



Kapese Community Charitable Trust v African Camp Solution (Environment & Land Case 11 of 2023) [2024] KEELC 13532 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 11 OF 2023
FO NYAGAKA, J
DECEMBER 3, 2024**

BETWEEN

KAPESE COMMUNITY CHARITABLE TRUST PLAINTIFF

AND

AFRICAN CAMP SOLUTION DEFENDANT

RULING

1. When this matter came up for further hearing of its case, following its re-opening for purposes of PW3 testifying over a document which had been marked for identification, the said party made an oral application. It was for prayers that this Court grants it leave to have the Supplementary List of Documents and Supplementary List of Witnesses both dated 13/11/2024 to be duly filed and served, and that the said party does rely on them for its case. Learned counsel submitted that the two documents were regarding Kitale ELC Case No. 17 of 2020 which was between African Camp Solution and Tullow (K) BV. She prayed that the Deputy Registrar of the Court be called to produce documents as the pleadings therein and contents thereof related to how the suit was compromised, and the facts would be subject to the written submissions they would make for the benefit of the court. She stated that, however, if the court file were traced there would be no need for the grant of the orders prayed for since the court would have the opportunity to peruse the file and make its own determination. She prayed that leave be granted to the Plaintiff to file the documents out of time in terms of Order 11 of the Civil Procedure Rules because they went to the core of the instant matter.
2. At first, learned counsel for the Defendant objected to the oral application stating that it ought to have been made formally and not orally. However, he stated that in the interest of justice he would have no objection if the Defendant's application dated 15/11/2024 too would be allowed.
3. In response counsel for the plaintiff objected to the grant of the orders prayed for in the Application dated 15/11/2024. She argued that to grant the application would mean that the Defendant would have stolen a match against her client. Further, to call additional witnesses at the stage of the case,



when the Defendant had closed its case was tantamount to the Defendants patching up their case. The Plaintiff's contention was that the Defendant ought to have had in their possession the documents they sought to introduce at that stage.

4. The Court gave the parties time to respond to and submit on the Application dated 15/11/2024 but reserved a ruling date for the oral Application hence this ruling.
5. This Court has considered the oral application. It has also considered the law and the submissions by both counsel for the parties herein. Since the Application dated 15/11/2024 was opposed, the oral application would have automatically become opposed, but it was not. The good faith and interests of justice as envisioned by the Defendant remained the core of the response by the party. Thus, the olive branch extended by the Defendant to the Plaintiff was rejected but it remained extended.
6. This Court has considered the Application, the submissions by learned counsel and the law. The only one issue for determination is whether the Application is merited or not.
7. The law regarding the filing of documents and statements on the part of a Plaintiff, which is the relevant party in the instant application Order 3 Rule 2 of the *Civil Procedure Rules*. It provides for the procedure to be followed by the Plaintiff, Petitioner or Claimant when filing his suit, petition or claim by stipulating which documents must as of necessity accompany the Plaintiff and which ones, if any, may be filed later. It provides that:

“All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by-

- (a) the affidavit referred to under Order 4 rule1(2);
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”

8. This Court has had occasion to discuss the import of such a provision in the case of *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR. In it, it held that:

“I remind the parties herein and all and sundry that I have noted the silence by the Rules Committee as to the consequence of failure to comply with the Rule. Also, there is no provision that permits a party to file documents after the Plaintiff or Defendant has not complied with the Rules. In addition, Rule 28 of the *ELC Rules* provides that:

“In addition to the matters contained in Order 11, Rule 3 of the *Civil Procedure Rules, 2010*, the following are the orders/directions that may be issued by a Judge during a pre-trial conference:

- (d) The issuance of summons for witnesses to attend court to testify and/or produce documents, and for the filing of Witness Statements in respect of such witnesses.
- (e) The issuance of an Order requiring the filing of more comprehensive Witnesses Statements;



- (f) The issuance of an Order that the parties agree and narrow down issues for trial.
- (g) Taking of all objections to the production of specific documents, where notice has been issued to the other party, thereafter, objections on the production of any document shall not be entertained at the main hearing;
- (h) The issuance of Directions that a matter shall be determined through filed witness statement(s) and bundle of documents.”

9. What appears to me to be the proper interpretation of the relevant part of the Rule that I have reproduced is that even where a situation calls for a party to be permitted to file additional documents or detailed statements, that happens only at the Pretrial Conference when directions are being given by the Judge and leave is granted therefor. It is not open for a party to come to court afterwards for leave to file additional documents. What the Rule imports is that by the time parties indicate at the pre-trial conference that they are ready for hearing, and do not require additional documents or witnesses for that matter, they have assessed their case and known that it is up to date and tight enough to be sustained with the evidence already presented to both the Court and the other side.
10. To otherwise keep bringing in new evidence or witnesses as and when the matter comes to court, and at any stage, amounts to conducting a trial by instalments. It is akin to a party keeping peeping into a smokescreen and when they see clearly the adverse party’s case and realise that that case is an iron curtain, they go back to the drawing board in order to bring into their aid x-rays and scan machines to use to go through the curtain. This is not only trial by ambush but an unfair trial. It amounts to stealing a match over the other party. Litigation should not be a do or die game. It is all about truth and justice. Moreover, there was a reason why the rules of practice and procedure were put in place. The mischief that Orders 3(2) and 7(5) of the *Civil Procedure Rules* and 28 of the *ELC Rules* sought to remove was the cases where parties lay in wait to ambush the other side thereby occasioning unfair trials.
11. While the finding of this Court, as reproduced above, is the proper position in law, particularly where parties do not consent to enlargement of time, this Court needs to consider one important provision in the *Civil Procedure Rules*, regarding failure of parties to comply with the timelines set by the law or the Court and there is a prayer for enlargement of time and the parties or adverse party(ies) consent(s) to a request for enlargement of time. Order 50 Rule 6 of the *Civil Procedure Rules* provides:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

12. And Order 50 Rule 7 of the *Civil Procedure Rules* provides:-

“The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court”



13. From the facts of the instant matter, the Defendant did not object to the leave being granted to the Applicant to file the further List of Documents and Witness Statement. In essence it consented to the enlargement of time, in the interest of justice. The only difference between the consent the Defendant gave and the one envisaged by the Rules is that the parties did not record the same or put it in writing. Be that as it may, it is as good as the one written and signed by the parties. This Court therefore adopts the same and grants leave to the Plaintiff to have the List of Documents dated 13/11/2024 together with the List of Witnesses dated and filed the same date, admitted as part of the court record.
14. Further directions regarding how the further hearing shall be conducted shall be given after the determination of the Application dated 15/11/2024.
15. 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:

Chebet-----Plaintiff

Chemoiwa-----for the Defendant

