



REPUBLIC OF KENYA



KENYA LAW
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**Koilel & 47 others v Ntiya & 2 others (Environment & Land Case
47 of 2019) [2022] KEELC 3196 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3196 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 47 OF 2019**

CG MBOGO, J

MAY 12, 2022

BETWEEN

MOSOITO OLE KOILEL & 47 OTHERS APPLICANT

AND

SIPOI PARTEI NTIYA 1ST RESPONDENT

JONATHAN TOLIMO NDIYANI 2ND RESPONDENT

DISTRICT LAND REGISTRAR 3RD RESPONDENT

RULING

1. What is before this court for determination is a notice of motion application dated January 25, 2022 brought pursuant to order 51 rule 1 of the [Civil Procedure Rules](#) and section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. Spent
 2. That the applicant be granted leave to expunge from court records the plaintiff's statement, witness statement filed on the September 18, 2019 and file fresh plaintiff's statement before the hearing date.
 3. That the costs of the suit be granted for.
 4. Any other order that meets the ends of justice.
2. The application is supported by the supporting affidavit of Mosoito Ole Koilel, the 1st plaintiff/applicant herein and sworn on January 25, 2022. The application is premised on the grounds that the hearing of the suit is slated for January 31, 2022 and there is need to file the witness statements before then and that the witness statement filed in court on September 18, 2019 be expunged from the court record. The plaintiff/applicant in his supporting affidavit deponed that the filed witness statements



- dated September 18, 2019 are incorrect statements and he wishes that the annexed documents marked MK1 (a)(b)(c) be the correct witness statements and that if the orders sought for are not granted then he stands to suffer irreparable loss.
3. The 3rd defendant/respondent filed grounds of opposition dated February 10, 2022 in opposition to the application as follows: -
 1. That the plaintiffs' witnesses had testified and closed their case.
 2. That the plaintiffs had proceeded without the participation of the 3rd defendant.
 3. That the court had allowed the 3rd defendant to cross examine the plaintiff's witnesses.
 4. That the plaintiff/applicants have not stated the law under which the plaintiff seeks to expunge their statements and introducing new ones after they had closed their case, neither have they laid down the grounds under which the court should entertain their application.
 5. The plaintiff/applicants are concealing material facts of the case.
 6. That the suit is frivolous, vexatious and a waste of judicial time.
 4. The plaintiff/applicant filed written submissions dated March 7, 2022. The plaintiffs/applicants submit that the only issue in the witness statement dated September 18, 2019 is that it was incorrect and it would be in the interest of justice that leave be granted to file witness statements. The plaintiffs/applicants further submit that since the 3rd defendant/respondent was allowed to cross examine the plaintiffs'/applicants' witness after close of the plaintiffs'/applicants' case, then the plaintiffs'/applicants' case stands open giving room for the plaintiffs'/applicants' to file witness statements.
 5. The 1st and 2nd defendants/respondents filed written submissions dated March 15, 2022. They submit that the plaintiff/applicant should not be allowed to file witness statements for the reasons that the defendants/respondents have always attended all mentions and hearing whenever the matter is before court, that the plaintiffs'/applicants' have dragged the matter in court and now want to introduce a new witness and that no sufficient grounds have been made. They rely on the case of *Francis Gitbinji Karobia versus Stephen Kageni Gitau* [2014] eKLR.
 6. I have analysed the application, grounds of opposition and considered the written submissions filed by the plaintiffs/applicants and the 1st and 2nd defendants/respondents. The issue before me is whether or not the plaintiffs/applicants ought to be allowed to introduce witness statements and expunge the witness statement date September 18, 2019 at this stage of the proceedings. It will be noted that prior to the filing of this application, the plaintiffs/applicants had already presented their witnesses and closed their case. On March 16, 2021, my brother Honourable Justice Kullow, in the interest of justice allowed the 3rd defendant/respondent to recall the witnesses who have testified and a hearing dated was slated for July 19, 2021.
 7. It will also be noted that in the supporting affidavit annexed to the application, the plaintiffs/applicants rely on documents marked as MK1 (a)(b)(c). The 'new witness statements' intended to be relied are not on record and therefore the court has not had the opportunity to analyse and comment on the same. Be that as it may, the *Civil Procedure Rules* of 2010 require parties to furnish their evidence in advance before the commencement of the trial. These provisions are found in order 3 and order 11 of the *Civil Procedure Rules*.
 8. Under order 3 rule 2, when filing suit, one needs also to 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.

9. It will be seen from the above that the plaintiffs/applicants are supposed to furnish their evidence when filing their pleadings. 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.
10. There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in order 3 rule 2. The provisions of order 3 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. But 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.
11. 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 or documents 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 vs 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. The fresh witnesses statements were not availed to the court and I can only speculate, could it have been the plaintiffs intention to introduce new documents or additional information? I will leave it at that. 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 plaintiffs/applicants to file new witness statements.
12. It is unfortunate that the reason advanced by the plaintiffs/applicants was that the witness statement dated September 18, 2019 was incorrect. It is also unfortunate that the plaintiffs'/applicants' witnesses proceeded to testify while relying on written statements that they knew were incorrect. The plaintiffs/applicants have not demonstrated how 'incorrect' the written statement is and to what extent. If at all the witness statement dated September 18, 2019 was incorrect, the plaintiffs/applicants had sufficient time to amend the witness statement or file additional witness statements before the period stipulated for closure of pleadings. When the matter was mentioned in court on September 21, 2020, both parties confirmed that they had complied with order 11 of the Civil Procedure Rules. In my view, this would have been the best time to seek leave of the court to have the witness statement expunged from the records and additional or new witness statements filed. I believe that the orders given by my brother on March 16, 2021 were clear to effect that the 3rd defendant/respondent was to recall the witnesses who had testified. This order does not provide room to file any document whatsoever.
13. Arising from the above, I find that the Notice of Motion application dated January 25, 2022 lacks merit and the same is dismissed. Costs to be in the cause. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL ON 12TH MAY, 2022.

Mbogo C.G

Judge

In the presence of: -

CA: Timothy Chuma

