



**Kirioba v Njomo & 9 others (Environment and Land Case Civil Suit 1510 of 2014) [2024] KEELC 1759 (KLR) (9 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1759 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1510 OF 2014**

**LN MBUGUA, J**

**APRIL 9, 2024**

**BETWEEN**

**SAMSON MAISIBA KIRIOBA ..... PLAINTIFF**

**AND**

**JAMES KAMORE NJOMO ..... 1<sup>ST</sup> DEFENDANT**

**JULIUS JOSEPH KABUI GITAU ..... 2<sup>ND</sup> DEFENDANT**

**MULI WAKYENDO ..... 3<sup>RD</sup> DEFENDANT**

**ANNE KERU MULI ..... 4<sup>TH</sup> DEFENDANT**

**JOYCE KANYUA MURITHI ..... 5<sup>TH</sup> DEFENDANT**

**ALICE KIBERI ..... 6<sup>TH</sup> DEFENDANT**

**GODFREY OYORO ODIDA ..... 7<sup>TH</sup> DEFENDANT**

**LEAH WACHECHI KARIUKI ..... 8<sup>TH</sup> DEFENDANT**

**ELIUD NG'ANG'A MURIMI ..... 9<sup>TH</sup> DEFENDANT**

**FRANCIS OSUMA ..... 10<sup>TH</sup> DEFENDANT**

**RULING**

1. Plaintiff's case was closed on 5.7.2022, of which on 7.2.2024, the court gave a date for judgment to be on 25.4.2024 without any evidence from the defendants.
2. The 7<sup>th</sup> defendant has now filed an application dated 12.2.2024 to arrest the delivery of judgment herein, that the case be re-opened and he be allowed to testify. The application is premised on the grounds set out on the face of the application and on his supporting affidavit. He has given a chronology of the events that took place on 7.2.2024, where by the hearing of the defence case was



- scheduled at 1.30.pm. He contends that he was disallowed by the security guards to access the court room. That he called his advocate who was in the court room to get him, and by the time they came to court, the court had given a date for judgment.
3. In his submissions dated 1.3.2024, the 7<sup>th</sup> defendant avers that he should not be driven from the seat of justice as that would be contrary to the rules of natural justice. He relies on the cases of Martha Wangari Karua vs. IEBC Nyeri Civil Appeal No. 1 of 20 17 and Juma Mohamed Mwachini vs. Samuel Hezron Kamunya.
  4. In opposition thereof, the plaintiff filed a Replying affidavit dated 20.2.2024 where he similarly gave a chronology of the events leading to the issuance of a judgment date without defence evidence. He avers that his advocate was even told to look for the defendants' advocates outside the court room, but the said defendant and his advocate were nowhere to be found.
  5. He pointed out that there is no witness statement on record for the 7<sup>th</sup> defendant, nor any documents, thus the evidence which the 7<sup>th</sup> defendant desires to present has never been disclosed to the plaintiff.
  6. His submissions are dated 4.3.2024 where he reiterates that the 7<sup>th</sup> defendant has no pleadings or witness statements and that the defendant has been given sufficient opportunity to represent his case. The plaintiff relied on the cases of Nginyanga Kavole v. Mailu Gideon [2019] eKLR, and Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & Another [2004] eKLR.
  7. I have considered all the arguments raised herein. The events of 7.2.2024 indicate that the matter was mentioned in the virtual platform in the morning around 9 a.m, when the matter was allocated time for defence hearing at 10.30.am in open court. At 10.30.am, the court proceeded to the open court where the 7<sup>th</sup> defendant was present with his advocate, Mr. Kinaro. Present too were the advocates for the plaintiff as well as those of the 1<sup>st</sup>, 2<sup>nd</sup> and 8<sup>th</sup> defendants. Preliminary issues arose relating to issues of service and whether the interlocutory judgment entered many years ago on 26.8.2002 should be set aside. Eventually the court delivered a short ruling stating that; "interlocutory judgment entered several years ago shall not be set aside, but the same shall only apply to liquidated claims. To this end, the 7<sup>th</sup> defendant is hereby allowed to tender evidence in so far as it makes reference to non-liquidated claims".
  8. With that, the court took a short health break and scheduled the defence hearing to commence at 1.30.pm. Come 1.30pm and the only person present was the advocate for the plaintiff. The court proceeded to mark the cases of defendants as closed and then gave a date for delivery of judgment.
  9. The court cannot ascertain if indeed the defendant was prevented from accessing the court room at 1.30.pm, and in the circumstances, I will give him the benefits of doubts. Thus I will not belabor on that point, any more save to add that the opportunity given to the 7<sup>th</sup> defendant to present his case comes with a rider, that the said evidence must have been known up front as at the time the plaintiff commenced his testimony on 7.11.2019.
  10. The legal regime governing the mode of presentation of evidence at that time was (still is) anchored in [the Constitution](#), the [Civil Procedure Act](#) and Rules as well as various practice directions.
  11. The provisions of Article 50 (1) of [the Constitution](#) stipulate that;  

“ Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



12. While Article 159 (2) (b) there of provides that;
- “justice shall not be delayed”
13. Order 11 of the Civil Procedure Rules, 2010 provides for pre-trial conferences which are meant to inter-alia aid in expeditious disposal of suits. To this end, courts are mandated to uphold the objectives set out under Article 159 (2) (b) and (d) as well as Section 1A, 1B, 3 and 3A of the Civil Procedure Act by exploring expeditious ways of introducing evidence upfront, hence the trial bundle is usually availed well in advance of the date of the trial.
14. The provisions of Section 1 A of the Civil Procedure Act stipulates that:
- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
15. The Practice directions too have not been left behind in the quest to achieve the overriding objectives set out in the Constitution and in the Civil Procedure Act and rules. The Practice Directions of 25.7.2014 (gazette notice no 5178) contain elaborate mechanisms of what should happen during the pre-trial exercise, At clause 28 (a) there of, the directions are geared towards;
- “The issuance of appropriate Orders and directions to ensure parties comply and take pre-trial conferences seriously as they constitute a vital stage in the overall case management and the efficient administration of justice”.
16. What resonates from the above laws, rules and practice directions is that courts are called upon to actively manage cases so as to shepherd the trial in a harmonious and speedy manner.
17. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the overriding objective is achieved. The overarching principles in Active Case Management are; the doctrine of predictability (Where there is certainty of the processes and outcome at every stage of the trial); Transparency; Accountability; Efficiency; Fairness; Just; and Expeditious trial.
18. The parties and their advocates too have a role to play in terms of adhering to the overriding objective as set out in the above cited laws, rules and practice directions.
19. In the case of Virginia Kathambimaingi v Nicholas Mwatika & 2 others [2021] eKLR, the court had this to say in relation to the above cited laws and rules;
- “The totality of the above provisions is that this court as well as the parties appearing before it together with their counsel, should at all times in the lifespan of any case they handle or are involved in, as the case may be, be guided by the overriding objective, which essentially



seeks to meet the ends of justice through the just, expeditious, proportionate, affordable and accessible resolution of disputes. Therefore, the law expects both the court and the litigants together with their counsel to embrace case management as a tool towards achieving the efficient administration of justice”.

20. Has the 7<sup>th</sup> defendant complied with the cited laws, rules and practice directions? Was the case of the 7<sup>th</sup> defendant known by the time the plaintiff commenced his testimony?.

21. The first port of call is the pleadings. What are the pleadings of the 7<sup>th</sup> defendant. It is trite law that parties are bound by their pleadings. This was the holding in the Court of Appeal case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR that;

“...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda ....”.

22. I have perused the entire file and the only document filed by the 7<sup>th</sup> defendant was a memorandum of appearance dated 17.3.2006 and filed on 24.3.2006. To date, 18 years down the line, no defence was ever filed. On 7.2.2024, the advocate for the 7<sup>th</sup> defendant informed the court that “the 7<sup>th</sup> defendant was adopting the defence of the 1<sup>st</sup> defendant dated 9.9.1997.” However, a perusal of the entire file reveals that the said pleading had not been adopted or ever mentioned by the 7<sup>th</sup> defendant as at 7.11.2019 when plaintiff testified. It follows that the pleading of the 7<sup>th</sup> defendant was unknown as at 7.11.2019, and reliance on a certain statement of defence 5 years later is untenable and unacceptable.

23. In the Supreme Court Case of Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR, the court emphasized that in absence of a foundational pleading, other documents were of no effect. Similarly in this instant case any evidence that the 7<sup>th</sup> defendant would desire to adduce is anchored on nothing in absence of a pleading.

24. Be that as it may, I find it expedient to capture the litigation history relating to the period when parties were directed to comply with Order 11. On 2.10.2017, it turned out that the defendants had not filed their trial bundles, but plaintiff had apparently complied. The court gave directions that; “all parties are directed to file and serve their duly paginated and indexed bundles within 45 days....”. The matter was then scheduled for hearing on 14.3.2018.

25. Come the date of 14.3.2018 and Mr. Kinaro for the 7<sup>th</sup> defendant (Applicants) stated that they had filed an application to cease acting, thus case was adjourned. 6 years down the line, the said advocate is still on record for the 7<sup>th</sup> defendant and there was no compliance with the court’s directions of 2.10.2017!

26. I handled this suit for the very first time on 9.11.2021 and during the mini pretrial exercise, Mr. Kinaro had addressed the court as follows; “We have no bundle. We only have a witness statement dated 17.11.2017”. That document is not in the court file. And even if it was, there is nothing to indicate that the same was availed to the plaintiff on or before 7.11.2019 when the plaintiff commenced his testimony.



27. In the case of *Moschion v Mwangi* (Environment & Land Case 350 of 2018) [2023] KEELC 17144 (KLR) (27 April 2023) (Ruling) Neutral citation: [2023] KEELC 17144 (KLR) where I dismissed 8 consolidated matters at the pretrial stage for the failure by the plaintiff to avail her witness statements, I stated thus;
- “These matters are already scheduled for hearing on June 26, 2023. The question is; What then is going for trial? The defendants are going to defend themselves against who? and what?. Nothing!. The logical route is to strike out the 8 matters”.
28. Still in the *Moschion vs Mwangi* case (supra), while making reference to the case of *Nginyanga Kavole v Mailu Gideon* [2019] eKLR, I stated that;
- “The right to be heard is sacrosanct and is embodied in the latin maxim “audi alteram partem”. However, a party is only entitled to a reasonable opportunity to be heard”.
29. In that case of *Nginyanga Kavole v Mailu Gideon* (supra), the court had this to say on the right to be heard:
- “What the applicant is entitled to is a reasonable opportunity of being heard on appeal and once that right is availed to him and he does not utilise it, he can no longer complain of being denied an opportunity of being heard ....”.
30. Similarly, this is a case of mere inaction that has persisted for decades on the part of the 7<sup>th</sup> defendant. And the logical conclusion to make is that the said 7<sup>th</sup> defendant is the one who deliberately drove himself from seat of justice.
31. The upshot of my findings herein is that allowing the 7<sup>th</sup> defendant to give evidence at this stage would fly against the known laid down laws and rules of procedure, and it also amounts to trial by ambush which is not acceptable. As such, the application dated 12.2.2024 is found to be unmerited, the same is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

M/s Kimani for Plaintiff

Court assistant: Eddel

