Kanyarkwat Group Ranch & 4 others v Joseph & 3 others (Environment & Land Case 38 of 2021) [2022] KEELC 15037 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15037 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 38 OF 2021

FO NYAGAKA, J

NOVEMBER 22, 2022

BETWEEN

KANYARKWAT GROUP RANCH ..... 1ST PLAINTIFF

JULIUS LONGUROKWANG ..... 2ND PLAINTIFF

PHILIP CHEMALA RUTO ..... 3RD PLAINTIFF

LOKORLUKA LOTUNALE ..... 4TH PLAINTIFF

JOSEPH NGIRUYE ..... 5TH PLAINTIFF

AND

MERINGIRO LOKADIR JOSEPH ..... 1ST DEFENDANT

ANTONY MUKELUK TONGOLO ..... 2ND DEFENDANT

LOMANGIRO INVESTMENT LIMITED ..... 3RD DEFENDANT

LAND REGISTRAR, WEST POKOT COUNTY ..... 4TH DEFENDANT

RULING

1. When this matter came up for the further hearing on November 17, 2022, the Plaintiffs called PW3, one Julius K Kolinguria to take the witness stand. Upon him being sworn and introducing himself, the Defendants' learned counsel raised an objection to the testimony of the witness being received by the Court. Their objection was based on the allegation that the said witness and one other who was yet to be called had been "sneaked" into the Court record and proceedings. They contended that that was the position because neither were the said two witnesses listed amongst the initial List of Witnesses filed on June 29, 2021 when this suit was filed nor were their statements filed in court with leave or served on them. They stated that the said 'witnesses' found their way into the court record through a "Plaintiff's Further List of Witnesses" dated September 27, 2021 which was amongst the documents

filed as the Plaintiffs' Trial Bundle filed on May 06, 2022, and was at page 95. They pointed out that the said two witnesses the other one who was Limang'ura Lotunale, had recorded their statements on the said date of September 27, 2021 and they two were "sneaked" into the court record vide the Trial Bundle, and were at pages 97-98 and 99-100 respectively. Their argument was that three documents were neither filed nor were they even stamped as the rest of the documents in the Trial Bundle.

2. The Court considered the objections and upheld them the same date. It struck out the strange or unfiled documents and also directed that the said witness, one Julius K Kolinguria be stood down forthwith and his testimony be not considered. The detailed reasons for the order of the Court are contained in the Ruling delivered the same date pursuant to the objections.

3. After the Court directed the Plaintiffs to proceed but they did not have other witnesses in Court, they applied for adjournment to call the remaining five (5) witnesses. They were granted a last adjournment and the suit was fixed for further hearing on February 16, 2023. It was upon these final directions of the Court being given that the Plaintiff's Counsel moved this Court orally on the instant Application.

4. Learned counsel prayed for this Court to grant the Plaintiffs leave to file and serve a further list of witnesses and two witnesses' statements before the next hearing date, and thereby grant the Plaintiffs chance to have the witnesses called to give evidence. At first, in the submissions on the application, learned counsel did not give the reasons or a basis for the application. Upon the same being strenuously opposed by being termed as an afterthought which was made after the matter had substantially proceeded and whose basis had neither been laid nor explanation given why the witnesses' statements were not filed with the Plaint, and was a gimmick to seal loopholes created in the Plaintiff's testimony already given, and also that the Plaintiffs had squandered their chance before Pre-Trial Directions being given when they failed to file the witnesses' statements, or stated who and what the said witnesses were coming to testify on, learned counsel for the Plaintiffs' stated a few more things.

5. He stated that although time for filing pleadings was long past the time the application was being made, the law permitted a party wishing to file any pleadings, after the close of pleadings, to seek leave of the Court before filing such. That was the basis for the Plaintiffs making the instant application to file a further list of witnesses and witness statements while the Plaintiff's case was still on. He argued that only two (2) witnesses' testimony out of nine (9) had been received by Court hence no loopholes were being sealed by the request for further witnesses filing their statements and testifying yet the Defendants "story" (sic) had not been "heard". He then stated that the two proposed witnesses were the officials of the 1st Plaintiff, and the Defendants would have opportunity to cross-examine them when they testify. He then prayed that the Court does not lock out the two witnesses out of the proceedings since their evidence was vital. He implored the Court, in answer to the Defence arguments that he should have moved the Court by way of a formal Application, that the law permitted oral applications of the nature to be made on such an issue. It is against this background and arguments that I now determine the Application.

Issues, Analysis and Determination

6. I have considered the oral Application before me, the law, the submissions by all counsel and the circumstances of the same. I am of the view that the following are the issues that commend themselves before me for determination: -

    a. What law is applicable in an application of this nature?

    b. Whether the application is merited.

c. What orders to make and who to bear the costs of the application.

7. Beginning with the first issue, that is to say, regarding the law applicable, it is worth of note that the application was presented orally before the Court and after the suit had proceeded to hearing, with two witnesses out of a possible five, two having been left out by the Plaintiffs voluntarily. First, to take note also is that the Plaintiffs' prayer was for the grant of leave for them to file a further list of witnesses and witnesses' statements. At first, they did not specify how many the proposed witnesses were but in answer to the objections by the defence counsel, it turned out to be that they wanted leave to bring in two witnesses. Their prayer, though not confirmed, seems to be for bringing onto the record the two witnesses about whom the Further List of Witnesses dated September 27, 2021 and the two Witnesses' Statements signed the same date were filed, that this Court expunged. However, since the identity of the proposed witnesses in the instant application was not disclosed, this Court will not speculate about who they may be.

8. At this juncture I will need to set the record straight over the Applicant's argument that the prayer for leave to file a further list of witnesses and witness statements is akin to and part of amendments of pleadings. It was submitted that although the time for filing pleadings had passed long before the time of the application, the law permitted a party wishing to file any pleadings, after the close of pleadings, to seek leave of the Court before filing such. I do not agree with this submission for reasons that I give in the following paragraph.

9. Witnesses statements ultimately constitute the parties' evidence when adopted as part of the evidence of the parties when giving oral testimony. In so far as they are only filed and have not been adopted as evidence, they are mere documents in the record and cannot form part of the evidence and or pleadings of the parties. Pleadings and witness statements are two different things. Pleadings, on the one hand, as defined in Section 2 of the *Civil Procedure Act*, "...includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defence." Brian A. Garner, in Black's Law Dictionary (Eleventh Edition) Thompson Reuters, St. Paul MN, 2019, p. 1394 defines the term pleading as "a formal document in which a party to a legal proceeding, especially a civil lawsuit, sets forth or responds to allegations, claims, denials, or defences. In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer". Garner continues to explain from the same page to 1395 that in "...common law pleadings in a cause are commenced, on the part of the plaintiff, with a declaration which is a statement in writing of his cause of action, in the legal form." The same author, at page 1922, defines a "witness statement" as a "recorded account, made on oath or in preparation for a court proceeding, od a person's knowledge of facts about something." Thus, a witness statement finally transforms into evidence, which, on the other hand, is the set of facts which a party must prove or disprove the existence of alleged facts or in order to succeed in his claim. Therefore, Lists of Witness Statements and Witness Statements do not constitute pleadings. Therefore, the procedure for amendment of pleadings is not applicable to the procedure of introducing and proof of evidence.

10. The prayer for the leave to be granted for the Plaintiffs to file a further list of witnesses was made long after pleadings had closed and compliance confirmed by way of taking Pre-trial Directions in terms of Order 11 of the *Civil Procedure Rules, 2010* done. It is vital at this point to note that the procedural requirement that parties file lists of witnesses and witnesses' statements is an obligation that is now embedded in our legal system and practice, and it is for good reason. It is a tenet that is anchored on the right to fair hearing which is Constitutionally entrenched. Article 50(1) of the *Constitution* 2010 is on spot over the same. Thus, it is an important fulfilment of the law that a party avails in advance the evidence that he/or she relies on in a case, to the adverse party so that the opposing party

has opportunity to confront the same and know the case before him or her. Long gone is the believe which must be disabused that it is a preserve of the practice of Criminal Law.

11. Therefore, the Civil Procedure Rules developed a deliberate mechanism of ensuring that parties to matters lay before each other before hand the evidence they have. Order 3 Rule 2 of the *Rules* then was adopted to firm up this position in regard to suits while Order 7 Rule 5 was made to take care of Defences and Counterclaims. Order 3 Rule 2 provides that: -

> " 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 rule1(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:"

12. Order 7 Rule 5 also provides that:

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by - (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim; (b) a list of witnesses to be called at the trial; (c) written statements signed by the witnesses except expert witnesses; and (d) copies of documents to be relied on at the trial."

13. The two provisions cited immediately above have a proviso to the effect that "...statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11." Therefore, first, only expert witnesses are exempted from having their statements recorded and filed in advance of the hearing. The meaning of expert witnesses is not a matter to draw a lot of energy and thought in finding it out. Suffice it to say that according to Brian A. Garner, in *Black's Law Dictionary* (Eleventh Edition) Thompson Reuters, 2019, St. Paul MN, p. 1922 an "expert" witness as:

> " A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder."

14. And in the words of the learned authors, Sarkar on Evidence, 10th Edition:

> " An expert, in order to be competent as a witness, need not have acquired his knowledge professionally; it is sufficient, so far as the admissibility of the evidence goes, if he made a special study of the subject, or acquired a special experience therein."

15. Only the witnesses who fit in the category of the persons defined above are the ones whose witness statements are not ordinarily to be found in the Court record other than the oral testimony of the said witnesses. But in case a party for any reason is prevented from filing a witness statement from other persons other than expert witnesses in advance, the provisos to the two Rules, and which as same, word for word, give room for the filing of such documents, with leave of the Court. However, a plain reading of the Proviso is that it should be done at least fifteen days before the trial conference envisaged under Order 11. The Rules do not provide for the subsequent filing of witness statements, whether with leave of the Court or otherwise. It would appear to me that once the pre-trial conference under Order 11 is done, only the witness statements that are filed prior to that time as per the provisions of the law are the only ones to be taken in as the evidence of the parties in form of statements.

16. It would also be in important to consider at this point the import of Order 11 of the Civil Procedure Rules. The Order should be read with Section 28 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and

Occupation of, and Title to Land and Proceedings in other Courts (Gazette Notice No. 5178). Section 28 (b) provides for the consequences of non-compliance of the regulations. These include striking out of pleadings or further sanctions as costs or similar sanctions. Order 11 of the Civil Procedure Rules provides for case management and conferences. At the trial conference, the parties indicate to the Court that they are satisfied that the case their evidence and pleadings are in order hence the matter ready for hearing. It therefore is vital that before a party certifies to the Court that the matter is ready for hearing, he/she shall have weighed his case and is fully satisfied that it is actually ready for hearing. Once that is done, the case is firmly fixed on the trajectory of hearing. A party then must demonstrate that the proposed evidence he seeks to bring in later than the one sealed in the pre-trial process would not, with all due diligence be available when the preparation of the case was underway. This he has to do to the satisfaction of the Court. It is not automatic that the leave be granted. It would be a mockery of the procedure and justice for a party to inform the Court for the sake of it or lie to or mislead it that the matter is ready only for him/her to come to the trial and change his mind to introduce more evidence which with due diligence he/she would have had and put in the Court file and turned over to the adverse party before the trial conference or fixing the matter for hearing. Also, it would be prejudicial for a party who has prepared for his case upon reliance of the others' disclosed information to be ambushed with further information about the case. Worse the position is when the hearing of the case has taken off.

17. Having found that the law applicable in relation to leave to file further witnesses' statements, I must determine one further issue attendant thereto. It is by solving the question: what then is the procedure for asking for leave to file the further witness statements? A reading of Order 3 Rule 2 and Order 7 Rule 5 does not give the procedure. The provisos thereto only provide that leave must be sought at least fifteen days prior to the pre-trial conference. It therefore means that what is open for a party is to rely on the provisions of the Civil Procedure Rules regarding Applications. Order 51 Rule 1 provides as follows, "All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide." It therefore goes without saying that an application for leave, since it is not provided expressly to be made orally or by way of chamber summons, should be made by way of Notice of Motion. This would set out the reasons for the failure to file the statements at the time of filing the Claim or Defence, and give more details as to what kind of evidence or witnesses are sought to be introduced. In my view, to raise the application orally in Court amounts to nothing but an ambush on the adverse party, is meant to steal a match, and it makes the application incompetent. I know that the Applicants are likely to think that the application of Article 159(2)(d) of the *Constitution* would have afforded an escape route for then in the sense that the requirement is a mere technicality. In my view, justice requires that the adverse parties be notified of the application in advance so that they too can prepare for its determination on merits. That would firm the right to fair hearing and trial being afforded them hence failure to follow this procedure amounts to prejudicing the other party hence perpetration of an injustice to them, and both the *Constitution* and the law generally do not countenance that.

18. Lately, I have seen, with mesmerism and abhorrence, a practice of law out there that is common but exasperating: of parties filing and exchanging documents piecemeal, seeking leave after another to add more and more, something akin to trial by instalments. Such practice not only occasions injustice to the other parties in the case but defeats the whole overriding objective of the law, of both Section 3(1) and (2) of the ELC Act and Section 1A (1) and (2) of the *Civil Procedure Act*, of just, expeditious, proportionate and efficient resolution of disputes, and Article 159(2)(b) of the *Constitution* that justice shall not be delayed. The law does not envisage such a situation. The practice ought to stop. Courts not to encourage this practice. A party has to show that he could not, with all due diligence, access the evidence at the time of filing the suit or his Defence or Counterclaim. To file witness statements in

'instalments' is nothing but a travesty of justice and a practice of unleashing secret weapons when met with strong cases or keeping cards under the table for mischievous ends other than those of justice. A party should endeavor by all means to present his case or evidence at once. Absent of that, the burden is higher for him to satisfy the Court why he did not avail the evidence at the first time he presented his case before the Court.

(b) Whether the application is merited

19. The Applicants moved the Court on for leave to permit them file a further list of witnesses. As rightly submitted by the Defendants, the Applicants did not lay the basis for making such an application. It was only upon the objection being raised that they sought to explain that the two witnesses intended to be introduced were officials of the 1st Plaintiff and that their evidence is crucial. It was not explained why, if at all the alleged officials' evidence was central to the Plaintiff's case they could not record their statements at the beginning and be part of the witnesses that were lined up for the Plaintiffs.

20. What I understood the Plaintiffs to mean by praying for leave to file further list of documents is that they seek extension of the time which is limited or fixed by the Civil Procedure Rules, and court by extension, to do an act which they ought to have done within the required time. Order 3 Rule 2 prescribes the time of filing witness statements to be limited to the filing of the Plaint or Claim, and if by any chance of delay there exist reason thereof, then it be done, with leave of the Court, at least fifteen (15) days before the pre-trial conference or directions being given. Once that period is past, the party can only then seek extension of the Court, if he has to, although I do not find any provision permitting that, by bringing himself within the confines of Sections 3, 3A and 79G of the *Civil Procedure Act*, Order 50 Rule 6 of the *Civil Procedure Rules, 2010*.

21. Where that happens, the principles of extension or enlargement of time for the doing of an act ought to be observed. First, it is worth noting that it calls for the discretion of the court which must be exercised judiciously in the interest of justice. The party seeking the exercise of that discretion, just as in any other discretionary power of the court should come to court with clean hands, not as the plaintiff's did in this matter by sneaking onto the record (and thereby purposefully proceedings to mislead the Court) a further list of witnesses and two witness statements. Moreover, of parties moving the court for extension of time to do an act required, it has been stated, in *Kiptoo arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR, as follows: -

> "...it is clear that discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion; extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the courts should exercise the discretion to extend time; is a consideration to be made on a case to case basis; where there is a reasonable (cause) for delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent if extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time."

22. I will determine the merits of the application before me, using the facts of the instant case singly. From the totality of the circumstances of this case, which include the Plaintiff's ingenious acts of

sneaking witness statements onto the record, of failing to move the court for leave to file further witness statements within a period of more than fifteen days before pre-trial, I am persuaded by the arguments by the Defendants, and I find so, that the proposed witnesses are only intended to avail evidence to fill in gaps left by the other witnesses who have either testified or have recorded their statements, to the prejudice of the Defendants. In any event, the suit has proceeded to hearing, and the matter is fixed for a last adjournment on the part of the Plaintiffs. It is an afterthought which is inexcusable. The act of seeking of leave to avail two other witnesses, after the Court had given a last adjournment to the Plaintiffs upon some of its witnesses testifying would serve to delay justice and prolong the suit indirectly and occasion injustice to the Defendants. In any event this suit was brought under certificate of urgency, and the Plaintiffs having obtained favourable orders now want to prolong it to the hilt. The Court is not prepared to see its process being abused. Justice delayed is justice denied. In this Court, each party is under obligation to conduct its cases efficiently and expeditiously as the law requires, under Sections 1A of the *Civil Procedure Act* and Section 3(1) and (2) of the *Environment and Land Court Act*.

c. What orders to make and who to bear the costs of the application

23. I have found that the application before me is wholly unmeritorious. I have little option but to dismiss it. Since costs follow the event, the applicant will bear the costs of the Application.

24. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF NOVEMBER, 2022.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE