Ibau & 73 others v Lang'ata Development Company Limited & another (Environment & Land Case 129 of 2019) [2022] KEELC 3781 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3781 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 129 OF 2019

LN MBUGUA, J

JULY 21, 2022

BETWEEN

JOSEPH GITHU IBAU & 73 OTHERS ..... PLAINTIFF

AND

LANG'ATA DEVELOPMENT COMPANY LIMITED ..... 1ST DEFENDANT

MARGARET ESTHER DAMES & JOHN ANDREW DAMES (ESTATE OF MARY WAIRIMU DAMES) ..... 2ND DEFENDANT

RULING

1. Before me is a Notice of Motion Application dated February 25, 2022 brought forth by the 2nd defendant seeking the following orders:

    a. Spent

    b. That the order given on February 23, 2022 to close the plaintiff's case be set aside and the plaintiff's case be re-opened for cross examination of the plaintiff's witness Joseph Ibau by the Applicant/2nd defendant's counsel.

    c. That the plaintiff be recalled on July 24, 2022 for cross examination by the applicant's/ 2nd defendants counsel.

    d. That the applicant / 2nd defendant be granted leave to file an amended list of documents to add 4 additional exhibits for the 2nd defendant to enable the Honourable Court to determine the real question between the parties in this suit

    e. That the costs of this application be costs in the cause.

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of Mr. Gitau Mwaro who is the advocate representing the 2nd defendant/ applicant. The said advocate confirms that this suit was scheduled for hearing on February 23, 2022. That when the matter was called out in the virtual platform at 9.30 am, he indicated that he was ready to proceed with plaintiff's case and the matter was allocated time for hearing at 11.30 am in open court (physical hearing).

3. That the said counsel left his office along Kamiti road around 10.15 am headed for Milimani Law Court for the hearing. However he encountered traffic jam and did not make it in time. At 12.22 pm of the same date, his clerk who was in court as well as the plaintiff's advocate informed him that the court session was over.

4. The Applicant's advocate argues that his client has a right to cross examine the plaintiff, that it is trite law that the applicant should be afforded a fair hearing and that in any event, the plaintiff shall not be prejudiced.

5. Further, the applicant avers that he intends to produce 4 extra documents and he is thus seeking leave to amend their list of documents.

6. The plaintiff has opposed the application via the Replying Affidavit sworn on April 25, 2022 by his advocate one Dennis Kirwa who avers that all the advocates for the parties were present on the morning of February 23, 2022 when the matter was confirmed for hearing in open court at 11.30 am. That he went to open court as scheduled, and at exactly 11.40 a.m, the trial commenced. He denies the claim made by 2nd defendant's advocate that their clerk was in court. He also avers it is the advocate for 2nd defendant who called him on the material day at 12.30 pm inquiring on, whether they had logged in for virtual hearing yet he knew very well that the matter was being heard physically.

7. On introduction of new evidence, it was argued that the plaintiff stands to be prejudiced as the plaintiff has not seen the new evidence. That once the plaintiff had closed his case, then the train had left the station and the 2nd defendant cannot stop the process midstream. He drew the attention of the court to the fact that pretrial had been fully conducted.

8. The 1st defendant equally opposed the application through the grounds of opposition dated May 16, 2022. He avers that even if the counsel for 2nd defendant had been held up in traffic, no reason has been given for the absence of the 2nd defendant in court.

9. It is also argued that it was grossly impossible and indeed improbable that 2nd defendant would have been ready for the trial as asserted by his advocate since they had intended to make an application to file an amended list of documents.

10. On the question of additional documents, it was contended that pretrial directions had long been undertaken where by, the 2nd defendant had filed their Trial Bundle on 2.10.2020.

11. It was argued that the effect of allowing the application would be to unduly allow the 2nd defendant to *post-facto* address, counter and or cure issues arising from the plaintiff's testimony which amounts to stealing a match.

Determination

12. I have considered all the arguments including the submissions of the parties. The issues falling for determination are;

i. Whether the plaintiff should be recalled for cross examination by the 2nd defendant's advocate and,

ii. Whether the 2nd defendant should be granted leave to avail additional documents.

Recalling of a witness

13. I find that in paragraph 3 of Mr. Gitaus affidavit, he states that;

> " I first appeared at 9.30 am and I confirmed I was ready for the hearing of the plaintiff's case and physical hearing was allocated at 11.30 am."

14. In paragraph 4 thereof, he proceeds to state that;

> " I left my branch office along Kamiti road from about 10.15 am".

15. The counsel has spoken in singular terms, meaning he was not with the 2nd defendant in virtual court or when he allegedly got stuck in traffic.

16. In the case of *Nginyanga Kavole v Mailu Gideon* [2019] eKLR, the court had this to say on the right to be heard:

> " What the applicant is entitled to is a reasonable opportunity of being heard on appeal and once that right is availed to him and he does not utilise it, he can no longer complain of being denied an opportunity of being heard ....".

17. It is trite that a case belongs to the parties and not their advocates and certainly not the clerks of the advocates. The court records clearly indicate that when the matter was called out on February 23, 2022 in open court at the scheduled time, the only party who was present was the plaintiff, though advocates for plaintiff and 1st defendant were present. By the time the plaintiff's case was closed, there was no word from the 2nd defendant or his advocate as to their whereabouts. The court proceeded to reschedule the hearing of defence case to July 28, 2022.

18. This is a situation where by the hearing date had been given almost a year earlier on May 12, 2021, hence the 2nd defendant ought to have ensured that he was in court ready for the trial. This court is not in a position to gauge the claim of 2nd defendant's advocate that he got stuck in traffic, hence I'll say no more on the advocate's situation. However, I find that no reasons have been advanced as to why the Applicant failed to turn up in court. I therefore reject the prayer to recall the plaintiff for cross examination.

19. On the question of production of documents by 2nd defendant, I have perused the court records. On 26.5.2020, the court gave directions as follows:

> " On applications which do not resolve the substantive issues, the court will focus on the main suit. Each party will file and serve a single bound, paginated and indexed bundle of pleadings, witness statements and Documentary evidence within 45 days. Hearing of the main suit on 12/5/2021."

20. The 1st defendant has stated that the 2nd defendant in compliance with the aforementioned Pretrial Directions proceeded to file their Trial bundle on October 2, 2020, an averment which has not been rebutted by the 2nd defendant.

21. The question of re-opening a case is one where courts exercise their judicial discretion on the interest of justice based on the merits of a case. It is not a purely yes or no answer as bolstered by the Supreme Court in the case of *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR as follows;

> " ... we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right..."

22. In the Court of Appeal case of *Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others* (Civil Appeal 33 & 148 of 2019 (Consolidated)) [2022] KECA 25 (KLR) reference was made to the High Court case of *Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd* [2015] eKLR where Kasango, J. cited a Uganda High Court, Commercial Division in the case of *Simba Telecom v Karuhanga & Anor* (2014) UGHC 98 which had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case *Smith v New South Wales* [1992] HCA 36; [1992] 176 CLR 256 where it was held:

> " If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application..."

23. And in the already cited Supreme Court case of Raila Odinga & 5 others (*Supra*) , it was also stated that:

> " ... 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..." (emphasis own)

24. All along, the 2nd defendant had never indicated that they were awaiting for any documents. Indeed after the date of May 26, 2020 when the court directed the parties to file their Trial bundles and scheduled the matter for hearing on May 12, 2021, the 2nd defendant simply stated that they were ready for trial on that day of May 12, 2021. The only reason as to why the case did not proceed on that day was because courts were not conducting open court hearings due to the Covid 19 pandemic.

25. Further, the documents which the 2nd defendant intends to produce cannot be termed as 'small'. Thus the plaintiff stands to be prejudiced by introduction of any fresh evidence.

26. The provisions of Section 1A (3) of the *Civil Procedure Act* provides that;

> "(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect,

to participate in the processes of the Court and to comply with the directions and orders of the Court".

27. The provisions of Section 1B thereof stipulates that;

> "(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
>
> (a) The just determination of the proceedings;
>
> (b) The efficient disposal of the business of the Court;
>
> (c) The efficient use of the available judicial and administrative resources;
>
> (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
>
> (e) The use of suitable technology."

28. This court has a statutory mandate to consider the overriding objective set out in the aforementioned Act. To this end, the court takes into consideration the notion of procedural and efficiency of justice. Procedural justice concerns the fairness, consistency and the transparency of the process, while efficiency of justice is done at reasonable costs and within reasonable time.

29. I find that there having been no mention of any documents that the Applicant was expecting prior to the date of the trial, then this is a case where as submitted by the 1st defendant "The Applicant appears to have all along calculated to spring up this rabbit from its hat and file extra documents, or worse, the decision is an after thought lodged in answer to the plaintiff's testimony".

30. In light of the foregoing analysis, I find that the application dated February 25, 2022 is not merited. The same is hereby dismissed with costs to plaintiff and 1st defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mr. Kirwa for Plaintiff

Lusi for 1st Defendant

Njuguna holding brief for Gitau Mwara for 2nd Defendant

Court Assistant: Joan