Big Tree Farm Limited v Rono & 25 others (Environment & Land Case 104 of 2018) [2024] KEELC 13555 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13555 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 104 OF 2018

FO NYAGAKA, J

DECEMBER 3, 2024

BETWEEN

BIG TREE FARM LIMITED ..... PLAINTIFF

AND

MARY ANGOLA RONO & 25 OTHERS ..... DEFENDANT

RULING

1. This suit was fixed for hearing on various occasions but did not proceed for one reason or other, particularly, at the instance of the Plaintiff. Then on 17/11/2021 when the Plaintiff was not ready to proceed once more, the Court gave it a last adjournment. It also ordered that the party pays the costs of the Defendants. It fixed the suit for hearing on 01/02/2022. On the material date, the Plaintiff did not once more proceed with its case. The Court dismissed the same with costs to the Defendants. It ordered further on the said date that the Defendants' Counterclaims be heard forthwith.

2. On that date the 1st Defendant testified on her Counterclaim as DW1. She testified that on 24/09/2007 she entered into a written agreement with one Geoffrey Kilwake Wabuge for the purchase part of the suit land. In respect to her Counterclaim, she produced as D.Exhibit 3 a copy of an Agreement entered on that date by her and Geoffrey Kilwake Wabuge, and as D.Exhibit 4 a copy of an acknowledgement dated 16/02/2008, for payment of a further sum of money. These two documents formed part of the other set of documents the 1st Defendant relied on in her evidence at the trial. She closed her case for the Counterclaim in the same manner as other Defendants who testified in regard to their counterclaims.

3. With the Court retired to write the Judgment in the case, it turned out that the D.Exhibit 3, the photocopy of the agreement dated 24/09/2007 was, in some few parts, not very legible. By this time all the parties who participated in the proceedings herein had filed their written submissions on their and the others' cases, hence there was no issue pending as to the admissibility or proof of the documents relied on by the parties. The Court, therefore, put on hold the preparation of the judgment pending the following step. It called upon the parties to attend Court during a mention of the matter, for the

1st Defendant to produce a clearer copy of the document, in the presence of all the parties so that they would compare the same with D.Exhibit 3 and confirm that indeed the clearer document was a replica of the unclear one so that the Court would proceed to complete preparation of the Judgment. Thus, all that the Defendant was supposed to do was to avail a clearer but exact copy of D.Exhibit 3 for use by the Court.

4. After several mentions of the matter, without any meaningful progress regarding the directions that court gave, the 1st Defendant filed the instant application, dated 26/09/2024. She brought it under Sections 1A, 1B and 3A of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules, Article 51(1) and 159 of *the Constitution*, and Sections 3, 13 and 18 of the *Environment and Land Court Act*, and Sections 68(1)(c) and 69 of the *Evidence Act*. She sought the following orders:-

    1. The defendant/applicant herein be granted leave to rely on and produce photocopies of the agreement dated 24th September 2007 in place of the original, on account of loss / misplacement or destruction of the original.

    2. Costs be provided for.

5. She based the Application on six (6) grounds, being, that the original was given to the 1st defendant but surreptitiously taken away from her. Further, counsel who did the agreement (sic) admitted the existence of the original copy produced at the same time as the defendant's copy. Both original copies were unavailable. The 1st defendant was a party to the execution of the original. The court had powers to order the production of a copy. There was no objection to the production of the documents availed.

6. The application was supported by the affidavit of the first defendant sworn in on 26/09/2024. She repeated the contents of the grounds of the Application. She added that at the time she filed the List of Documents dated 23/11/2018. The Plaintiff/ Respondent filed Minutes of meetings at the E-Wabuge Farm on 17/01/2018 of which Minute 2/1/2018 constituted a harmonization of a List of buyers. Further, the Minutes confirmed that Geoffrey Wabuge affirmed that he was willing to have all genuine buyers settled once and for all, but first attempts had been met with difficulties emanating from authentication of various agreements purportedly signed by his other family members. The family members had to go through the said agreements when different lists were produced at the meeting and some buyers claiming they had been allocated land did not have agreements. She annexed as MAR 1, a copy of the Minutes. She also annexed as MAR 2 a copy of a List of buyers presented to the County Commissioner on 20/03/2017 wherein, she appeared as No. 1. She annexed as MAR 3 and 4 copies of letters dated 20/09/2023 and 19/04/2024 which her Advocates wrote to the farm of Kidiavai and Company Advocates inquiring about the original documents. She annexed and marked as MAR 5 a letter dated 25/04/2024 from the firm of Kidiavai and company advocates confirming that indeed the agreement was made at his offices but was amongst the documents disposed of. She deposed that for that reason she did not have the original documents.

7. The Applicant filed a Further Affidavit sworn by herself on 22/10/2024, to which she annexed as MAR 1 a copy of the sale agreement dated 24/09/2007.

8. The application was opposed through a Replying Affidavit sworn by Grace Nakhumicha Wabuge on 30/10/2024 and filed the same date. She deposed that she was one of the directors of the plaintiff company and competent to swear the Affidavit. She swore that she never entered into an agreement with the 1st Defendant who was never in occupation of the suit land in the first place, that is on LR No. 8986 owned by the Plaintiff. She stated that she was surprised that the firm of Kidiavai and company advocates did not have the original agreement. She had never been to Kidiavai's Office. The documents are annexed to the applicant's Affidavit was alleged to be drawn by Kidiavai & Company Advocates but

attested in the office of Michael Wafula advocate yet there had always been several advocates in the office of Kidiavai and company advocates. She was not the administrator of the Estate of Geoffrey Kilwake Wabuge. The photocopies produced by the Applicant were suspicious and may have been self-made.

9. Further, M/S Kidiavai and company advocates did not confirm that the agreement had been made in their offices and that Mr. Kidiavai Advocate was not the one who signed the letter. Michael Wafula should be the right person to testify in over the Agreement in question. It was surprising that the Applicant stated that all along she had a better copy of the agreement, yet it was never availed (to Court). She opposed the application.

10. The application was canvassed by way of written submissions. The Plaintiff/Respondent filed its submissions dated 11/11/2024, the following day. The applicant opted not to file submissions. The 7th, 11th, 21st and 24th Defendants supported the Application.

11. This court has considered the Application, the law and the submissions by the Respondent. The only question for determination is whether the application is merited, and who to bear the costs thereof.

12. In regard to the merits of the application, this Court is of the view that the Application cannot be considered in a vacuum. It has to be weighed against the Court record. This is particularly important in relation to the documentary evidence the 1st Defendant prays for consideration in the instant Application and the summary of the record given at the beginning of this ruling.

13. At this point it is important to remind parties of the stages of adduction of evidence, particularly, documentary evidence. Section 64 of the *Evidence Act* provides that,

> " The contents of documents may be proved either by primary or by secondary Evidence." Section 65 provides also that, "(1) Primary evidence means the document itself produced for the inspection of the court."

14. Flowing from the two provisions, the stages of production of documentary evidence, which are basically four, come into play. In Lwangu v Ndote (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10th November 2021) (Ruling), this Court held:-

> 9. Before a document was produced to show its contents, its existence or state/physical appearance (whichever was relevant to the proceedings before the court), it passed through three stages if it was the original or four if it was the secondary that was available.
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> 1. First, the document was filed in court (according to the rules or legal requirements). If the party had not complied with the rules of filing the documents, he had to seek leave of the court to be permitted to file them out of time. The court had to be satisfied with the reasons why the party failed to comply with the rules. It was not a walk in the park for a party who failed to comply with the timelines set by law or an order of the court. Even article 159(2)(d) of *the Constitution* that parties often relied on did not come to the aid of all parties in all situations. Each case had to be treated on its own merits. Even so, the bar for convincing the court to exercise its discretion to permit documents to be filed out of time was higher than the usual standard.
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> 2. Second, if the document was not the original, that was to say, it was secondary evidence, the party had to show the copy to the other parties and the court first. Then he would proceed to lay the basis for the production of the copy and not the original. That had to fall within the usual standard of satisfaction of the requirements of reliance on secondary evidence.

3. Third, once the court was satisfied that the party had laid a proper basis for producing secondary evidence of the document, it then permitted the party to lay further basis for the production of the document. That had to be in according with the rules of relevance and admissibility in the law of evidence.

4. Once, the above was complete, then the party had to prove the contents, state or physical appearance of the document.

10. The party that sought to rely on a document to prove the issue in court would not succeed to do so unless the court exercised its discretion under section 69(iv) of the *Evidence Act* to dispense with the need for the production of the document. The mere marking of a document for identification did not dispense with formal proof. When called upon to form a judicial opinion on whether a document had been proved or disproved or not proved, the court would look not at the document alone but would take into consideration all facts and evidence on record."

15. Similarly, in Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR the Court of Appeal gave a summary of the three stages. At paragraph *18*, their Lordships stated thus:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

16. In regard to the instant application, it is clear from the court record that the receiving of evidence in suit was concluded. Thus, in terms of adduction of documentary evidence, especially in regard to the agreement dated 24/09/2007, all the above stages had been taken by the 1st Defendant. Even in terms of other evidence, the plaintiff on the one part and the defendants on the other part had exhausted their opportunities at the trial. The only issue that arose was the legibility of the document produced by the 1st defendant as D.Exhibit 3, the copy of an agreement in issue. Arising from that this Court wished only to receive a clearer copy from the parties. At no point in time did the court set aside the evidence already adduced on the part of the first defendant or indeed the other parties, more so that the 1st Defendant did enter into an agreement with one Geoffrey Kilwake Wabuge, a copy of which she produced as D.Exhibit 2. Had it done so, it could have raised the issues the parties contend herein now but it did not. Therefore, the evidence still stands and is part of the record.

17. The 1st Defendant and Plaintiff missed the point. All that the Court wanted from the parties was for the 1st Defendant to avail a similar but clearer copy to the D.Exhibit 3 for comparison and confirmation by consensus or to the satisfaction of the Court that indeed the clearer copy was the

replica of the D.Exhibit 3. To that extent, then the prayer by the 1st Defendant for leave to rely on and produce photocopies of the agreement dated 24/09/2007 in place of the original was at best a misconception, misdirection or misapprehension of the directions of the Court and the status of the evidence on record. It follows then the contention of the parties herein in regard to the instant application was misplaced and the Court need not dwell on the irrelevant facts and arguments thereto. The Application, the response thereto and even the support of the 7th, 11th, 21st and 24th Defendants are not merited. This Court do only one thing which is to dismiss the application with no order as to costs.

18. That being the case the Court is left with one issue which it placed before the parties. It is whether the 1st Defendant has discharged the burden of giving the Court a legible or clearer copy of D.Exhibit 3. This Court has, in the interest of justice, scrutinized the annexture marked MAR 1 to the Further Affidavit sworn by the 1st Defendant on 24/10/2024 and compared it with D.Exhibit 3.

19. The Court finds that there is no difference in content and print between Annexture MAR 1 and D.Exhibit 3. The Court is of the further view that the Annexture MAR 1 to the Further Affidavit answers the concerns it had regarding D.Exhibit 3, for the following reasons. At the top part of the D.Exhibit 3, particularly the heading, it was fairly faded towards the right side of it where it reads "Republic of Kenya". When that part is compared with Annexture MAR 1 it is the exact print and read. Similarly, the part of the D.Exhibit 3 which, at the part of the date of the agreement being 24/09/2007 which was fairly faded where it was written in words, it is clearer on the annexture than on D.Exhibit 3. Also, the prints of paragraph *7* which were slightly faded all are clearer and legible on the annexture. Those were the only concerns the court had while preparing the judgment. Since the annexture matches in every respect with the document produced as D.Exhibit 3, the Court is satisfied that it can now proceed with the completion of the judgment.

20. Therefore, this Court now shall deliver the judgment herein on 20/12/2024.

21. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM ON THIS 3RD DAY OF DECEMBER, 2024.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Kiarie Advocate----------for Plaintiff

Wanyonyi Advocate----------for the 1st Defendant

Bororio Advocate------for the 7th, 11, 21st and 24th Defendants