



**Onyango v Mbitto & 2 others (Environment & Land Case
62 of 2019) [2023] KEELC 20443 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 62 OF 2019
FO NYAGAKA, J
OCTOBER 4, 2023**

BETWEEN

DISMAS ONYANGO PLAINTIFF

AND

MICHAEL MALINGA MBITO 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. By a Notice of Motion dated June 8, 2023, the 1st Defendant moved this Court under Sections 1A, 1B, 3, 22, and 63(e) of the *Civil procedure Act*, Order 11 of the *Civil Procedure Rules* and Article 50 of the *Constitution of Kenya*, the inherent powers of the Court and “all enabling provisions of the law.” He sought the following orders:-
 1. That the 1st Defendant/Applicant is granted leave to file a supplementary witness Statement attaching a further list of documents.
 2. That upon grant of the prayer above, the Supplementary Witness Statement and List of Documents annexed to the affidavit in support of this application be deemed duly filed and served upon payment of court fees.
 3. That the court be pleased to issue directions on the hearing of the suit in view of prayers 1 and 2 above.
 4. That costs be reserved.
2. The Application was based on eleven (11) grounds being that the List filed on June 29, 2021 did not include all the documents necessary to enable the court make a determination in this matter; the



omitted documents include the Provisional Certificate of Title which is at the heart of the dispute herein; the documents came to the possession of the Applicant after filing of the suit and therefore leave of court is necessary to adduce them; the documents relate to the root of the 1st Defendant's title which is in support of his counterclaim; the 1st Defendant could not exhibit the said documents since he had been taken ill and sought treatment abroad intermittently; it was equitable to allow the Applicant to produce the documents to grant him a fair hearing and for the court to determine the matter in contention on merits.

3. By his Replying Affidavit he swore on June 15, 2023 and filed it on June 16, 2023, the Plaintiff opposed the Application vehemently. He deponed that the Application was incompetent, an afterthought, frivolous, lacked merit, brought with bad faith, calculated to prejudice the trial of his case which he had already close, an abuse of the process of the Court and brought with laches. He deponed that the Applicant had not given evidence of his indisposition, whether by way of discharge notes or medical reports from the time he filed his defence in 2019 to date which would have made him unable to comply with the law.
4. He deponed that for the Applicant to be permitted to introduce documents at this stage, which he (the Plaintiff) could not verify and testify on would be prejudicial to him since he would not have opportunity to call witnesses to rebut them. His further deposition was that the Application had been filed in breach of Sections 1A and 1B of the Civil Procedure Act and Order 7 Rule 5 and Order 11 of the Civil Procedure Rules.
5. He deponed to a sequence of events which he deemed prejudicial to him and aimed at driving him from the seat of justice through the prayers sought. These were that he filed the claim in 2019 wherein he pleaded fraud and forgery and the Defendant filed his defence on December 10, 2019; then the applicant filed the his List of Documents on June 29, 2021, two (2) years later after filing his Defence and Counterclaim; on October 19, 2021 the pretrial conference was held and the matter confirmed for hearing in terms of Order 3 and 11 of the *Civil Procedure Rules*; after the matter was fixed for hearing the 1st Defendant never sought leave to file the further documents yet all were not new and were in his custody; the Respondent closed his case on October 17, 2022 on which day he learnt for the first time of the indisposition of the 1st Defendant; the applicant now sought leave of Court after the matter had been fixed for defence hearing; for the court to allow the Application it would be prejudicial as the 1st Defendant would have no opportunity to verify the documents.
6. The 1st Respondent deponed that the application was incompetent as it was executed by the same person who witnessed the documents intended to be introduced thus raising a conflict of interest. That to allow the Application would infringe the Respondent's right to fair trial under Article 50(1) of the *Constitution* hence the court should not exercise the discretion in favour of the Applicant. He prayed for the dismissal of the Application.

Submissions

7. After giving a summary of the application and the facts in contention the Applicant repeated the argument that it was common ground that he had been unwell for a very long time and had been treated in and out of the country. That due to the illness the matter had been adjourned severally and as a result, the List of Documents he filed on June 29, 2021 did not include all documents necessary for a just determination in this matter. He gave an example of the Provisional Certificate of Title which was issued to him after an elaborate process sanctioned by the court after the loss of the original title document. He argued that an injustice would result if the documents were locked out. He also argued for the Court to consider the order issued by the High Court in Kitale in order to trace the root of his



- title. He repeated his averment that he purchased the land from a beneficiary in the cited succession matter.
8. He added that he had not pleaded that the property was charged to a bank and the letter showing that the document was in the bank was issued after the filing of the original List of Documents. That this information was not in his possession when he filed the original list. He stated that the circumstances informing merited the Application.
 9. On whether the Court had Powers to allow additional documents and a Supplementary List of Documents, he relied on Article 50 of the Constitution as read with Article 159 both of which he argued guaranteed the right to a fair hearing, of the Constitution. He called to aid the cases of *Republic V District Land Registrar, Uasin Gishu & Another* (2014) eKLR and *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR, He also relied on the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo T/A Hangover Kaakwacha Hotel* [2022] eKLR.
 10. The Applicant then submitted on the probative value of the documents sought to be filed. He stated that the test was whether he demonstrated that the documents sought to be introduced would not be obtained with reasonable diligence at the time of hearing of his case, also whether the evidence is such that, if admitted, would probably have an important influence on the result of the case, though it need not be decisive, and if it is apparently credible, though it need not be incontrovertible. To support this argument, he relied on the case of *Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo* [2019] eKLR.
 11. After that he submitted how he had shown that he had been unwell and that he ought to benefit from record estoppel. He submitted that the Plaintiff/ Respondent could not deny the fact of the Applicant's illness in view of previous representation and acquiescence. He stated that due to the illness, he was handicapped in preparing for this matter and could not adduce the evidence in the manner proposed and that he obtained some documents as recent as June 5, 2023 hence his case deserved the exercise of the Court's discretion. He stated that the title sought to be included as a document went to the root of the dispute hence of probative value. He also submitted that part of the evidence to be adduced included documents such as a Certificate of Confirmation of Grant that originate from the family division of the Honourable Court hence believable.
 12. On whether the Court should grant leave to him to adduce the evidence he sought to and the Supplementary List of Document, he relied on Civil Appeal No. 13 of 2018 *Ainu Shamsi Hauliers Limited Versus Anastacia Ndinda Mwanzia (suing as Administrator of the Estate of Harrison Mwendwa Karili)* [2018] eKLR, the learned judge expressed himself that a Court of law should not be deprived of information which will assist it reach a fair and first determination of a case except where it is shown that he is making a fresh case. He submitted that there would be serious prejudice if he was denied leave to organise the case in the manner intended now that he was in good health.
 13. The Applicant submitted that the Replying Affidavit was insincere and had factual errors and misrepresentation because the Respondent continually acquiesced to adjournments due the Plaintiff's infirmity. He stated that to call for proof of his illness is barred by the plea of record estoppel and the matter is not a fact in issue and record estoppel cannot operate against the grant of the prayers sought for the reasons given above.
 14. On his part, the Respondent began its submissions by arguing that during the pretrial conference and even at the hearing of the plaintiff's case, the 1st Defendant never ever mentioned of his indisposition until October 17, 2022. That even at the time he did not indicate that he needed leave to introduce new evidence and even on the defence hearing dates, namely, the December 8, 2022 and February 16, 2023. He argued that he acceded to the adjournments on account of indisposition of the 1st defendant on humanitarian grounds. He argued that the applicant was non-deserving of the orders sought as



they would amount to driving the Plaintiff from the sit (sic) of justice by a violation the principles of equality and fairness. He submitted about the provisions of Order 7 Rule 5 of the [Civil Procedure Rules](#) which requires the filing of a list of witness to be called at trial, written statements signed by the witnesses except expert witness and copies of documents to be relied on at trial, and its proviso about a party seeking leave of Court to avail written witness statements at least fifteen days prior to the trial conference.

15. He submitted that herein the parties appeared participated in the pretrial conference October 19, 2021 and confirmed compliance with Order 7 of the [Civil Procedure Rules](#) after which they fixed the case for hearing on December 16, 2021. The Applicant did not seek leave or court or request for more time to file more documents and statements or indicate indisposition. That the issue of indisposition began in February, 2023, two years after the pre-trial conference. He argued that the applicant gave no medical documents to prove his indisposition from the time of pro-trial to the time of application. He argued that it would be unfair to introduce such evidence at this stage. He relied on the case of [Sedy Kenya Freight Limited v Multiple Solutions Limited](#) [2021] eKLR in which the learned trial judge refused an application by a Defendant to give additional evidence after the Plaintiff had closed his case.
16. He submitted that there was no provision in the Rules permitting courts to accept list of witness and documents filed outside the timeless given under Order 3 Rule 7 and Order 7 Rule 5 of the [Civil Procedure Rules](#). He argued that under Article 50 (1) of the [Constitution](#) the right to a fair trial is provided for hence to allow the defendant at this stage to table new evidence not provided to the plaintiff and or contemplated by him would occasion an injustice to him. He relied on the case of [Jobana Kipkemei Too v Hellen Tum](#) [2014] eKLR wherein the judge stated that the Plaintiffs would be greatly prejudiced if he allowed the defendant's application after the close of the Plaintiffs' case as the Plaintiff would not have an opportunity to rebut the evidence closure of his case and the evidence would fundamentally alter the character of her case. Then he concluded that the trial would be unfair to the Plaintiff.
17. He also relied on the case of [Alois Oceans P. Sumba v Rajnikoini Narshi Shah and Anor](#) [2017] eKLR and that of [Mansukhalal Jesang Maru v Frank Wafula](#) [2021] eKLR.

Issue, Analysis And Determination

18. I have considered the Application, the Law and submissions of the rival parties herein. Only two issues lie for determination and I will analyze them sequentially:
 - a. Whether the application is merited;
 - b. Who to bear the costs
19. Regarding the first issue of merits or otherwise of the application, it is not in dispute that the instant application was brought after the Plaintiff had closed his case. This was after the matter had gone through the stage of pretrial directions in which the parties indicated to the court that they were ready to proceed. This was in compliance with Order 11 of the [Civil Procedure Rules](#). In order for one to understand the import of the Order, it is worth of note that the provisions in it do not apply to small claims and any other suits the court may by order exempt.
20. Among the prerequisites of compliance of Order 11 is the filing of the documents parties to a suit intend to rely on. That means that for claimants or plaintiffs they ought to have complied with Order 3 Rule 2 regarding the filing of lists of documents and witness statements, and both witness statements and copies of documents. For Defendants, they ought to have complied with Order 7 Rule 5 of the



Civil Procedure Rules. Relevant for the instant application then is the application of Order 7 Rule 5. It provides that:

“The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-

- (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses except expert witnesses; and
- (d) copies of documents to be relied on at the trial.

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

21. By it, the Applicant was required to file his Defence together with the set of documents referred to in paragraph (d). While witness statements may not be filed immediately with the Defence and Counterclaim if any but must be done at least fifteen (15) days before the trial conference, the proviso to the Rule imports the idea that for documents they ought be filed with the pleadings and not later since there is no phrase providing for late filing.
22. The Applicant relied on the case of *Republic V District Land Registrar, Uasin Gishu & Another* (2014) eKLR. I agree as submitted about the holding therein that justice is about doing the right thing. He also relied on the case of *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR which speaks to the principle that each party should be afforded a fair trial and that such a trial is not existent in a vacuum but that each party needs to be given opportunity to prosecute or defend his case. Similarly, he relied on the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR in which the judge admitted to the record documents which were obtained after the filing of the case but before the hearing would commence. In it the judge stated that the defendants did not demonstrate the prejudice they would suffer if the documents were admitted. But in the instant case the Plaintiff contended that he would suffer prejudice since he has already testified and close his case hence he cannot rebut the documents to be filed.
23. He also relied on the case of *Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo* [2019] eKLR which sums it that one has to show whether the evidence could not have been obtained with reasonable diligence at the time of hearing, among other conditions. Lastly, he relied on Civil Appeal No. 13 of 2018 *Ainu Shamsi Hauliers Limited Versus Anastacia Ndinda Mwanzia (suing as Administrator of the Estate of Harrison Mwendwa Karili)* [2018] eKLR which is to the effect that no court should deprive itself of information that would assist it reach a fair finding.
24. On his part the Respondent relied on *Sendy Kenya Freight Limited v Multiple Solutions Limited* [2021] eKLR in which the learned trial judge refused an application by a Defendant to give additional evidence after the Plaintiff had closed his case. But in that case the defendant had opportunity to file his documents in time yet he did not. In the case of *Johana Kipkemei Too v Hellen Tum* [2014] eKLR the judge concluded that great prejudice would result if he allowed the defendant's application after the close of the Plaintiffs' case. He relied on the case of *Alois Oceans P. Sumba v Rajnikoini Narshi Shah and Anor* [2017] eKLR wherein the judge found that the documents did not form new and compelling evidence and disallowed them. I agree with the Respondent herein that if the documents herein do not form new and compelling evidence I must disallow them. In *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR this Court found that the Applicant had in his possession the documents he sought to introduced at that late stage hence it is a distinguishable decision. That in mind, I now consider the facts before me.



25. In order to arrive at a just conclusion this Court needs to consider two important points. One is whether the Applicant had opportunity to file the documents at the point required by law but squandered it. Two is whether if he had the opportunity or not it would be prejudicial to the Respondent to grant the Applicant chance to introduce the documents at this stage of the proceedings.
26. I discuss the first point by analyzing both the record and the reason given by the Applicant for failure to file the documents he seeks to introduce. The record bears that the suit was instituted on October 9, 2019 and temporary orders on October 14, 2019. On October 28, 2019 learned counsel for the 1st Defendant filed a Notice of Appointment of Advocates and on November 27, 2019 the Defendant filed a Replying Affidavit to which he annexed a copy of a Grant I.R. No. 12091 in which one of the entries (No. 9) showed a transfer to him. To the said Affidavit were other annexures of receipts of payments made to the relevant County Government of Trans-Nzoia offices for rates.
27. On December 10, 2019 the 1st Defendant filed only a Defence and Counterclaim. On May 20, 2021 the Plaintiff filed an Amended Plaintiff pursuant to an order of the Court. On June 17, 2021 the Plaintiff filed a List of Documents and on June 30, 2021 the 1st Defendant filed a witness Statement dated June 29, 2021. He also filed on the same, June 30, 2023, a List of Documents containing the copies of the same documents and on June 27, 2021 the Plaintiff filed a Reply to Defence and Defence to Counterclaim. On October 19, 2021 the Plaintiff withdrew the case against the 2nd and 3rd Defendants. On the same date directions on compliance were given in the presence of both parties' learned counsel.
28. The matter was fixed for hearing on December 16, 2021. On that date the Plaintiff testified as PW1. The matter was adjourned to March 2, 2022. On the latter date the matter did not proceed because the Plaintiff's second witness did not attend Court and upon an adjournment being given to April 20, 2022 the Court did not sit because it was engaged in official duties. It adjourned the suit to May 24, 2022 when further hearing did not take place as the intended witness did not attend Court and a warrant of arrest was issued against him.
29. The witness would testify on June 15, 2022. On that date the Plaintiff once again applied for adjournment to call another witness. The adjournment was granted to July 21, 2022 and again to October 17, 2022 when the Plaintiff closed his case without calling the third witness he wished to.
30. On October 17, 2022 the Defendant's learned counsel sought an adjournment on account of the alleged fact that his client had been unwell and travelled out of the country for treatment. Upon that application being made, learned counsel for the Plaintiff acknowledged that indeed he was aware that the Defendant was facing medical challenges. For those reasons the suit was adjourned to December 8, 2022 when it was to be fixed for hearing upon confirmation of the health condition or recovery of the Defendant. On December 8, 2022 the parties informed the Court that the Defendant had undergone throat operation earlier in Nairobi Hospital and had been discharged the previous day but needed two more months to assess the recovery process. The matter was fixed for mention again on February 16, 2023 when learned counsel for the Defendant informed the Court that his client has been flown to King Hussein Cancer Treatment Centre in Jordan for further treatment and he was expected to be back in the country on May 28, 2023. He requested for a tentative Defence hearing date in June, 2023 and the Court gave the June 7, 2023.
31. When the defence hearing date came, learned counsel applied to have another date to move the Court for inclusion of four (4) documents which he termed as being "at the centre of the defence" and which were not in court. That gave rise to the instant application.
32. This Court has taken time to give the summary of the proceedings as have been taken in this matter because the main contention as I see it in the instant application is that on the one hand the argument is



- that due to the illness of the Applicant he was not able to procure and file the said documents together with his Defence and Counterclaim while on the other the counter-argument is that the applicant was not as ill as to prevent him from filing the documents with the pleadings as the law requires.
33. I have looked at the totality of the facts before me. I find that the Applicant has given sufficient reasons why he could not move the Court early in the proceedings and even at the time of filing the suit to have the documents he now seeks to introduce filed and served. First, they were not in his custody at the time of filing the suit. Second, the new documents he wants to file constitute new and compelling evidence as they go to the root of his defence. Third, the other set of documents he wishes to file again were among the documents in the original List filed but were disorganized. Fourth, the Applicant has all along been sickly and been in and out of hospital within the country and abroad. This is a fact the Respondent is aware of and it requires no rocket science to know since the record bears it out. The Respondent should not take advantage of or rejoice at the Applicant's illness in order to deny him a chance to ventilate his case evenly. I am convinced by the Defendant's argument and explanation that his illness acted negatively on how he could organize and prosecute his defence.
34. While I have found that there are good reasons to grant the Application, the question that remains is whether the grant of the application would prejudice the Plaintiff who has closed his case and thus bring an uneven ground of the case. The Respondent argues that having closed his case he will not be in a position to rebut the evidence hence it would be prejudicial. This Court has to weigh the prejudice that would be occasioned by locking out the documents if the application were to be refused and the prejudice to a party who has closed his case.
35. In my humble view the prejudice that the Plaintiff would suffer is that of failing to test the veracity or truthfulness of the contents of the documents if he were not to cross-examine on them or give evidence as to the root of the documents, if it is questionable. On the other hand, the Defendant who is battling a terminal illness would forever lose the opportunity to produce documents that support his case. In the circumstances lesser prejudice would befall the Plaintiff if he is allowed to reopen his case and file a witness statement and avail testimony about the new documents to be filed than rejecting the Application. Therefore, I would and I do allow the application as prayed. The Plaintiff's case is re-opened only for purposes of him availing evidence limited to and only specific to rebutting the new evidence the Applicant will file as prayed in the Application. The Applicant shall file the Supplementary Witness Statement and List of Documents as per the annexed copies to the Application, within only ten (10) days of this Order and serve the same within that period, and the defendant shall have ten (10) days to file any evidence as stated above.
36. In my humble view since the application has been brought in circumstances whose background is illness, the costs shall be in the cause.
37. This matter shall be mentioned on October 31, 2023 for further directions.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 4TH DAY OF OCTOBER, 2023.

HON. DR. FRED NYAGAKA
JUDGE, ELC KITALE

