



REPUBLIC OF KENYA



Ruto & another v Cherutich & 4 others (Environment & Land Case 322 of 2018) [2022] KEELC 15217 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15217 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 322 OF 2018
FM NJOROGE, J
DECEMBER 6, 2022**

BETWEEN

LINDA CHEPKORIR RUTO 1ST PLAINTIFF

MUNYAO SILA 2ND PLAINTIFF

AND

SALLY CHERUTICH 1ST DEFENDANT

PETER ONDANDE 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

NAKURU DISTRICT LAND REGISTRAR 4TH DEFENDANT

ATTONERY GENERAL 5TH DEFENDANT

RULING

1. Mr Wambeyi is in the process of leading the witness through his evidence-in-chief and he is referring to documents already produced in evidence by other witnesses. However, Mr Matiri feels that the limits within which the witness in the stand should give his evidence should be very narrow on two grounds:
 - (1) The witness, DW4 never recorded any statement in the matter that was detailed enough to capture those deep details he now testifies about,
 - (2) But for his wife's demise, DW4 would not be able to testify.
2. Ms Chepkurui for the 3rd, 4th & 5th defendants takes a more conciliatory path away from Mr Matiri's stringent objections and avers that to ensure no injustice is done, DW4 should be stood down to enable him file a further statement.



3. I have considered submissions of all counsel on Mr Matiri's objection. Order 3 rule 2(d) of the [Civil Procedure Rules](#) requires the plaintiff to file his witness statement in the suit with his plaint or in any event 15 days before the hearing and I have not heard any claim that they defaulted on that order in this case.
4. Order 7 rule 5 (d) of the [Civil Procedure Rules](#) requires the defendants to file his witness statements with the defence and it is apparent now that no witness statement was filed in compliance with that order. The only witness statement for the 1st defendant therefore is the scanty statement filed by DW4 on June 17, 2022. It is not clear why if the witness was in the know of the things that now seem to be emanating from his ongoing evidence they were not included in his statement either: -
 - 1) as an independent witness, to corroborate what the deceased had said in a statement;
 - 2) as the substitute to the deceased.
5. The witness statement he filed came on June 17, 2022 after his substitution for the deceased and he cannot be said not to have known the state of the record as he had counsel representing him all through the proceedings.
6. This court must eternally guard against the infilling of gaps in a litigant's case in breach of rules of procedure and in a manner that may occasion the other litigants considerable harm. When a plaintiff has conducted and closed his case there are only three options left for the defendant who has failed to comply with order 7 by filing his witness statement or documents.
 - 1) He may proceed with the hearing as the record is;
 - 2) He may with the consent of the other parties be allowed to file those items;
 - 3) He may at the discretion of the court be permitted to file those items.
7. At Ms Chepkirui's suggestion, Mr Wambeyi has taken up the submission that the witness may be stood down to enable him file a further witness statement and so obviously option (1) above does not appeal to him. The plaintiffs' counsel will hear none of the suggestion that there could be a consent as per option 2 above.
8. The 1st defendant is now left to the mercy of the court as per option No 3 herein above, but does he merit it?
9. This court has noted that by the time the said witness, DW4 came along, much of the defendants' case had been conducted while the original 1st defendant was alive, and yet no 1st defendant's statement had been filed during that period. There was therefore nothing to adopt as evidence of the original 1st defendant. When he stepped into her shoes he chose to file the very scanty statement dated May 23, 2022 fully aware there was no other statement on the record in favour of the 1st defendant.
10. It is clear that from the provisions in order 11 rule 1 to order 11 rule 4 of the [Civil Procedure Rules](#), parties are meant to prepare for the hearing and during this time further discovery may be allowed by the court. Beyond that, the other [rules](#) that follow in order 11 allow only for either a settlement or a hearing of the suit and no more, but I perceive that there could also be withdrawal of suit. No settlement is going on. No withdrawal is intimated. Only the hearing is proceeding now.
11. The probable consequence of adopting Ms Chepkirui's and Mr Wambeyi's submissions that the witness DW4 be stood down would be further delay in the hearing of this case, yet the original defendant was not demonstrated to be so incapacitated to the extent that she could not file a witness



statement while alive. Neither was the witness DW4 so incapacitated. It is noteworthy that the matter has been adjourned several times to allow for substitution.

12. In my view any filings should have been done during that period immediately after substitution. I think it is too late for the witness to be stood down as suggested, or for him to adduce evidence that is not in his witness statement. His ad libbing of evidence by way of going off the written details on the filed exhibits is also, in my view, likely to prejudice the plaintiffs, who have already closed their case and those two options should not be countenanced by this court as they may lead to a re-opening of the plaintiffs' case.
13. In the upshot, I allow Mr Matiri's objection and I order that save for commenting on what is on the face of the said exhibits DW4 shall not go off the path and give evidence the plaintiffs were not made aware of prior to closure of their case, no matter how relevant those extraneous details may be. This will avert any ambush upon the plaintiff. Hearing to proceed.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 6TH DAY OF DECEMBER, 2022.

MWANGI NJOROGI

JUDGE, ELC, NAKURU

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