



REPUBLIC OF KENYA



**Issa & another v Mbugua & 5 others (Environment and Land Case Civil
Suit 77 of 2014) [2022] KEELC 2851 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 77 OF 2014**

LN MBUGUA, J

JULY 7, 2022

BETWEEN

MAHADIA WANJIRU ISSA 1ST PLAINTIFF

ALIMA WANJIKU KINUTHIA 2ND PLAINTIFF

AND

HARRISON KINUTHIA MBUGUA 1ST DEFENDANT

FRANCIS MUREITHI KIBICHO 2ND DEFENDANT

JOSEPH MUNYUNGU KAMAU 3RD DEFENDANT

GEORGE KAMAU KINUTHIA 4TH DEFENDANT

KELVIN MBUGUA KINUTHIA 5TH DEFENDANT

ELIJAH NJAU KINUTHIA 6TH DEFENDANT

RULING

1. On May 24, 2022 this matter came up for defence hearing whereby Counsel for the 1st defendant indicated that they had filed an additional witness statement dated May 17, 2022. Counsel for the plaintiff objected to its admission stating that the plaintiff had already testified and closed its case whereas the issues raised in that statement required to be responded to in evidence. This court in its ruling on that issue outlined in detail the pre-trial steps that had been undertaken in this matter noting that on January 24, 2022, the plaintiff testified and their case was closed. The court had observed that the introduction of a witness statement at the 11th hour was akin to trial by ambush contrary to article 159 (2) of the *Constitution* and the overriding objective stipulated under section 1A of the *Civil Procedure Act*. This court also noted that no basis had been laid for admission of the said witness statement at that stage of the trial.



2. During the testimony of 1st defendant, Kinuthia Mbugua (herein referred to as DW1) counsel for the plaintiff raised an objection on the grounds that the testimony was geared towards introducing the contents of the statement which had been rejected by court and the said statement was contrary to what was stated in the pleadings and in DW1's statement of March 18, 2014. It was argued for the plaintiff that parties were bound by their pleadings and they should not depart from them adding that the Plaintiff would not have an opportunity to address the issues raised if this was allowed.
3. In rejoinder, Counsel for the 1st defendant stated that they need latitude to tell the court how the 2nd plaintiff became owner of the suit property since the 1st plaintiff in her testimony had not given that information. That they were also trying to establish whether 1st plaintiff has a cause of action, that they needed to refer to the succession proceedings which gave the land to DW1 and that they needed to state that the land was owned by the father and not grandfather of DW1. Counsel added that the plaintiff would have an opportunity to cross examine DW1 on his testimony.

Analysis and determination

4. The issue for determination is whether the 1st defendant should give viva voce evidence that is contrary to what has been captured his statement and pleadings filed before this court.
5. This court had already rendered itself on the status of the further witness statement dated May 17, 2022 which the 1st defendant desired to rely on.
6. It is trite law that parties are bound by their pleadings. This was the holding in the Court of Appeal case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR;

"...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves..."

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice." (emphasis mine)....

7. Flash back on January 24, 2022, during the mini pretrial exercise, Mr. Burugu advocate for 1st defendant had addressed the court as follows;

"Our trial bundle was filed on March 18, 2014. Our defence and Counterclaim is dated March 18, 2014. I have a list of witnesses on page 10 (one witness). I have another statement of witness dated December 10, 2015. The Statements are Comprehensive..."
8. However, when Dw1 took to the witness stand, he did not adopt his "comprehensive" witness statement as his evidence. Instead, he embarked on giving oral evidence relating to why and how he decided to share his father's land, issues that were not captured in his recorded statement.
9. I find that whatever counsel for the 1st defendant claims to be information to help court understand the case is "Any other business".



10. The provisions of section 1 A of the *Civil Procedure Act* stipulates that:

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”

11. It follows that parties and their advocates have a role to play in terms of adhering to the overriding objective set out in the above statute. This court has a mandate to actively manage the case in order to have a just and expeditious trial. The overarching principles in Active Case Management are; the doctrine of predictability (Where there is certainty of the processes and outcome at every stage of the trial); Transparency; Accountability; Efficiency; Fairness; Just; and Expeditious trial.

12. The manner in which the 1st defendant is giving his evidence amounts to trial by ambush and flies against the overriding objective mentioned herein. In that regard, the objection raised by plaintiff’s counsel is upheld. DW1 should stick / adopt his witness statement filed in court and proceed to give evidence in tandem with the contents of that statement.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Maando for the Plaintiff

M/s Kirui holding brief for M/s Muchira for 3rd Defendant

Burugu for the 1st, 4th, 5th and 6th defendants and holding brief for Mr. Orina for 2nd Defendants

Court Assistant: Eddel

