
6. The documents to be filed are itemized under Order 3 Rule 2, which direct that when filing suit, one needs to also file a Verifying Affidavit, list of witnesses, statements of witnesses (excluding expert witnesses), and copies of documents to be relied upon at the trial. There is a proviso that the written statements may with the leave of the court be availed at least 15 days prior to the Trial Conference envisaged under Order 11 of the *Civil Procedure Rules*.
7. For the defendant, Order 7 Rule 5 require that the defendant has to file a defence and counterclaim (if any). The Order provides as follows:

Order 7 Rule 5 Documents to accompany defence or counterclaim.

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.



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.

8. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.
9. From the provisions in the rules there is nowhere the rules permit the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no provision itemizing the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court.
10. *The Constitution* under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing. A fair trial is one which is conducted fairly, justly, and with procedural regularity by an impartial judge. 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.
11. The court can and has discretion under allowable 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.
12. The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by the defendant to adduce the supplementary bundle of documents.
13. Counsel for the Plaintiff Mr Mugambi in supporting the recall of the 1st Defendant stated that these extra six documents form part of the plaintiff's filed bundle which they served all parties. Further that the 1st Defendant could be recalled to deal purposely with the six documents. When the plaintiff testified and tendered their evidence, they indeed had in mind that all that the 1st defendant would call was one witness and that the 1st defendant would not be relying on documents not filed in court. The supplementary bundle of documents sought to be introduced was not in their contemplation. They were never cross-examined on it. Before the 1st defendant started giving evidence, he never gave



any indication that after listening to the plaintiff's evidence, he would wish to produce a further supplementary bundle of documents in addition to those that he had earlier furnished.

14. I have to concur with Ms Chesinya that the plaintiffs, the 2nd and 3rd defendants will be greatly prejudiced if I am to allow this application by the 1st defendant. Allowing the application at this late stage will fundamentally alter the character of this case, to one that the plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50(1) of *the Constitution*.
15. For the above reasons, I am inclined to disallow the application by the 1st defendant to avail and file a supplementary bundle of documents. The defendant will proceed on the basis of the evidence he had proposed to tender when he filed his defence.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON THIS 19TH DAY OF MAY 2022.

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J.A MOGENI J

JUDGE

In the Presence of

Mr. Kamindo h/b for Mr. Mugambi Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd Defendant

N/A for the 4th Defendant

N/A for the 5th Defendant

N/A for the 6th Defendant

