



Dalco Trading Limited v Imathiu & 3 others (Environment & Land Case 18 of 2019) [2022] KEELC 4821 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE 18 OF 2019
CK YANO, J
SEPTEMBER 22, 2022**

BETWEEN

DALCO TRADING LIMITED PLAINTIFF

AND

KAMAITA IMATHIU 1ST DEFENDANT

LAWRENCE N. MUGAMBI 2ND DEFENDANT

MOHAMED HASHIN JAMA 3RD DEFENDANT

LAND REGISTRAR, THARAKA NITHI COUNTY 4TH DEFENDANT

RULING

1. In this matter, all parties had closed their respective cases and the case was listed for mention to confirm filing of written submissions on May 9, 2022. However, by that date, none of the parties had filed their submissions and the court granted them further time to comply, and the matter was fixed for mention on June 8, 2022 to confirm compliance and to fix a date for judgment.
2. On June 8, 2022, Mr Siagi advocate for the Plaintiff was present and informed the court that he was also holding brief for Mr Murango Mwenda advocate for the 1st and 2nd defendants. Also present was Ms Kendi learned counsel for the 4th defendant.
3. Mr. Siagi informed the court that he had filed and served his submissions. He further stated that the 1st and 2nd defendants' advocate had served him with their submissions the previous day, while the other parties had not filed theirs. In view of the late service of submissions by the advocate for the 1st and 2nd defendants, Mr Siagi requested for three days to file and serve supplementary submissions in response. He also prayed to file the original documents under seal since the copies filed do not show the seal. On her part, Ms Kendi requested for seven days to file and serve her submissions. The court granted the 3rd and 4th defendants seven days to file and serve their submissions and leave was also granted to



the plaintiff to file and serve supplementary submissions within seven days of service. In addition, the court granted the plaintiff leave to supply the original authorization document showing the seal.

4. When the matter came up on July 14, 2022 to confirm compliance of the above directions, counsel for the 1st and 2nd defendants made an oral application to have the court set aside the directions granted by the court on June 8, 2022 with regard to the leave granted to the plaintiff to file original authorization documents from the company. Mr Murango Mwenda submitted that all parties tendered before court the evidence that were available at the time of filing of suit, including the various documents in the form in which the parties intended them to be. Counsel for the 1st and 2nd defendants' further submitted that to allow any further documents at the stage of closing submissions will amount to allowing the plaintiff to re-open the case without the benefit of the other parties scrutinizing and challenging those documents. In addition, Mr Murango submitted that the defendants had in their submissions challenged the documents relied on by the plaintiff on the basis that they had no legal effect since they did not bear a company seal, and that the leave that was sought and granted was to circumvent those submissions. It was further submitted that the documents sought to be introduced did not exist at time of filing the suit and were manufactured by the Plaintiff after the filing and reading of the defendants' submissions. It was also submitted that the defendants will be highly prejudiced by the admission of the new documents. Counsel for the 1st and 2nd defendants submitted that the main issue in this case is whether the plaintiff had the legal capacity to file this suit. Mr Murango further denied asking Mr Siagi to hold his brief on June 8, 2022.
5. Mr Wanyanga, learned counsel for the 3rd defendant supported the submissions of Mr Murango Mwenda, adding that when he came on record for the 3rd defendant on September 14, 2020, his request to file proper documents was vehemently opposed by counsel for the plaintiff on the basis that the plaintiff would be prejudiced. That the court then ordered that no further documents should be introduced by any of the parties.
6. Ms Kendi learned counsel for the 4th defendant did not oppose the introduction of the said original authorization documents.
7. In a rejoinder, Mr Siagi submitted that he had informed the court that the plaintiff had submitted documents which were not objected to on production. That the authority could not be felt and thus the application to produce the original. It was his submissions that the question of the seal had not been raised in the submissions then filed. He submitted that counsel for the 1st, 2nd and 3rd defendants were not acting in good faith. The plaintiff's counsel urged the court to look at the paramount of the case which is justice. His submission was that the issue at hand was not the introduction of a new document, but rather the original copy. Counsel for the plaintiff urged the court to reject the application made by the 1st and 2nd defendants to have the directions given on June 8, 2022 set aside.
8. I have considered the application and the submissions made. The issue that falls for the court's consideration is whether or not to set aside the orders granted by the court on June 8, 2022 with regard to the introduction of original authorization document.
9. The court has power to review its orders, but the said power must be exercised within the framework of section 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the [Civil Procedure Rules](#).
10. Section 80 of the [Civil Procedure Act](#) provides as follows:

- “ 80. Any person who considers himself aggrieved-
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.”

11. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that:

“ 1(1) Any person who considered himself aggrieved –

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

12. From the foregoing, it is clear that section 80 gives the powers of review while order 45 sets out the rules. Further, the rules lay down the jurisdiction and scope of review and limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by them at the time when the decree was passed or the order made or (b) on account of some mistake or error apparent on the face of the record or (c) for any other sufficient reason, and whatever the ground, there is a requirement that the application has to be made without unreasonable delay. It has also been held that any other sufficient reason for purposes of review refers to grounds analogous to the other two.

13. The application by the 1st and 2nd defendants is the setting aside of leave granted to the plaintiff on June 8, 2022 to file original authorization documents bearing the company seal. The main reasons given by the 1st and 2nd defendants for the setting aside the said orders were that the documents constitute contested documents in this case and that allowing the introduction of the documents at the submissions stage amounted to allowing the plaintiff re-open its case and without giving the other parties an opportunity to challenge the same. The 1st and 2nd defendants’ submission was that the said order will prejudice the defendants cases, especially when the same had been challenged in the closing submissions. Counsel for the 1st and 2nd defendants submitted that the plaintiff sought the impugned orders to circumvent the submissions already made by the 1st and 2nd defendants and thus would be prejudicial to their case.

14. The application which is the subject of this ruling was made on July 14, 2022 while the orders sought to be set aside were issued on June 8, 2022. This was a period of about one month and six days. The advocate for the 1st and 2nd defendants had also written a letter dated June 10, 2022 raising the issue. I am therefore satisfied that the application has been made timeously.

15. I have perused the court record. It is clear from the pleadings and proceedings that the issue of authorization by the directors of the plaintiff’s company to commence these proceedings is a key issue in this case. The court has also noted that directions regarding compliance with Order 11 of the [Civil Procedure Rules](#) had been given. The court (Njoroge J) had also declined to allow introduction of new evidence after the parties were directed to comply with Order 11. The court on June 2,



2020 categorically directed parties to ensure that original copies of documents are produced during the hearing. This court has further noted that on November 9, 2020, the court (P M Njoroge, J) made a ruling on a similar issue, and even during the pre-trial conference, the issue of filing original authorization documents was never raised. The issue was again raised after all the parties had closed their cases and when the matter was pending filing of written submissions. This is a case in which the plaintiff was always represented by counsel and the Plaintiff was therefore always aware of the case and the issues therein. In this regard, I am in agreement with the 1st, 2nd and 3rd defendants submission that the introduction of the said documents at this late stage of the proceedings would be highly prejudicial to the defendants. In any case, it is clear that the application was *res-judicata*, the issue having been determined previously.

16. As already stated, it is not disputed that the setting aside is a discretion of the court. What is important is whether the 1st and 2nd defendants have demonstrated that there is sufficient cause to warrant the exercise of the court's discretion in their favour. From the record, it is quite clear from the parties' pleadings, the proceedings including cross-examination and submissions that the question of the authorization of the plaintiff to commence this case was a very central issue in this case. That the plaintiff had to wait until parties had closed their respective cases and even filed final submissions is sufficient reason to conclude that the application was meant to circumvent the case of the defendants. In the circumstances, this court finds that the 1st and 2nd defendants have shown sufficient reason for the court to review its orders of June 8, 2022.
17. For the foregoing reasons, I am satisfied that the application to set aside is merited. The same is allowed. The order made on June 8, 2022 granting leave to the plaintiff to file original authorization documents is set aside. Costs of this application shall be in the cause.
18. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF SEPTEMBER, 2022 IN THE PRESENCE OF:

CA: Martha

Murango Mwenda for 1st & 2nd Defendants

Siagi for Plaintiff

Ms. Kendi for Kiethi for 4th Defendant

Wanyanga for 3rd Defendant

C.K. YANO,

JUDGE.

