



REPUBLIC OF KENYA



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United States International University & 2 others v Estate of HE Daniel Toroitch Arap Moi & 10 others (Environment & Land Case 840, 771 & 1040 of 2016 (Consolidated)) [2024] KEELC 6670 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEELC 6670 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 840, 771 & 1040 OF 2016 (CONSOLIDATED)

MD MWANGI, J

JULY 9, 2024

BETWEEN

UNITED STATES INTERNATIONAL UNIVERSITY 1ST PLAINTIFF

MUTHAIGA LUXURY HOMES LIMITED 2ND PLAINTIFF

MAESTRO CONNECTIONS HEALTH SYSTEMS LIMITED 3RD PLAINTIFF

AND

ESTATE OF HE DANIEL TOROITCH ARAP MOI 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

DIRECTOR OF SURVEY 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

ICEA LION LIFE ASSURANCE COMPANDY LIMITED 5TH DEFENDANT

BALOZI COOPERATIVE SOCIETY LIMITED 6TH DEFENDANT

OMWANZA OMBATI 7TH DEFENDANT

ANDREW SUNKULI 8TH DEFENDANT

TRIPPLE OK LAW ADVOCATES LLP 9TH DEFENDANT

RILEY SERVICES LIMITED 10TH DEFENDANT

DPS INTERNATIONAL LIMITED 11TH DEFENDANT

(In respect of the 1st Defendant's Notice of Motion dated 11th June, 2024 seeking that the Court be pleased to strike out or expunge from the record of the Court, the 8th Defendant's list and bundle of documents dated 7th May, 2024)



RULING

Background

1. Before this Court is the 1st Defendant's Notice of Motion dated 11th June, 2024 brought under the provisions of Article 50 of the *Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 3 rule 2 and 4, Order 7 rule 5(d), Order 11 and Order 51 of the *Civil Procedure Rules*. The 1st Defendant/Applicant prays for an order that the Honourable Court be pleased to strike out or expunge from its record, the 8th Defendants list and bundles of documents dated 7th May, 2024.
2. The application is premised on the grounds on the face of it and on the Supporting Affidavit of Zehrabanu Janmohammed (S.C.) sworn on 11th June, 2024. The Applicant asserts that the 8th Defendant has without leave of the Court stealthily sneaked into the record of the Court its list and bundle of documents dated 7th may, 2024 in an attempt to introduce 3 sets of documents. It is the Applicant's position that at no point in these proceedings, since December, 2021, has the 8th Defendant sought or obtained leave to file any additional pleadings or documents in this case.
3. The Applicant avers that the 8th Defendant is introducing new evidence after the Court has substantially proceeded with the hearing of this case. The Applicant points out that several witnesses have already testified on the basis of the pleadings and documents already filed by the parties. The Applicant accuses the 8th Defendant of bad faith calculated at stealing a match on all the parties in these proceedings especially after damning evidence came to the fore during cross-examination of the 2nd Plaintiff's 2nd witness concerning the conduct of the 8th Defendant.
4. The Applicant avers that if the Court allows the 8th Defendant's documents, it will open a Pandora's box where any party can file documents as and when they wish to in order to fill in gaps in evidence and panel-beat their respective cases.
5. In his reply, vide the Replying Affidavit sworn on 19th June, 2024, the 8th Defendant deposes that the filing of the documents goes to the core of the allegations against him by the 1st Defendant to the effect that he was a 'stranger and interloper'. He states that if he is disallowed from presenting the documents filed in Court, it will result in his case being suppressed and the 1st Defendant will succeed on the false allegations against him. The documents filed are in support of his pleadings and seek to demonstrate that he was not a stranger to the late Daniel Toroitich Arap Moi and indeed had financial dealings with him.
6. The deponent explains that he could not have filed the three documents earlier on because he had not previously come into possession of the Nairobi Law Monthly, Issue No. 3 of March, 2012. His attempts to procure the bank statements on the other hand did not bear fruits since Transnational Bank had been sold to Access Bank and he had been told to wait until audit was concluded. He further states that he had misplaced the photographs he has filed before the court and only came across them recently while moving houses.
7. The 8th Defendant pleads that he filed his list and bundle of documents in good time giving the parties adequate time to prepare for the hearing. He alleges that he intended to orally seek leave of the Court to have the documents admitted as part of the Court record on the next hearing date rather than filing a formal application which could have derailed the hearing of the case.
8. The 8th Defendant further asserts that since the hearing of the suit is yet to be concluded, any party who may have closed its case has an opportunity not only to cross-examine on the documents filed but



also recall witnesses for purposes of commenting on the said documents. The 1st Defendant/Applicant is yet to adduce any evidence and will therefore have a full opportunity to address the documents filed and cross-examine the 8th Defendant on them.

9. The deponent states in his affidavit that the law does not prohibit later filing of documents and that the only time a party would be precluded from filing documents is when it would cause prejudice to other parties in the suit which is not the case in this matter. It is the 8th Defendant's position that the application by the 1st Defendant amounts to double standards since the 1st Defendant as well as other parties too have filed documents after hearing of the main suit kicked off.
10. The 8th Defendant at paragraph 16 of his affidavit lists the documents and statements allegedly filed after the commencement of the suit. He insists that the 1st Defendant too has previously filed documents without leave of the Court and subsequently sought to have them deemed as duly filed.
11. The other parties took various positions in regard to the application by the 1st Defendant; with some supporting it and others opposing it.
12. The parties participating in the hearing of the application filed skeleton submissions which were highlighted before the Court. The skeleton submissions and the proceedings recorded during the highlighting now form part of the Court record. I will not replicate them in this ruling.

Determination

13. As I make this ruling, I am minded that this is a Court of record. Whatever decisions are made in this Court are binding on the subordinate Courts. Further, I cannot overemphasize the need for certainty, consistency and predictability in the application of the law and rules, in the conduct of civil proceedings to give assurance to the public and the practitioners before our Courts that there is a certain way and a clear manner in which things are done. That is one of the ways in which we maintain confidence in our legal system.
14. This determination is not in respect to the relevance of the documents filed or the or on their admissibility in evidence. The issue in my mind at this juncture is whether the list of documents was procedurally filed in court and if not whether the documents should be expunged from the record of the Court.
15. I do entirely agree with Odunga, J (as he then was) in the case of *Interactive Gaming & Lotteries Ltd v Flint EA Ltd & 2 Others* (2013) eKLR, where he stated that the provisions of Order 11 of the *Civil Procedure Rules*, are meant to ensure that parties to a suit disclose their evidence upfront before the commencement of the hearing of the suit in order to avoid trial by ambush. He made reference to his earlier decision in *National Bank of Kenya Ltd v John Aswani Litondo & Another*, (NBI HCCC 171 of 2016, where he had stated that;

“The rationale of Order 11 is to discourage trial by ambush and ensure that the provisions of Section 1A and 1B of the *Civil Procedure Act* are meaningfully implemented to create a level playing field for all the parties before the Court by ensuring the principle of equality of arms is maintained and as far as practical to place the parties on equal footing. To conceal documents until after the Plaintiff's case is closed was the kind of mischief that the rules intended to cure trial by ambush is no longer acceptable in civil litigation.”

16. Order 11 of the *Civil Procedure Rules* essentially requires that parties file all their documents and witness statements before the case is confirmed for hearing. It is contemplated that parties will agree on the issues in dispute as well as finalize all preliminary issues and discoveries before the case is confirmed



ready for hearing. Ideally once a hearing begins no more documents or witness statements should be allowed.

17. The intentions of Order 11 are noble and I have no doubt in my mind that if there was full compliance with the Order, in the manner and form contemplated therein, cases would be disposed of expeditiously and without interruptions as we are now facing in this case. Parties in any case are obligated to comply with the rules. The rules, as Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR stated:

“...serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. (It is)the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

18. Courts however, retain a double-edged inherent jurisdiction; on the one hand to make such orders as may be necessary to ensure that the ends of justice are met and on the other hand to prevent abuse of the process of Court. That is the jurisdiction that a Court would resort to in allowing the filing of documents even after the commencement of the hearing in deserving cases upon considering the unique circumstances of each case.

19. Therefore, where a party intends to file documents and or witness statements outside the timelines provided under the Rules the party may invoke the inherent jurisdiction of the Court by laying a basis for the Court to exercise that discretion in its favour. The application for leave fortuitously would serve the purpose of notifying the other parties of the Applicant’s intention.

20. As Odunga, J noted in the above cited of *Interactive Gaming & Lotteries Ltd v Flint EA Ltd* & 2 *Others* (*supra*);

“The grounds which would justify such a cause would be akin to those that justify the addition of evidence after trial which includes but not limited to showing that the evidence adduced could not despite the exercise of due diligence be obtained earlier on in the proceedings and further that the said evidence is crucial to the party’s case and no prejudice will be occasioned to the other side.”

21. The 8th Defendant proceeded to file the impugned list and bundles of documents way after the hearing of this case had commenced and without seeking leave of the Court.

22. Accordingly, I find merits in the 1st Defendant’s application dated June 11, 2024 and proceed to expunge from the record of the Court the 8th Defendant’s list and bundle of documents dated May 7, 2024. The 1st Defendant shall have the costs of the application against the 8th Defendant.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF JULY 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:-



Mr. Ashitiva for the 1st Plaintiff

Mr. Githara with Mr. Kago for the 2nd Plaintiff

Mr. Musyoka for the 3rd Plaintiff

Mr. Elkington for the 8th Defendant also h/b for Mr. Katwa for the 7th Defendant

Mr. Allan Kamau for the 2nd, 3rd, and 4th Defendants

Mr. Kiche for the 9th Defendant

N/A for the 5th, 6th, 10th and 11th Plaintiff

Yvette: Court Assistant

M.D. MWANGI

JUDGE

