



**Nganga v Wambua (Environment & Land Case 89 of 2019)
[2023] KEELC 17301 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 89 OF 2019**

TW MURIGI, J

MAY 3, 2023

BETWEEN

BENARD KITUVA NGANGA APPLICANT

AND

JACINTA MUTIO WAMBUA RESPONDENT

RULING

1. Before me for determination is a Notice of Motion dated September 6, 2022 brought under Article 159 of the Constitution of Kenya (2010), Sections 1A, 1B of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law, in which the Applicant seeks the following orders:-
 1. That this Honourable Court be pleased to allow the Applicant to enlarge time for the Plaintiff to obtain a forensic report of the Applicant's known signature and hand written notes from the Director of Criminal Investigations headquarters for the purposes of comparing the same with the specimen signature and handwritten notes produced by the Defendant in the agreement dated May 15, 2009 and January 6, 2009 purporting to be the handwritten notes and known signatures of the Applicant.
 2. That the Honourable Court be pleased to allow the Applicant to extract and file call log communication between him and the Respondent from September up to November 2014 which was the last call between the Plaintiff and the Defendant where the Defendant asked the Plaintiff (Niwanengie concent ya kuvindua title deed?) the word consent will be in that conversation and the same be used as evidence during the hearing of this case.
 3. That an order be issued by this Honourable Court to one Johnson Wambua Mutheke to be enjoined as a party in this proceedings.
 4. That the costs of the application be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. The Applicant is seeking for an order to obtain a forensic report from the DCI on his known signature and handwriting for purposes of comparing the same with the specimen signature and handwritten notes produced by the Defendant in the agreement dated May 15, 2000 and January 6, 2009. He averred that the forensic examiner engaged by the Plaintiff examined his signature and not the handwritten notes in the documents. He argued that for the Court to comprehensively determine this matter, it will be necessary to subject his known signature and handwriting to forensic examination since the Plaintiff pleaded fraud in her suit.
4. He urged the Court to enjoin one Johnson Wambua Mutheke to the proceedings as he is purported to have signed the sale agreement executed by the Applicant. He admitted that he had previously sought for prayer No 1 in his application dated September 27, 2021, but the same was dismissed for want of prosecution.

The Respondent Case

5. In opposing the application, the Respondent vide her replying affidavit averred that the application is an abuse of the Court process as the Applicant had sought for similar orders in his application dated September 27, 2021 which was dismissed for want of prosecution. She contended that the Applicant is seeking to re-open his case through the back door without laying any basis.
6. She argued that the Plaintiff has not given any reason why the evidence could not be tendered before he closed his case. The Respondent contended that all along the Plaintiff was represented when pre-trial directions were taken on September 16, 2020.
7. She further averred that she will be prejudiced if the application is allowed as the party intended to be joined in the proceedings is her husband.
8. The application was canvassed by way of written submissions.
9. The Applicant's submissions were filed on February 2, 2023 which I have duly considered. By the time of writing this ruling, the Respondent had not filed her submissions.

Analysis And Determination

10. Having considered the application and the Applicant's submissions, the following issues arise for determination:-
 - i. Whether the application is an abuse of the Court process.
 - ii. Whether the Applicant is entitled to the orders sought.

Whether the application is an abuse of the court process

11. The Respondent contended that the instant Application is an abuse of the Court process as the Applicant had sought for similar orders in his application dated September 27, 2021 which was dismissed for want of prosecution. The Applicant on the other hand admitted that he had sought for prayer No 1 in his application dated September 27, 2021 which was dismissed for want of prosecution.



12. Discussing what constitutes abuse of the Court process, the Court of Appeal in the case of *Muchanga Investment Limited Vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No 25 of 2002 (2009)* eKLR stated that;
- ' The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bonafides and frivolous, vexatious or oppressive.'
13. It is evident from the Court record that in the application dated September 27, 2021, the Applicant sought the following orders:-
- a. Spent.
 - b. That this Court be pleased to enlarge time for the Plaintiff to obtain a report from the DCIO headquarters and file the same out of time on such terms as the court deems fit and expedient.
 - c. THAT the costs of the application be provided for.
14. The record shows that when the application came up for hearing on October 18, 2021 the Applicant was absent. The application was therefore dismissed for want of prosecution.
15. I have carefully perused the Court record and I have not come across an application to reinstate the application dated September 27, 2021.
16. Instead of filing an application to reinstate the application dated September 27, 2021, the Applicant filed the instant application seeking for similar orders. Having filed an earlier application which is similar in terms of Prayer No 1 of the present application, it is the finding of this Court that the filing of the application dated September 6, 2022 is an abuse of the Court process and the Court cannot allow the same.

Whether the applicant is entitled to the orders sought

17. The Applicant is seeking for an order to extract and file call logs communication between himself and the Defendant so as to adduce additional evidence on the same. As correctly submitted by the Respondent, the Applicant is asking this Court to reopen his case. The Plaintiff has not stated why he did not adduce the evidence during the pre-trial conference or prior to the hearing of this case. The application was made after the document examiner presented his evidence.
18. The Plaintiff tendered his evidence and closed his case on April 20, 2022. The application is coming too late in the day as the Plaintiff has already closed his case.
19. From the record it is clear that the parties herein were given time to comply with the provisions of Order 11 of the Civil Procedure Rules. The Plaintiff ought to have extracted and filed the call log communication during the pre-trial conference. This Court finds and holds that the Plaintiff has not laid any basis why the Court should exercise its discretion to re-open his case.



20. In so finding I am persuaded by the Supreme Court Case of *Raila Odinga & 5 Others Vs IEBC & 3 Others Petition No 3, 4 and 5 of 2013* where the Supreme Court declined to allow additional evidence filed outside the contemplated rules and held as follows;

' The parties have a duty to ensure they comply with their respective time lines and the Court must adhere to its own. There must be a fair and fair level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided.'

21. The Applicant has sought for an order to enjoin one Johnson Wambua Mutheke to the suit on the grounds that he signed the sale agreement executed by the Defendant.

22. The Plaintiff has not demonstrated that he has recently discovered that the sale agreement was signed by Johnson Wambua Mutheke. This is a fact which was within his knowledge. The Applicant has not disclosed any reason why he did not make the application before he closed his case. He has not demonstrated that he has discovered new evidence which was not within his knowledge.

23. In light of the foregoing, I find that the application is devoid of merit and the same is dismissed with no orders as to costs.

.....

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF MAY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Applicant in person.

Ms Kirunja holding brief for Njagi for the Respondent.

