



Kayoyo Investment Limited v Nesclay Limited & 7 others (Environment & Land Case E006 of 2022) [2024] KEELC 749 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEELC 749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E006 OF 2022
LN MBUGUA, J
FEBRUARY 13, 2024**

BETWEEN

KAYOYO INVESTMENT LIMITED PLAINTIFF

AND

NESCLAY LIMITED 1ST DEFENDANT

**PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL
PLANNING 2ND DEFENDANT**

DIRECTOR OF SURVEYS 3RD DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

GEEPEE GENERAL TRADING LIMITED 7TH DEFENDANT

**SAINT BENJAMIN MEMORIAL CLINIC SUPPLIES LIMITED 8TH
DEFENDANT**

RULING

1. I find that counsel for the plaintiff in the main suit has made an application that one Joseph Bonge be allowed to testify for the plaintiff on the basis that he is a director of the plaintiff in the main suit and 7th defendant in the counterclaim. He avers that the witness who was to testify for plaintiff in the main suit, one Wakangu has fallen ill. He further states that the interests of the plaintiff, the 6th and 7th defendants are similar and they don't have separate set of documents. That for good order, the 6th and 7th defendants should be made plaintiffs.



2. The prayers sought by the plaintiff's counsel (in the main suit) have been objected to by the rest of the parties. Counsel for the 1st defendant in the main suit (plaintiff in the counterclaim) avers that the move is geared towards derailing the trial, and that the plaintiff's case should be dismissed. While supporting the sentiments of the 1st defendant, the Attorney General contended that no witness statement has been availed by Mr. Bongeï in support of Kayoyo investments claim (the plaintiff).
3. In rejoinder, counsel for the plaintiff averred that Mr. Bongeï being a director of the company (plaintiff) can testify for the company. That if a narrow path is taken, it will amount to a violation of *the constitution*. That the defendants have not demonstrated the prejudice they will suffer if Mr. Bongeï gives his testimony.
4. I have perused the record and I find that this court conducted pre trial directions on 4.5.2023, 10.7.2023 and on 27.9.2023. During the pre-trial exercise, parties identified their pleadings, the witnesses they would call and their statements as well as the documentary evidence to be relied upon. In all these instances, the plaintiffs never indicated that they desired to have the 6th and 7th defendants as plaintiffs in the main suit. It is rather late in the day to make such an application.
5. As regards the prayer for Mr. Joseph Bongeï to testify for the plaintiff ostensibly because he is a director of both plaintiff and 7th defendant, I have gone through both the witness statements of the aforementioned parties. Nowhere in the statement of Mr. Bongeï does he mention the plaintiff. He only introduces himself as director of the 7th defendant. To this end, I decline the application made by Mr. Ogado for Mr. Bongeï to testify on behalf of the plaintiff.
6. On the averment that Mr. Wakangu feel ill this morning, I note that the issue was not brought to the attention of the court in the morning. When the matter was called out in the virtual platform at 9.00am, plaintiff's counsel had stated that he was not ready to proceed because they were looking for some documents from the ministry of lands. He also stated that there was an earlier order made by the court for the ministry of lands and director of survey to produce certain documents.
7. The court proceeded to schedule the matter for hearing in open court at 10.30.am. Mr. Ogado for the plaintiff did not appear in court on time and the case of his client, the plaintiff was dismissed while the case of plaintiff in the counterclaim took off at 10.55 am.
8. Mr. Ogado walked into the court room at 11.07 and his address to the court related to 3 issues:
 - i. A review of the dismissal of his case which the court obliged.
 - ii. An issue of service which was settled as he was served in court with documents emanating from the ministry of lands and survey.
 - iii. He tendered an apology, a general one.
9. Once the plaintiff's case was reinstated and he was served with the aforementioned documents, the counsel for the plaintiff addressed the court as follows "We can proceed with the hearing". It is only thereafter that the counsel for the plaintiff indicated that Mr. George Mwangi Wakangu, the witness for the plaintiff was taken ill in the morning.
10. What I discern is that the issue of the sickness of plaintiff's witness has been raised rather late in the day. In that regard, this court directs that the matter proceeds. And since the plaintiff in the main suit is absent, their case is hereby dismissed under Order 17 rule 4 of the Civil Procedure Rules.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS.



LUCY N. MBUGUA

JUDGE

In the presence of:-

Gichuhi for 1st Defendant

Allan Kamau for 2nd & 3rd Defendants in main suit and 2nd, 3rd & 5th Defendant in Counter Claim

Madi for 4th Defendant in Main suit and counter claim

Court assistant: Eddel

