



**Wekesa & 2 others v Simiyu & another (Environment & Land Case
42 of 2019) [2022] KEELC 2295 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 42 OF 2019**

**FO NYAGAKA, J
JUNE 29, 2022**

BETWEEN

**EVERLYNE WEKESA 1ST PLAINTIFF
PETER PRESTON WAFULA 2ND PLAINTIFF
EVERLYNE WEKESA 3RD PLAINTIFF**

AND

**TIMOTHY WAFULA SIMIYU 1ST DEFENDANT
LAND REGISTRAR TRANS-NZOIA COUNTY 2ND DEFENDANT**

RULING

1. At the defence hearing of the substantive suit on 16/05/2022, Counsel for the Plaintiffs informed the Court that he had been served immediately prior to the date with a list and bundle of supplementary documents by the 1st Defendant. He observed that the said documents introduced new evidence after the close of the Plaintiffs' case. He further submitted that the said documents were filed bereft of leave of this Court. Relying on the wording of Orders 3 and 11 of the *Civil Procedure Rules*, learned Counsel urged this Court to disregard and expunge the documents. He challenged the reliance of the certificate of translation also filed with the further list of documents by invoking Section 106 of the *Evidence Act* in that the same failed to comply with the provision. Finally, he furthered his argument that the 1st Defendant was not the maker of the bank statement whose copy was filed with the supplementary list and was consequently in flagrant breach of Section 35 of the *Evidence Act*. He prayed that the supplementary list dated 06/05/2022 and bundle of documents thereto filed on the same date be struck out for having been filed without leave of the court.
2. In opposition to the Application, learned Counsel for the 1st Defendant submitted that the filing of the supplementary list and bundle of documents was necessitated by the need to establish that two (2) cheques drawn in the sum of Kshs. 200,000/= and Kshs. 40,000/= were cashed to the favor of the



vendor. According to Counsel, based on the Court's observation that that fact was not ascertained during cross-examination at the hearing of the Plaintiffs' case (that the cheques were cashed), it was in the interest of justice that the said documents be admitted. Counsel posited that the documents were critical in order that the Court can make a determination of the suit holistically as all the evidence would be placed before the Court. He sought leave to have the said documents allowed on the record. Learned Counsel for the 2nd Defendant elected not to participate in the Application. He yielded to abide by the Court's ruling and directions.

3. In rejoinder, Counsel for the Plaintiffs' submitted that where a Court poses a question, that was not tantamount to advising a party. In the adversarial system, of which this court is part, questions can be asked by the umpire but that does not impose a party's right to presume that it is intended to succor a litigant. If the Defendant had a weak case, he had the liberty to lose it. His submission was that the introduction of new evidence at this juncture would be prejudicial to the Plaintiffs who had closed their case. His contention was that as things were, the Plaintiffs remained locked out as they would be unable to introduce new evidence to rebut that which the 1st Defendant intended to introduce. He advanced that the 1st Defendant was employing crafty machinations with a view of stealing a march on the Plaintiffs. He emphasized that all parties ought to be treated equally and he questioned why the said documents were filed at the close of the Plaintiffs' case when the 1st Defendant had every opportune moment to do so before the hearing of the substantive suit commenced.

Analysis and Disposition

4. The oral Application before me seeks an order of expunging a supplementary list of a bundle of documents filed by the 1st Defendant who contends that it is in the interest of justice that the same be admitted. It is not gainsaid that the documents were filed at the close of the Plaintiffs' case and without leave of the Court. The 1st Defendant, however, advanced the argument that it was only in the interest of justice that the documents be admitted on the record for the 1st Defendant to rely on them during hearing.
5. I am alive to and must remind myself that this Court is one of justice. Flowing from the provisions of Article 159 (2) of *the Constitution*, justice shall be administered without undue regard to procedural technicalities. In line with Article 50 (1) of *the Constitution*, every party has a right to a fair trial. This court, over and above those provisions, retains a constitutional mandate to ensure that justice is administered to all parties to a suit. Where a party is intent on introducing new evidence after pre-trial directions have been issued, the old adage is that the same ought to be allowed where no undue prejudice is occasioned upon his adversary. This is because the Court ought to allow such a party to prosecute or defend their case in full. That aphorism is, however, analyzed on a case by case basis and as such the circumstances of each and every case must be carefully scrutinized.
6. Order 7 Rule 5 (d) necessitates that a defence shall be accompanied by copies of documents to be relied on at trial. My understanding of the definitive term used in the provision is that it is an 'imperative' of mandatory nature. I draw the backing of my interpretation from the meaning assigned it in Bryan A. Garner (2019). *Black's Law Dictionary*, 11th Edition, Thompson Reuters, St Paul MN, p 1653 where it states that the term "Shall" is a verb which means, "Has a duty to, more broadly, is required to....This is the mandatory sense that drafters typically intend and that courts typically uphold." It therefore means, as can be discerned from the wording of the provision, the documents to be relied on by a Defendant must accompany the defence at the time of filing. While the said provisions give no consequences for breach, my understanding of the same is that the documents must be filed together with the defence. To allow parties to file documents in all and sundry manner outside the provisions would defeat its real purpose. Moreover, if the Court finds that prejudice would result from a party filing and relying



on documents not filed and exchanged in terms of the procedure it should disallow them. Prejudice to a party is one of the “nodes” that would otherwise destroy the smooth beautiful surface of fair trial. This was the rationale for disallowing additional evidence outside the set rules in the Supreme Court decision of *Raila Odinga & 5 others v IEBC & 3 others*, Supreme Court of Kenya, Petitions Nos 3, 4 and 5 of 2013 [2013] eKLR.

7. Turning to the present Application, the 1st Defendant filed a supplementary list and bundle of documents after the close of the Plaintiffs’ case. As was well captured by the Plaintiffs in their submission, the 1st Defendant stealing a march on the Plaintiffs. If the said documents were critical for the defence, nothing would have been easier than filing them at the time of filing the cheques they are sought to support payment of. Trial by instalments is not one of the celebrated processes of proceedings in Court. Need I remind parties that it is their duty to meticulously prepare for the conduct and trial of their suits and that duty does not stop until the logical conclusion of the matter? I think not: it is obvious. A party cannot rely on the sentiments of a trial court as the basis for introducing new evidence against rules of procedure. The Court is an impartial arbiter. To always listen to of-the-cuff comments of a Court or keep looking at the facial and bodily expressions of judges so as to consider whether or not the party’s case is progressing well or needs panel-beating would amount to making judges statues which have not feelings and are stone-faced fixtures when they take the seats of justice. If I allow this Application, the message I would be passing is that courts will embrace actions inimical to justice that all parties have a right to. As rightly pointed out by the Plaintiffs’, since they have closed their case, their opportunity to raise rebuttals has been fettered. This was gravely occasion prejudice and a miscarriage of justice at this stage of proceedings.
8. Needless to say, that when documents which are time-barred are filed in Court without leave of the Court being sought first, they are illegally on record. It is akin to filing an appeal from a judgment or decree out of time and then coming to Court to seek leave to deem it duly filed. He who needs to take a step in any matter should follow the right steps: if leave ought to be sought first, let it be so.
9. The upshot is that I am inclined to allow the Plaintiffs’ Application to expunge the supplementary list of documents 06/05/2022 and filed on 09/05/2022. They are hereby struck out or expunged from the record. A fortiori, I dismiss the 1st Defendant’s Application to have the said documents admitted. Costs shall be to the Plaintiffs. Resultantly, this matter shall be mentioned on 19/07/2022 to fix a date for Defence hearing.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JUNE, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

