



**Njoroge & 2 others v Sikuta (Environment & Land Case
170 of 2016) [2023] KEELC 497 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 170 OF 2016
FO NYAGAKA, J
FEBRUARY 1, 2023**

BETWEEN

PAUL MWANGI NJOROGE 1ST PLAINTIFF

PHYLIS W. NJOROGE 2ND PLAINTIFF

SUSAN NYAMBURA NJOROGE 3RD PLAINTIFF

AND

WAFULA SIKUTA DEFENDANT

RULING

1. By way of an Application dated January 20, 2023, brought under certificate of urgency, this court was called upon to determine a single substantive issue, and another obvious one for costs to be in the course (sic). It was brought under Articles 50(1) and 159 of the Constitution of Kenya and Section 1A, 1B, 3B of the Civil Procedure Act and what was termed as “all enabling provisions of law.” In it, the Defendant/ Applicant sought the following specific orders:-
 1. ...spent
 2. That the Applicant be granted leave to file and serve supplementary list of documents out of time.
 3. That the costs of this application be in the course (sic).
2. The Application was based on four grounds, namely, that Pre-trial Conference was already conducted and concluded and the suit set down for hearing on 1/02/2023; the applicant has got very crucial documents which would assist this honourable Court to determine the matter in question; none of the parties would be prejudiced by the grant of the prayers sought; and leave was thus necessary in this case.



3. The Application was supported by the Affidavit of one Wafula Shikuta which was sworn on January 20, 2023. He repeated the contents of the grounds of the Application but in a deposition form. The only further information he added was in the form of a set of annextures which he referred to as a transfer of lease and copies of green cards in respect of the suit land. He marked the copies of the documents as Annextures WS 1(a) and (b).
4. It is worth of note that the Application was filed on January 23, 2023, exactly a week before the hearing date. Clearly, in terms of Order 51 Rule 14(2) of the *Civil Procedure Rules*, 2010, the timelines for the filing and service of responses in relation to the date of hearing of the suit, that is to say, February 1, 2023, was far too short of those the Rule gives for to a respondent to do so before an inter partes hearing can take place. The Court considered these issues together with the fact the instant suit was an old matter of 2016 which was filed on November 25, 2016. Therefore, it fixed the Application for hearing within a week, that is to say, the January 31, 2023. With the order of hearing of the Application on that date, the Court directed that both the Application and the directions be served within two (2) days. The Respondent was to file a response within three (3) days of service.
5. When the Application came up for inter partes hearing, counsel for the Applicant moved the Court that he was ready and that since the Respondent had not responded to the Application it be granted as prayed. Learned Counsel for the Plaintiffs/Respondents opposed the Application, first noting that he could have not filed a response by that date for reason of the short duration from service to hearing. He prayed for leave of the Court to oppose the application orally and submit in that manner. He stated that the Application was merely intended for all purposes to scuttle the hearing of February 1, 2023. He stated that it should not be allowed and that to him and his clients, they were ready for the hearing. He submitted that discoveries cannot be done in an open-ended manner. Further, he stated that the documents sought to be introduced were in the custody of the Plaintiff and the Applicant ought to have issued a Notice to Produce them at an appropriate time. He lamented that the Applicant had only gone to the Directorate of Criminal Investigation (CID) offices and procured copies of the documents his clients had left there with them when he filed a complaint against them and was now purporting to produce them yet the originals were not with him. He asked that the Application be dismissed.
6. The Applicant replied that the law permitted parties to matters to seek leave of the court to request for the filing of further documents. He stated that his client was only keen on producing the transfer document in relation to the suit land to show how the plaintiff obtained the registration of the land in his name. He prayed that the Court does allow the Application.

Submissions

7. As noted above, the Application was disposed of by way of oral submissions. I have summarized them as I introduced the background and basis of the application above.

Issues, Analysis & Determination

8. I have given due consideration of the Application, the law, the facts herein. I have also analysed both statutory and case law and the submissions of the parties. I am of the view that the following are the issues to be determined:
 - a. Whether the Application is merited
 - b. What orders to issue and who to bear costs.
9. Here is the sequential determination of the issues identified herein. Thus, I begin with the first one.



(a) Whether the Application is Merited

10. I have stated above that the Application was brought under Article 50(1) and 159 of the Constitution of Kenya, among other provisions. Article 50(1) provides 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.” The provision imports an idea that a dispute that can be resolved where the law is applied should be one that constitutes a fair and public hearing. In terms of the instant application the Court was not being asked to hear the suit in public: that was already the process and at no time did the Court indicate that the hearing could not be in public. Therefore, that part of the limb was not in issue. What was in issue then was about a fair hearing. The Applicant wished to file and serve some other documents other than those he already did. If I heard him well, he therefore argued that for the instant hearing to be fair, justice demanded that he be permitted to file and serve the documents he sought leave for.
11. It has been held severally now, that Article 50(1) applies not both civil and criminal matters. For this, refer to the Court of Appeal holding in Okiya Omtatab Okoiti & 2 others v Attorney General & 4 others [2020] eKLR as one of the authorities on the issue. What constitutes a fair trial would entail an opportunity to avail evidence for use in a trial. However, that has to be done within the confines of the law and not in a capricious and careless manner.
12. This suit was instituted on November 25, 2016. On January 17, 2017 the Defendant filed a Defence to the Claim through the firm of Ms Chepkwony & Company Advocates. It was dated January 16, 2016. Accompanying it was a list of documents titled “The Defendant’s List of Documents.” It bore the same date as the Defence. Among the copies of the documents annexed to the List were two listed a numbers 8 and 21, being a certified copy of register (green card) contained in two pages for parcel numbers Kitale Municipality Block 6/341, and a transfer of the Lease of the same parcel of land respectively. The transfer was dated April 10, 2013 on one page and the backside August 14, 2013. Definitely, the firm of Ms Chepkwony & Company Advocates no longer represents the Defendant but the law firm of Ms Ndiwa Serebe & Co Advocates does, presently. It is the latter law firm that presented the instant application.
13. The record bears that on February 18, 2019 the Defendant was in court and ready to proceed with the case but the Plaintiffs were absent. Since the date was taken by consent as he, being ready to proceed with the hearing, applied for the dismissal thereof and listing of his Counterclaim for hearing. It was so ordered. Later, the Plaintiffs applied to the Court to set aside the orders of February 18, 2019 and on March 29, 2019 the Court finding that the non-attendance on the part of the Plaintiffs was as a result of a mistake on the part of their advocates, set aside the orders and directed that the costs be in the cause. From then on, the suit has been adjourned on a number of occasions for one reason or other but more on the part of the Defendant than of the Plaintiffs. I need not list the occasions that has happened.
14. Then came the Application for filing of further documents, on the eve of the hearing. It was vehemently opposed. I note that beside citing Article 50(1) of the Constitution, the Applicant also relied on Article 159. I find that the provision as cited is too wide as not to guide the Court as to what part of it the Applicant wished to rely on. The entire Article is on Judicial Authority: that is a wide area. In my humble view, even if the Applicant wished to rely on Article 159(2)(d) of the Constitution, while Article 50(1) of the Constitution which is on fair trial and Article 159(2)(d) which is about determination of disputes by courts without basing the decisions on technicalities are both relevant in this matter, they are not essentially the provisions of law that guide or provide for the filing and exchange of documents in preparation for trial: they are not procedural provisions.



15. In any event it has been held by the Court of Appeal, and I agree with the Court, in *Kakuta Maimai Hamisi Vs. Peris Pesi Tobiko & 2 Others* [2013] eKLR, that Article 159(2)(d) of the *Constitution* is not a remedy to all short-comings of parties as they present their disputes to Court. I add that the provision is not and cannot be solution to and a refuge of such. For a while the application of the Article has been the subject of abuse in Kenya since it found its entrenchment in the *Constitution*, and it is time that Courts gave firm direction that parties who deliberately and/or carelessly fail to stake steps prescribed by law should not receive the protection of the Article 159(2)(d). Parties should take responsibility of their failures, actions, malpractices and the sort of careless and advertent conduct as seen today in the practice in many a matter before Court. Article 159(2)(d) did not intend to breed a careless and carefree society of Kenyans. I will repeat the holding of the Court of Appeal in the *Kakuta case* (*supra*) here. The Court held:-

“...the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) of the *Constitution* to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation”.

16. Also, in regard to the further provisions he cited, Sections 1A, 1B and 3A of the *Civil Procedure Act* do not do so. Section 1A provides for the objective of the Act which is to “...facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act” which I am of the view that the Applicant herein is, by bringing the instant application this time and day of the status of this suit, in violation of. Section 1B is on the duty of the Court which is the just, efficient and timely disposal of the business of the court by use of available judicial and administrative resources and technology, which thing this Court is doing at all times, and Section 3A is on the inherent power of this Court to make orders as may be necessary for the ends of justice or to prevent the abuse of its process, and this the Court does always even in other matters and will do shortly, at the end of this ruling. Needless to say, that I consider with disdain the use of the phrase “all enabling provisions of law” since it is a hollow meaningless and strange scarecrow parties use in applications in the practice and procedure in the legal system. Thus, all the provisions cited by the Applicant are not directly relevant to the instant application and I must look further when determining the merits of it.

17. That said, the Applicant herein is a Defendant. I will restrict myself to the law guiding the filing and service of documents before trial by such a party, that is to say, a Defendant. The law relevant in that regard is Order 7 Rule 5 of the *Civil Procedure Rules*, 2010, as read with Order 11 Rule 3 thereof and Section 28(b), (c), (g) and (h) of the *Practice Directions on Proceedings in the Environment and Land courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts*, Gazette Notice No. 5178 (hereinafter referred to as the Mutunga Rules, 2014).

18. The above provisions require that the Applicant should have filed and served the documents he/she wished to rely in the suit, together with his Defence (and Counterclaim) if any. Particularly, Order 7 Rule 5(d) of the *Rules* is specific regarding documents. The Rule is then followed with a Proviso couched in the following words: “Provided that statement under sub rule (c) may with leave of court be furnished at east fifteen days prior to the trial conference under Order 11.”

19. To me, using a grammatical and plain interpretation of the phrase, there is no room left for a party to file a further list of documents after they file their Defence and Counterclaim (just as those who are Plaintiffs or Claimants do not have it after filing their Complaint or Claims). It may appear that the interpretation is harsh to the parties but that is what the law is. If the Rules Committee intended to



provide for otherwise, it could have done so as it did in regard to the need of filing of further lists of and witness statements. Further, by using the statutory rule of interpretation, *Expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of the other, it is clear that the grant of leave to file documents not filed at the same time with any set of the three sets of pleadings stated above was not contemplated by the Rules Committee.

20. A very high bar which is almost at the point of absolute should be set against a party who files their pleadings in line with what the law (Rules) requires but fails to file documents of whatever kind that he/she wants to rely on in the matter with the relevant pleading. By way of juxtaposition and comparison, one of the standards and requirements of review, under Order 45(1) of the *Civil Procedure Rules* is that a party who applies for an order in that manner is required to show “...discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.” Thus, if it is not a walk in the park for one who moves the Court wishing to introduce evidence by way of review on account of discovery of new evidence after a decision of the court has been made, so it should be, if ever it should be allowed, for a party who did not file with pleadings all the documents they intend to rely on. Needless to say, that for a review of a decision on that ground, the law provides for it. How much more difficult should it not be in cases where the law did not envisage it? Extremely difficult! The courts should guard against fishing expeditions and filling in gaps, in the guise of justice.
21. In any event, a party who seeks extension of time to comply with the law where it is specified, as it being done in the instant case, has a burden to bear, as the Supreme Court held in *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR when it listed a number of requirements or underlying principles which he/she has to demonstrate satisfaction of. In the case, the Court stated:
 1. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
22. In the instant case application, I have carefully analyzed the facts, the law and the reasons being advanced by the Applicant. He has not complied with the *Nick Salat case* above. It is not a right that he be given the leave he sought, as he argued. Again, he has not discharged the burden of laying the basis to the satisfaction of this Court. Also, the application has been brought with undue delay. Additionally, he has not dislodged the position that he may have acquired the copies of the documents unlawfully or illegally by getting them without permission of the Applicants hence violation of their right privacy and going against the prohibition of relying on illegally obtained evidence, thus to allow the prayer would prejudice the Respondents.



23. Noting further from the foregoing, first, as I noted in paragraph 12 the documents sought to be introduced by him were filed on January 17, 2017 with others. It is laughable why he needs to file them now, separately. Even if they could not have been available to him at the time of filing his Defence, he has not demonstrated that they were documents which, with all due diligence, could not be available to him at the time of filing his Defence. In any event, if he was able to file documents No 8 and 21 in the List of Documents filed on January 17, 2017 which are of the same character as the ones he alleges wants to produce herein, he has not shown that with diligence he could not get the ones he seeks herein to include in a new list. By this I do not mean that the documents are different from those filed earlier.
24. A close examination of the Annexure which is supposed to have been marked as WS1(a) - the transfer of lease - is similar to document No 21 in the List filed on January 17, 2017 while the one purporting to be Annexure WS2 is similar to document No 8 of the List save that the latter is only handwritten and page 2 thereof is the only new addition. But as I have stated above, if the Applicant was able to obtain the green card of the land in 2017 and filed it, there is no explanation given as to why he could not obtain a complete extract then so as to include Entry No 11.
25. Lastly, the annexures to the supporting Affidavit do not comply with Rule 9 of the Rules made under Section 6 of the *Oaths and Declarations Act*, Chapter 15 of the Laws of Kenya because they were not commissioned by the Commissioner who swore the Affidavit. When the import of the provision is applied it means the Affidavit is bear and is not supported factually by documents. It therefore becomes incompetent automatically in relation to the paragraphs that purport to import the idea of exhibits.
26. In my view the application herein is one of those that is glaringly an abuse of the process of the Court. The applicant did not bring himself within the requirements of the law in granting an order as the one sought. The Application was clearly a gimmick to adjourn this suit: it was device and a ploy to scuttle the hearing of this suit and this Court will not be bought into such tactics. I dismiss it with costs to the Respondents and order that the suit proceeds forthwith. Suits cannot lie in Court forever on account of such baseless tricks.
27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT THIS 1ST DAY OF FEBRUARY, 2023.

**HON. DR. IUR FRED NYAGAKA
JUDGE, ELC KITALE**

In presence of:

Plaintiff: Ngigi

Defendant: Kisémbé

