



REPUBLIC OF KENYA



KENYA LAW
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**Kareithi v Barclays Bank of Kenya & 3 others (Environment & Land
Case 51 of 2017) [2023] KEELC 454 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 51 OF 2017**

JO OLOLA, J

FEBRUARY 2, 2023

BETWEEN

SAMMY KAREITHI PLAINTIFF

AND

BARCLAYS BANK OF KENYA 1ST DEFENDANT

MUGA AUCTIONEERS & GENERAL MERCHANTS 2ND DEFENDANT

ROSS XAVIER WITHEY 3RD DEFENDANT

KENYA LIVESTOCK FINANCE TRUST 4TH DEFENDANT

RULING

1. By the Notice of Motion dated 24th May 2022, Rose Xavier Withey (the 4th Defendant) prays for orders that:
 - (a) ...
 - (b) Upon hearing the application inter-partes, leave is granted to the 4th Defendant to file and serve a further Witness Statement and Additional List of Documents;
 - (c) The 4th Defendant's Further Witness Statement and Additional List of Documents filed and served with this application are deemed as duly filed and served.
 - (d) Leave is granted to the 4th Defendant to file Case Summary out of time.
 - (e) The 4th Defendant's Case Summary filed and served with this application is deemed as fully filed and served;
 - (f) The costs of the application shall be costs in the cause.



2. The application is supported by an Affidavit sworn by the 4th Defendant and is premised on the grounds inter alia that:
 - (i) The suit is part-heard and is due for further hearing;
 - (ii) In February, 2021 companies where the 4th Defendant is a director purchased Naromuru Block 1/Ragati/390 which is adjacent to Naromuru Block 1/391 the suit land; and
 - (iv) The additional evidence is relevant to the fair adjudication and determination of the suit.
3. The Plaintiff is opposed to the application. In a Replying Affidavit sworn on his behalf by his authorized Attorney and Agent George Wanderi Karanja the Plaintiff avers that upon the 4th Defendant's belated joinder in the matter on 5th May 2021, the Court directed that he files his pleadings and related documents within 14 days from the Ruling date and that he filed his defence and counter-claim on May 17, 2021 but neglected, failed and/or refused to file his documents as directed by the Court.
4. The Plaintiff further avers that the 4th Defendant proceeded without leave of the Court to file his List and Bundle of Documents, Witness Statements and List of Witnesses on 15th July 2021. The Plaintiff further avers that the matter went for pre-trial subsequently before being set down for hearing and the 4th Defendant had numerous opportunities to produce the evidence but deliberately failed to do so.
5. The Plaintiff avers further that he has already testified and closed his case on 25th January, 2022 and the new evidence which is sought to be introduced is an afterthought coming late in the day and will prejudice his case if admitted.
6. The Plaintiff further asserts that the suit land – Naromuru Block 1/Ragati/391 has no nexus with the other property mentioned as Naromuru Block 1/Ragati/390 in the 4th Defendant's documents.
7. I have carefully perused and considered the 4th Defendant's application as well as the objection thereto by the Plaintiff. I have similarly considered the oral submissions and authorities placed before me by the Learned Counsels representing the two Parties.
8. The 4th Defendant herein urges the Court to grant him leave to file and serve a Further Witness Statement and an additional List of Documents. It is his case that he purchased property at an auction and that there is information which he wants to bring to the attention of the Court to enable the Court make a fair adjudication and determination of the matters in dispute.
9. The application by the 4th Defendant is supported by a brief 7 – paragraph Affidavit wherein the Defendant deposes in the relevant portion as follows:
 - “2. That I wish to adduce further evidence in this suit and say that I am a director of Silale Limited, Mobile Expeditions Limited and Samatian Island Limited which together as purchasers purchased Naromuru Block 1/Ragati/390 in February, 2021;
 3. That Naromuru Block 1/Ragati/390 and Naromuru Block 1/Ragati/391 are adjacent and belonged to brothers George Njeru Kariithi (the vendor of Naromuru Block 1/Ragati/390) and Sammy Kanyi Kareithi (the Plaintiff) respectively;
 4. That I ask the Court to allow me to produce the annexed additional witness statement and additional list of documents together with the copy of the



agreement for sale. I mark the bundle “RXW-1”. I ask that the agreement be admitted as document marked “RXW-6” to follow the Ruling of the Court delivered on the 5th May, 2021 which is marked “RXW-5” in my list and bundle of documents of 14th July, 2021;

5. That the agreement for sale dated is dated 24th February 2021 between George Njeru Kariithi and Silale Limited, Mobile Expeditions Limited and Samatian Island Limited. I signed as one of the purchaser’s directors; and
 6. That I believe that the additional evidence is relevant to the circumstances of the suit and the suit land. George Njeru Kariithi informed me that the two parcels of land had been one shamba of their father and was split between the two brothers by their father who bequeathed it to them.”
10. As it were, from a perusal of the record herein, this suit was initially instituted in Nakuru in the year 2015 being Nakuru ELC Case No. 133 of 2015 before it was subsequently transferred to this Court in the year 2017. Two years after its transfer and by a Notice of Motion application dated 30th August 2019, the 4th Defendant/Applicant herein applied to be enjoined as a Defendant on the ground that he was a person directly affected by the suit and whose presence would enable the Court to effectually and completely adjudicate upon all the issues in controversy.
 11. Having heard the application and by the Ruling delivered herein on 5th May 2021, the Honourable Justice Y. M. Angima allowed the Applicant to be enjoined as the 4th Defendant and directed that the Applicant was at liberty to file any pleadings or affidavits in the matter within 14 days from the date of the ruling.
 12. Subsequently on 28th July 2021, the Parties appeared again before the Learned Judge for pre-trial whereat the record reveals that all Parties including the 4th Defendant/Applicant indicated that they had filed their documents and were ready for hearing. Perhaps given the then prevailing situation in which there was no substantive Judge for this Court, the Learned Judge granted the Parties another 30 days to file and exchange any additional statements and or documents they would wish to rely on at the trial. The matter was then fixed for further mention on 11th October, 2021 when apparently the Court was not sitting.
 13. On 17th November 2021, the Parties appeared before me and confirmed their readiness for hearing. This Court then fixed the matter for hearing on 25th January, 2022. On that date, the Plaintiff testified and was examined extensively by Counsel for the 4th Defendant among others before the Plaintiff closed his case and the matter was scheduled for hearing of the Defence case on 20th April, 2022.
 14. On the said date however all the Defendants were absent from Court on account of the fact that the 1st and 2nd Defendant’s witness was unwell and since the 3rd and 4th Defendants had been informed of the same, they had thought it wise not to attend Court as the matter was unlikely to proceed. Their request for adjournment was granted and the matter was re-scheduled for further defence hearing on 2nd June, 2022.
 15. Some one week to the date scheduled for hearing, the 4th Defendant filed the present application before me seeking to file a Further Statement and to be allowed to adduce additional evidence. I would have expected in an application like this for the Applicant to lay a basis and bring to the Court’s attention the reasons why the Applicant was unable to adduce such evidence within the timelines given by the Court and before the Plaintiff had testified and closed his case.



16. As can be seen from the contents of the Supporting Affidavit reproduced at Paragraph 9 hereinabove, the 4th Defendant has not offered a single explanation why the documents were not produced at the said time. I have looked at the Further Statement and Case Summary sought to be introduced and I find no basis why the same were not filed and served upon the other Parties earlier. The Sale Agreement sought to be introduced is dated 24th February, 2021 and was equally available to the 4th Defendant before the orders enjoining him to this suit were issued on 5th May, 2021.
17. As it were, it was upon the party seeking to adduce additional evidence to demonstrate that it could not have been obtained with reasonable diligence at the trial, or that it was not within his knowledge or could not have been produced at the time of the trial for one reason or the other [See *Mohamed Abdi Mohamed -vs- Ahmed Abdullahi Mohamed and 3 Others* (2018) eKLR]. This Court would otherwise be making an error if it were to allow another party to patch up the weak points in his case and fill up omissions after the Plaintiff has testified and closed its case.
18. It follows that I was not persuaded that there was merit in the Motion dated 24th May, 2022. The same is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 2ND DAY OF FEBRUARY, 2023.**

In the presence of:

Mr. Omenta holding brief for Busiega for the Plaintiff

Ms Jemutai holding brief for Kisilah for the 3rd Defendant

Mr. S. M. Mwenesi for 4th Defendant/Applicant

No appearance for 1st and 2nd Defendants

Court assistant - Kendi

.....

J. O. OLOLA

JUDGE

