Shire v Omar & 6 others (Environment & Land Case 63 of 2006) [2022] KEELC 12712 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12712 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 63 OF 2006

BN OLAO, J

SEPTEMBER 28, 2022

BETWEEN

HADIJA SHIRE ..... PLAINTIFF

AND

KHADIJA OMAR ..... 1ST DEFENDANT

ZAINABU UMAR ABDI ..... 2ND DEFENDANT

JONATHAN NYONGESA NAMULALA ..... 3RD DEFENDANT

THE COUNTY PHYSICAL PLANNER BUNGOMA COUNTY .... 4TH DEFENDANT

THE COUNTY GOVERNMENT OF BUNGOMA ..... 5TH DEFENDANT

THE NATIONAL LAND COMMISSION ..... 6TH DEFENDANT

THE HON. ATTORNEY GENERAL ..... 7TH DEFENDANT

RULING

1. The record shows that Hadija Shire the plaintiff testified on 19th March 2013. For various reasons including change of Counsel and amendment of pleadings, it was not until 23rd September 2021 that the plaintiff closed her case.

2. When the defence case came up for hearing on 7th February 2022, Mr Anwar sought an adjournment on the ground that he had just been instructed to come on record for the plaintiff in place of Mr Olonyi. Both Mr Otsiula holding brief for Mr Bwonchiri for the 1st and 2nd defendants and Mr Walata holding brief for Mr Wayongo for the 4th and 5th defendants were prepared to indulge him. The hearing was adjourned to 21st March 2022 to allow Mr Anwar to regularize his appointment.

3. On 21st March 2022, the hearing could not proceed since Mr Anwar was un – well. It was adjourned to 22nd September 2022.

4. On that day, Mr Anwar sought an adjournment on the basis that he had discovered that the plaintiff closed her case on 23rd September 2021 before calling two witnesses namely the District Surveyor and the District Physical Planner both of whom had been summoned to testify on 19th March 2013 but did not do so. That their evidence is crucial in this dispute. He therefore sought to re – open the plaintiff's case adding that the defendants would not be prejudiced since they had not yet testified.

5. Mr Bwonchiriwho was the only other Counsel present and acting for the 1st and 2nd defendants strenuously objected to the application to re – open the plaintiff's case for the following reasons. Firstly, Counsel submitted that the application ought to have been made formally and not orally. Secondly, that this is an old case filed in 2009 in which the plaintiff had already closed her case. Thirdly, that Mr Anwar had not shown that he had served the other parties so that the Court could know their views on the application.

6. In response, Mr Anwar while appreciating that this is an old case, he nonetheless added that there is evidence for the plaintiff which should not be locked out. Counsel added that he only came on record for the plaintiff in February 2022 and was familiarizing himself with the case. He also stated that he had hinted to Mr Bwonchirithat he would be making this application. And with regard to service of the hearing notices, he stated that the 3rd to 7th defendants had been duly served. He urged the Court to allow the application.

7. I have considered the oral application and submissions by Mr Anwarand Mr Bwonchiriwith regard to the re – opening of the plaintiff's case.

8. On the issue of service, there is an affidavit of service dated 12th September 2022 showing that the Attorney – General was served and acknowledged service on 9th September 2022. There was however no evidence of service upon the other parties but I do not consider their absence during the canvassing of this application to be fatal because, as I shall be demonstrating shortly, the orders which I intend to make will not prejudice them in any event.

9. It is common ground that although the plaintiff closed her case on 23rd September 2021, none of the 7 defendants has called any witnesses in support of their cases. It is also not in dispute that the plaintiff testified almost 10 years ago on 18th March 2013 which is of course a matter of concern but as is clear from the record, there are various reasons for that delay attributable to all the parties.

10. Mr Bwonchirihas taken issue with the fact that the application has not been made formally. He did not however cite any provision of the law that renders this application fatal. This Court notes, however, that under Order 51 Rule 10(2) of the *Civil Procedure Rules*, it is provided that: -

> "No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

11. Indeed, as is clear from Order 52 Rule 10(1) of the *Civil Procedure Rules*, even where there is a requirement that any application be made under a particular statutory provision, "no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

Section 3A of the *Civil Procedure Act* also provides that: -

> " Nothing in this Act shall limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

Article 159(2) (d) of the *Constitution* provides that: -

> " Justice shall be administered without undue regard to procedural technicalities."

12. Finally, Article 50(1) of the *Constitution* provides that: -

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."

13. Applications to re – open cases are not strange. They are a common feacture in our Courts which no doubt retain inherent and residual powers to re – open cases. In my mind, whereas Courts have the discretion to re – open cases, what should exercise the mind of the Court should include, inter alia, the need to obviate an injustice, whether the re – opening of the case is likely to embarrass or prejudice the other party, whether there is mala fides in the application or if it has been made in good faith and where there is a delay, the explanation proffered for the same. Unless there is an intention to steal a march on the other party, mere delay should not disentitle a party to the right to re – open a case. Each case must however be considered on the basis of its own particular circumstances.

14. What then are the circumstances in this case? It is not in doubt that although the plaintiff testified on 19th March 2013 and closed her case on 23rd September 2021, she has had several changes of Counsel representing her. She lost one Counsel through natural attrition. Her current Counsel Mr Anwar only came on record in February 2022 and sought time to familiarize himself with the proceedings. It was in the process of studying the file that Counsel discovered that two crucial witnesses i.e. the District Surveyor and the Physical Planner have not testified.

15. The two witnesses whom the plaintiff wishes to call have not suddenly been sprung out of the blues. The record shows that after she had testified on 19th March 2013, the plaintiff's then Counsel Mr Sichangi informed the Court that he would be calling the District Surveyor and Physical Planner to testify in support of the plaintiff's case and applied for summons. This is what he said: -

> " I pray for summons to the District Surveyor and Physical Planner currently in Bungoma Lands office."
>
> Omollo J who was presiding allowed the application and said: -
>
> " The matter is adjourned to 7th May 2013 for further hearing. To – day's costs to the defendants. Summons to issue to the District Surveyor and District Physical Planner Bungoma Lands Office."

16. Both Mr Bwonchiri and Mr Situma who were appearing for the 1st, 2nd and 4th defendants did not have any objection to that application but only prayed for their costs. Therefore, the defendants have all along known that the plaintiff would be calling the District Surveyor and Physical Planner Bungoma County as her witnesses. This application has therefore been made in good faith and the defendants have always been aware of the plaintiff's intention to call the two officers as her witnesses.

17. As to whether the defendants will be prejudiced if the plaintiff's case is re – opened, it is clear that the defendants have not commenced prosecuting their respective cases. They will therefore have an opportunity to call their own witnesses to rebut the evidence of the District Surveyor and Physical Planner Bungoma should they wish to do so. There is nothing to suggest that the plaintiff's application to re – open her case is motivated by any oblique motive to obstruct the cause of justice or that it is intentionally contrived to fill up any gaps in her case after hearing the defendants' evidence. The primary duty of a Court is to give all the parties a fair playing ground by giving them an opportunity to call all the witnesses whom they may wish to bring forward so long as their evidence is relevant. To deny them that chance would amount to curtailing a party's right to a fair hearing and that would lead to an obstruction of justice.

18. Taking all the above into account, I am persuaded that the plaintiff's application to re – open her case has been made in good faith and most importantly, no prejudice will be caused to the defendants which cannot be compensated by an award of costs. It is in the interest of justice therefore that the application is allowed.

19. The up – shot of the above is that this Court makes the following orders in respect to the plaintiff's application: -

    1. The plaintiff is allowed to re – open her case for purposes of calling the District Surveyor and Physical Planner Bungoma to testify.

    2. Summons to issue to the said District Surveyor and Physical Planner Bungoma to attend Court on the next hearing date to be taken in the registry.

    3. The plaintiff shall meet the 1st and 2nd defendants' costs occasioned by this application.

BOAZ N. OLAO.

J U D G E

28th September 2022.

Ruling dated, signed and delivered at Bungoma on this 28th day of September 2022 by way of electronic mail as was advised to the parties.

Boaz N. Olao.

J U D G E

28th September 2022.