



REPUBLIC OF KENYA



KENYA LAW
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**Rotich & another v Kimetto (Environment & Land Case 54 of 2022)
[2022] KEELC 12636 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 54 OF 2022
L WAITHAKA, J
SEPTEMBER 27, 2022
(FORMERLY ELDORET ELC NO. 348 OF 2012)**

BETWEEN

JONATHAN ROTICH 1ST APPLICANT

BOG KOMBATICH PRIMARY 2ND APPLICANT

AND

CHARLES KIMETTO RESPONDENT

RULING

1. This is an oral application by Mr Kibii, counsel for the defendant, for an order that the Executive Officer Eldoret Law Courts be summoned to produce the file relating to Criminal Case number 3716 of 2005.
2. The matters leading to the application are as follows:- After the plaintiffs closed their case on September 26, 2022, the defendant's counsel informed this court that he would be calling one witness, the defendant herein, and applied for summons to issue against the Executive Officer Eldoret Law courts to produce the file for Criminal Case No 3716 of 2005. He stated that in paragraph 6 of the replying affidavit of Charles Kipchumba Kimetto, reference was made to Criminal Case No 3616 of 2005 and a copy of deposit receipt annexed.
3. The application was opposed by Ms Adeyo for the plaintiffs on the grounds that counsel for the defendant had not filed a list of witnesses, witness statements or proceedings for the lower court criminal matter; that the application was made late in the day, pleadings having closed. She urged the court not to allow litigation by ambush.
4. This matter was originated by way of originating summons on May 18, 2007. Directions were taken on June 26, 2018 before Ombwayo J that the Originating Summons be treated as a plaint and the grounds



of objection as a defence; that the matter be canvassed by way of *viva voce* evidence. On February 7, 2019 the replying affidavit of Charles Kipchumba Kimetto filed on the November 7, 2018 was adopted as part of the defendant's defence.

5. On various dates; April 8, 2015 and June 26, 2018 Ombwayo J, gave directions for compliance with pre-trial directions. Although time lines were given to both parties to file their witness statements and list of documents, the defendant filed his list of documents on March 27, 2017, supplementary list of documents on November 7, 2018 and further list of documents on November 8, 2019. The documents filed did not include proceedings for Criminal Case Number 3616 of 2005 and no list of witnesses or witness statements were filed.

6. In the case of *Johana Too v Hellen Tum* 2014 eKLR the court faced with similar facts stated:

“The courts 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 the article 159(2)(d) of *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.”

7. Applying the above principles to the circumstances of this case; whereas it is always in the best interest of justice that parties be allowed to place before the court all the evidence available so long as it is relevant, each case must be considered on its own peculiar circumstances taking into account all factors including the stage at which the trial has reached. At the same time, the court must be vigilant and guard against parties who attempt to steal a march on their adversaries in circumstances where such new evidence cannot be adequately rebutted.

8. In the instant case, the plaintiffs have closed their case. During cross examination, both PW1 and PW2 were emphatic they were not aware of Criminal Case No 3716 of 2005. If the defendant is allowed to introduce the new evidence (proceedings in the criminal case), the plaintiffs will not have an opportunity to call for additional evidence regarding the criminal case and witnesses to rebut the evidence being adduced by the defendants. In my considered view, the plaintiff will suffer prejudice which cannot be remedied with costs.

9. That said and having reviewed the court record in totality, it occurs to me that the witness summons being sought against the Executive Officer, Eldoret Law Courts to produce Criminal File No 3716 of 2005 are misplaced. I say so because there is no mention of these proceedings in the defendant's list of documents and replying affidavit.

10. I am guided by the provisions of articles 50 and 159 of the *Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*. In the exercise of my discretion, given the circumstances of this case, I decline to grant the order sought for witness summons to issue against the Executive Officer, Eldoret Law Courts.

11. Defence hearing to proceed on October 18, 2022.



12. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 27TH DAY OF SEPTEMBER, 2022.

L. N. WAITHAKA

JUDGE

