



REPUBLIC OF KENYA



KENYA LAW
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**Wadhwa (as the legal representative of the Estate of Deshpal Omprakash
Wadhwa) v Mohamed & 4 others (Environment & Land Case
51 of 2012) [2022] KEELC 13771 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 51 OF 2012
MAO ODENY, J
OCTOBER 27, 2022**

BETWEEN

**SHAMI DESHPAL WADHWA PLAINTIFF
AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DESHPAL
OMPRAKASH WADHWA**

AND

**HABIB ABU MOHAMED 1ST DEFENDANT
ABDALLA MWARINGA MAYE 2ND DEFENDANT
IBRAHIM MUKHTAR ABASHEIKH 3RD DEFENDANT
TAUHIDA TAHIR SHEIKH SAID 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. This ruling is in respect of a notice of motion dated March 6, 2019 by the plaintiff/applicant seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Leave be granted to the plaintiff to file an additional bundle of documents and list of witnesses within seven (7) days of the grant of such order.



- e. The defendants be and are hereby granted corresponding leave to file further documents if need be.
 - f. The plaintiff's case, closed by the court on February 5, 2019 be re-opened.
 - g. Leave be granted to the plaintiff to recall to the witness stand PW2- Juma Otine Athman, Land Registrar, Kilifi and that upon grant of said leave, witness summons do issue for the said witness to attend court on the date that shall be fixed pursuant to prayer 8 below, for the said witness to produce the 1992 presentation book for the Kilifi Land Registry.
 - h. That the court does fix the matter for further hearing of the plaintiff's case.
 - i. Costs of this application abide the outcome of this suit.
2. The applicant relied on the grounds on the face of the application together with affidavits sworn by Mohamed Amani Karega and Shami Deshpal Wadhwa. This application had been summarily dispensed with by the Honourable Olola J on October 15, 2019, however the Court of Appeal ordered that this application be heard again by another judge other than Justice Olola.
 3. The 1st defendant filed a replying affidavit sworn on March 21, 2022 by his son, Mohamed Habib Abu, holding a power of attorney whereby he deponed that the application is untenable since the suit has been fully heard and that the plaintiff had been granted numerous opportunities to file any additional documents before the close of her case on February 5, 2019, but failed to do so since the year 2014. He further deposed that the 1st defendant, a crucial witness in this suit, was seriously indisposed and elderly, thus incapable of responding to any documents sought to be introduced at this stage.
 4. The 2nd defendant equally filed a replying affidavit sworn on March 21, 2022, wherein he deponed that the plaintiff has had numerous opportunities to file the additional documents, for instance *vide* an application dated April 13, 2017, but failed to do so.
 5. The 3rd and 4th defendants filed grounds of opposition dated March 28, 2019 and a replying affidavit sworn on the same date by the 3rd defendant who deponed that there was nothing to show that the additional documents could not have been filed prior to the hearing and closure of the plaintiff's case.
 6. The 5th defendant filed a replying affidavit sworn on May 9, 2019 by Mary Ndale Kai, a former Land Registrar at Kilifi and opposed the application.
 7. Counsel agreed to canvas the application by way of written submissions which were duly filed.

Plaintiff/Applicant's Submissions

8. Counsel identified the following issues for determination: -
 - a. Whether the plaintiff's application is intended to fill gaps in the evidence.
 - b. Whether there is inordinate and unexplained delay on the part of the plaintiff
 - c. Whether the fact that the defence case has commenced and 1 witness has testified is a bar to the court's discretion to grant the orders sought.
 - d. Whether the plaintiff has demonstrated that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of the hearing of the case.
 - e. What is the nature of the evidence, is it apparently credible and if admitted, would it probably have an important influence on the result of the case?



9. Counsel relied on 146 (4) of the [Evidence Act](#) and the cases of [Shami Deshpal Wadbwa v Habib Abu Mohamed](#) (Unreported) Malindi civil appeal No 33 of 2019; [NSG V SCG](#) [2014] eKLR; [Raindrops Limited v County Government of Kilifi](#) [2020] eKLR; and [Joginder Auto Service LTD v Mohamed Shaffique & another](#) [2001] eKLR,
10. On the first issue whether the plaintiff's application is intended to fill gaps in the evidence, counsel submitted that the evidence sought to be adduced is the presentation book for Kilifi registry from 1982 which is already on record having been mentioned by Athman Juma-PW2 and as such there were no gaps to be filled and that the presentation book would not alter the character of the case as presented by the plaintiff.
11. On the second issue as to whether there is inordinate and unexplained delay on the part of the plaintiff, counsel submitted that the plaintiff retrieved the presentation book on January 29, 2019 and filed the same in court on January 30, 2019, thus there was no delay.
12. On the issue whether the fact that the defence case has commenced and one witness has testified is a bar to the court's discretion to grant the orders sought, counsel relied on the Court of Appeal decision between the same parties herein over the same dispute ([Shami Deshpal Wadbwa v Habib Abu Mohamed](#) [supra]) and submitted that since only the former Land Registrar had testified for the defence, it was not too late to have the application allowed in the interest of justice.
13. Counsel further submitted the plaintiff has demonstrated that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of the hearing of the case and argued that section 7 of the [Land Registration Act](#), the custodian of all land records is the land registrar, therefore, the plaintiff could not have been aware of the presentation book since it is not one of the documents given to a land owner.
14. It was counsel's submission that the nature of the evidence is a crucial missing link connecting the dispatch of the lease for Kilifi/Jimba/441 from Nairobi to Kilifi and for authentication of the application for registration of lease (Pexh-d) and issuance of the certificate of lease to the plaintiff's father in 1992.
15. Counsel further submitted that the defendants will not suffer any prejudice and that the plaintiff has equally sought an order allowing the defendants to file any documents to counter the evidence sought to be introduced.

1st and 2nd Defendants' Submissions

16. Counsel relied on order 11 of the [Civil Procedure Rule](#) and submitted that the application was an afterthought made in bad faith, ill-conceived and amounts to abuse of the court process meant to subvert and delay justice. Counsel urged the court to be guided by the said order 1, section 1A and 1B of the [Civil Procedure Act](#) and article 159 of the [Constitution](#) on trial and justice to find that the application lacks merit.

Analysis And Determination

17. The issue for determination is whether the applicant's case should be reopened to be allowed to present additional documents after closure of pleadings and whether the application is an attempt by the plaintiff to fill in the gaps in her case.



18. Civil Procedure Rules, 2010 require parties to furnish their evidence in advance before commencement of the trial. Order 3, order 7 and order 11 of the Civil Procedure Rules. The relevant provision in this case is order 3 rule 2 which provides: -

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 witnesses to be called at the trial;
- c. written statements 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 11.

19. It is therefore clear that parties are to furnish all the documents and list of witnesses they wish to rely on at the trial, while filing their pleadings. The court has the discretion to grant leave for additional documents to be filed and such leave should not prejudice the other parties.
20. Order 11 also provides that the court may grant such leave for a party to supply the documents at least within 15 days before the pre-trial conference. That notwithstanding, there is no clear cut provision setting out the consequences of failure to comply with those rules. This does not however mean that a party will be allowed to hide their evidence only to ambush the other party at the hearing stage.
21. The decision whether or not to allow such introduction of new evidence is a discretionary one which must be exercised judiciously. It is also trite that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate.
22. In the case of Johana Kipkemei Too v Hellen Tum [2014] eKLR Munyao J aptly stated the factors to be considered in such applications. He stated: -

“The 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 v 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.

This however is not to 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.”

23. Further, in the case of *Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & another* [2015] eKLR Kasango J stated: -

“17. Uganda High Court, *Commercial Division in the case Simba Telecom v Karuhanga & Anor* (2014) UGHC 98 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. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case *Simba Telecom* (supra) held thus:

“I agree with the holding in the case of *Smith v South Wales Bar Association* (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

24. The issue is whether it will be in the interest of justice, given the circumstances herein, to allow the plaintiff introduce a new document, re-open its case, and recall PW2 to the stand and whether such recall will cause prejudice to the defendants.

25. The record shows that this matter was fixed for pretrial on March 22, 2016 and later on May 30, 2016 the defendants were given 14 days to comply with order 11 of the *Civil Procedure Rules*, failure to which a hearing date will be fixed.

26. The matter was subsequently fixed for hearing on November 2, 2016. Sometime in April 2017, the plaintiff filed an application dated April 13, 2017 seeking *inter alia* leave to file a further supplementary list of documents and the suit be commenced *de novo*. That application was allowed on March 15, 2018 and the hearing commenced *de novo* on October 9, 2018. On that date, the plaintiff, Shami Wadhwa,



testified as PW1, when she attempted to produce a copy of an application for registration of lease, which production was objected to by counsel for the defendants, for reasons that she was neither the author or the recipient of the same, and consequently the documents were marked for identification-Mfid.

27. Mfid was subsequently produced as Pexh d by Athman Juma-PW2, the then land registrar. The record reveals that PW2 explained to the court the process from when an application for registration of lease is received at the registry and that it is given a presentation book number, and that the plaintiff's application was given presentation book number 051.
28. The document sought to be introduced at this stage is the said presentation book for Kilifi land registry from 1982, which according to the plaintiff is not intended to fill any gaps in her case.
29. It is not disputed that a presentation book is one of the documents in the custody of the lands registry, therefore, the plaintiff could not have access to it without the custodians of the same making it possible. The plaintiff explained that she made efforts to obtain the presentation book by seeking authentication of the Pexh d from the Kilifi land registrar. She attached copies of letters dated October 16, 2018 and another January 17, 2019. It was not until January 29, 2019 that she obtained the same.
30. The plaintiff unsuccessfully sought to have on record the presentation book on February 5, 2019 when Olola J declined to grant an adjournment and proceeded to close the plaintiff's case. It is also evident that the defence hearing commenced on November 21, 2019 but halted in compliance with the Court Appeal's decision directing the present application be heard by a different judge.
31. The dispute in this suit revolves around ownership of land. The plaintiff's claim is that the defendants' title was issued through fraud. The documents sought to be introduced emanate from government records. The government is represented by the 5th defendant herein who will have an opportunity to cross examine on the authenticity of the same. There is no doubt that the prejudice towards the defendants will increase if the plaintiff's application is allowed open ended.
32. I am also convinced that the document sought to be introduced will enhance this court's proper adjudication of the matters in dispute and therefore allow the application in the interest of justice to allow the plaintiff to file only the presentation book, the plaintiff's case be re-opened only for purposes of having PW2 produce the presentation book for the Kilifi Land Registry; the defendants be corresponding leave to file further documents in relation to the presentation book if need be. The plaintiff to pay the defendants Kshs 20,000/- being thrown away costs before the next hearing date failure to which the order lapses.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

