



REPUBLIC OF KENYA



**Ingosi v Ogutu & 2 others (Environment & Land Case 1157 of 2015)
[2022] KEELC 13296 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1157 OF 2015
JA MOGENI, J
SEPTEMBER 27, 2022**

BETWEEN

REUBEN SHITSAMA INGOSI PLAINTIFF

AND

WILLIAM OCHIENG OGUTU 1ST DEFENDANT

**ALBERT MOMANYI MAKORI T/A ALBERT MOMANYI MAKORI
ADVOCATES 2ND DEFENDANT**

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. This ruling is in respect to the Plaintiff's application dated 19th October 2018 which seeks the following orders:
 - a. Spent
 - b. That the plaintiffs be given leave to file a further list of documents.
 - c. That the annexed draft further list of documents be deemed as duly filed and served upon the defendants.
 - d. That the costs of this application be in the cause.
2. The application is based on the grounds set out therein and is also supported by the affidavit of William Ochieng Ogutu the 1st Defendant/Applicant herein.
3. The gravamen of the application is that the documents sought to be introduced i.e.;
 - i. A copy of Certificate of Official Search dated 28/10/2014
 - ii. Copy of Valuation Form dated 6/02/2015 of Sketch Map



- iii. Copy of Transfer dated 18/02/2015
- iv. Copy of Spousal Consent, Affidavit & I.D Card
- v. Copy of Power of Attorney
- vi. Copies of payment of Rates
- vii. Copy of Clearance Certificate
- viii. Copy of ID Card and PIN for Reuben Shitsama Ingosi
- ix. Copy for Application for New Certificate of Lease
- x. Copy of Stamp Duty Payment Slip
- xi. Copy of Consent to Transfer
- xii. Copy of OB Number on report of loss of the Title and Affidavit in Support
- xiii. Copy of Application for Gazettement of the Lost Title
- xiv. Copy of Certificate of Lease in the name of Reuben Shitsama Ingosi
- xv. Copy of Certificate of Lease in the name of William Ochieng Ogutu
- xvi. Copy of payment acknowledgement note.

are necessary and relevant for the fair and just determination of the issues in this dispute and that his former advocates on record did not file these critical documents that he believes that the further list of documents will enable the court to reach a just decision noting the issues at hand.

4. The Plaintiff, the 2nd and 3rd Defendants did not file any response to the said application.
5. The application was canvassed by way of written submissions only the 1st defendant filed his written submissions dated 27/06/2022. He contends that at the time of execution of the sale agreement the Plaintiff did not have the Title document to the suit property as the same was purportedly lost and this disclosure was only made after the parties had signed the sale agreement.
6. This matter has been pending in court since 2015 and had been listed for hearing several times. I took over the conduct of this matter in October 2021. It was first listed for hearing on 9/12/2021 the 1st defendant's counsel Ms Koech, sought an adjournment through Ms Mengich because Ms Koech was on maternity leave, the 2nd defendant sought an adjournment he needed to be granted time to file their defence and witness statement. The matter was adjourned and listed for hearing on 20/01/2022 the advocate for the 1st Defendant did not attend court and the advocate for the 2nd defendant sought an adjournment on the grounds of illness stating that his client had a flu. The court granted a last adjournment and listed the matter for hearing on 8/03/2022. On this date the 1st Defendant was in person in court and sought the court's indulgence to secure the services of another advocate. In line with Article 50 of *the Constitution* the court indulged the 1st Defendant and gave him time to get another advocate and the matter was now listed for hearing on 26/04/2022. The matter finally got to be heard on 26/04/2022 at 12:20 p.m. after allowing time for the 1st defendant to pay the court fees as ordered on 20/01/2022 which however was not done
7. The matter could not be concluded on this day but the plaintiff closed their case and the matter was listed for defence hearing on 26/05/2022, only the second defendant was able to testify and close their



case. The matter was listed for hearing on 3/06/2022 and the 1st defendant testified, was cross-examined and closed his case.

Determination

8. The Court has carefully read through the Application, the affidavit in support, the application is unopposed. The issue for consideration is Whether the Applicant has met the threshold for the exercise of discretion in his favour, at this stage of the trial be allowed to file a further list of documents after the close of the Plaintiff's and Defendants' case and re-call witnesses.

9. I am aware that I am required to ensure orderliness in every trial that I preside over and this is one such trial especially by the fact that the application is unopposed. I have a duty to also prevent trials by ambush, the Civil Procedure Rules require parties to furnish their evidence to the other side in advance before the commencement of the trial. Order 3 Rule 2 of the Civil Procedure Rules provides as follows:

“ All suits filed under rule 1 (1) including suits against the government, except small claims, shall be accompanied by –

- a. the affidavit referred to under Order 4 rule 1 (2);
- b. a list of witness to be called at the trial;
- c. written statement signed by the witnesses excluding expert witnesses; and
- d. copies of documents to be relied on at the trial including a demand letter before action.

Provided that statement under sub rule (c) may with leave of Court be furnished at least fifteen days prior to the trial conference under Order II”

10. A similar provision applies to a defendant while filing a defence and counter-claim in Order 7 Rule 5 of the *Civil Procedure Rules*.

11. It is instructive to note that neither Order 3 nor Order 7 of the Civil Procedure Rules prohibits the trial Court, upon application, from accepting late filing of statements or documents sought to be relied upon. In my view, and in keeping with Article 50 of *the Constitution* which provides for a fair hearing of any dispute, a trial Court is not barred from allowing a party, with leave, to introduce new statements and documents that were not previously filed and served as mandated by the provisions of Order 3 and Order 7 of the Civil Procedure Rules because the primary duty of the Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective claims. Each case will however be decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party.

12. In the instant case the trial has commenced and closed in fact a judgment date has been reserved. Notably, both plaintiff and defendant 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. Courts usually 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. This was done in this case.



13. Provisions of Order 3 Rule 7 and Order 7 Rule 5 do not contemplate a situation where documents will be filed outside the requisite time-frames and this is to ensure that there is no trial by ambush but also that litigation comes to an end. You can imagine a situation where every time a matter was being finalized the litigants were allowed to produce more documents and start the process all over again. This would mean that no matter would ever be finalized in our courts and litigants would be forever at each other's throat springing one surprise after another.
14. Each case will however be decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party.
15. Bearing the above in mind, it is clear that the plaintiff only had one witness and closed his case, the defence had two witnesses and closed their case. I am called to consider the provisions of Order 3 and Order 7 and I note that their cardinal purpose is 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 clear cut provision setting out 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. 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. Worse still after the parties have testified and closed their cases.
16. The 1st defendant apart from blaming his former advocates for not producing the documents he now intends to produce has not advanced any other reason. He is supposed to have attended through his advocates the pre-trial sessions starting with the first one on 24/05/2018, 8/8/2019, 27/8/2019, 2/10/2019, 5/11/2020, 14/10/2021 and subsequent court appearances as enumerated hereabove.
17. The purpose of Order 11 is not for roll-call purposes even in situations requiring roll call to be taken it is never for people to simply say "present" and that is it. The roll call serves different purposes depending on institutions undertaking the exercise. In the same manner in the same way Order 11 serves the purposes of reading all parties to a suit to ensure all their documents are check listed and their witnesses informed on when they are required in court.
18. The 1st defendant has enumerated a list of sixteen (16) documents all within his knowledge and or custody which are primary documents he should have produced at the trial.
19. I am well aware that this 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 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.
20. The position advanced in the Raila Odinga & 5 Others vs IEBC (supra) case does not in any way say, that the court can never under any 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.

21. I must now therefore address the question of whether it will be in the interest of justice, given the circumstances of this case, to allow the application by the 1st defendant to file further documents and re-call the witness.
22. When the plaintiff testified and tendered their evidence, they had in mind that all that the defendant would call are two witnesses and that the defendant would not be relying on other documents except was already listed and served upon them. The documents sought to be introduced were not in their contemplation. They were never cross-examined on it. They never thought fit to mention it, assuming that they knew of its existence. Before the 1st defendant started giving evidence, he never gave any indication that after listening to the plaintiff's evidence, he would wish to re-call any witness nor file additional documents. It is after his cross-examination that he has now sought to introduce new evidence. No reason has been given as to why the defendant did not contemplate furnishing this new evidence earlier.
23. Both the plaintiff and the defendants have closed their case and allowing this application will mean that the matter is started afresh. It will be unfair to the plaintiff, if I am to allow the 1st defendant, to file additional documents and re-call witnesses at this late stage of the proceedings, this would fundamentally alter the character of the plaintiff's case, to one that the plaintiff never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the plaintiff and will violate the provisions of Article 50(1) of the Constitution.
24. For the above reasons, I am inclined to disallow the application by the 1st defendant to avail file further documents and re-call the witness mentioned in the application.

Disposal Orders

25. The upshot of this is that;
 - a. The court will proceed with the evidence adduced and documents produced during trial.
 - b. The judgment shall be delivered on 10/11/2022
 - c. The cost of this application shall be borne by the 1st defendant

It is so Ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2022

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MOGENI J

JUDGE

In the Virtual presence of:-

Mr Ochanda for 1st Defendant/Applicant



Mr Kinyanjui for Plaintiff/Respondent
Mr Ongicho for 1st Defendant/Respondent
Mr. Vincent Owuor: Court Assistant

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MOGENI J
JUDGE

