



Kamau v County Government of Nairobi City County & 2 others (Environment & Land Case E248 of 2021) [2025] KEELC 929 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 929 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E248 OF 2021
MD MWANGI, J
FEBRUARY 27, 2025**

BETWEEN

JOHN PETER MAINA KAMAU PLAINTIFF

AND

**THE COUNTY GOVERNMENT OF NAIROBI CITY COUNTY ... 1ST
DEFENDANT**

PETER KAMWATHI 2ND DEFENDANT

BETHEL CHRISTIAN FELLOWSHIP CHURCH 3RD DEFENDANT

RULING

(In respect of the 1st Defendants' Notice of Motion dated 17th September, 2024 brought under Order 8 Rules 3 and 5 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#), Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and Article 159(2) of the [Constitution](#) of Kenya, 2010)

1. The 1st Defendant/Applicant seeks leave to amend its statement of defence, list of witnesses, witness statement and list of documents. Upon being granted leave, the Applicant seeks 7 days to file and serve the said statement of defence, list of witnesses, witness statement and list of documents.
2. The 1st Defendant/Applicant states that the Plaintiff's case was heard and closed on 9th May, 2024. It asserts that the defence hearing scheduled for 3rd October, 2024 did not proceed as planned because one of its witnesses W.S Ogola who was set to testify was indisposed. Hence, it sought to substitute him with Cecilia W. Koigu, its Chief Officer, Lands.
3. The 1st Defendant/Applicant contends that the proposed amendments and further information are necessary for shedding light and determining the issues in controversy prior to the defense case. It asserts that the amendment will not prejudice the Plaintiff nor cause any injustice because the information disclosed is already within the Plaintiff's knowledge and he will be at liberty to file any appropriate



responses and recall his witnesses for further examination if need be notwithstanding the closure of his case. The Applicant further states that they are not introducing any new or inconsistent issues.

Plaintiffs'/Respondent Case

4. The Application is opposed by the Plaintiff/Respondent through the grounds of opposition and notice of preliminary objection dated 26th September, 2024 raising the following grounds;
 1. The application is an afterthought brought after the plaintiff/Respondent already testified and closed his case.
 2. The Application is clearly an ambush on the Plaintiff/Respondent; he will have no opportunity to respondent to new matters of evidence being introduced by the 1st Defendant/Applicant as he cannot testify again in this matter.
 3. The Application seeks to react to the Plaintiff/Respondent's testimony and evidence tendered in court by amending its defence thus changing the nature and trajectory of this suit altogether.
 4. Pleadings closed long time ago and the 1st Defendant/Applicant cannot file new documents in this case particularly noting the voluminous documents which it seeks to introduce long after conclusion of the pretrial stage in this matter.
 5. The *Civil Procedure Act* does not envision amendment of a list of documents and the 1st Defendant/Applicant could only file a further list of documents which action would also be moot and overtaken by events noting the closure of the pretrial state and the fact that the Plaintiff/Respondent already testified and his case closed.
 6. The documents the 1st Defendant/Applicant seeks to introduce have always been under its custody and they could have filed them earlier as nothing stopped them from doing so.
 7. The 1st Defendant/Applicant now purported to hold brief for the 2nd Defendant yet it never filed any defence despite being duly served.

Directions

5. Even though the court directed parties to file submission seeking to disperse off the Application, only the Plaintiff complied through the submissions dated 18th November, 2024.

Submissions by the Plaintiff

6. The Plaintiff reiterates the grounds of his opposition and raises two issues for determination, namely, whether the Application is merited and whether it will be prejudicial to the Plaintiff to grant the Applicant the chance to amend the documents at this stage of the proceedings.
7. It is submitted that the Plaintiff will be prejudiced because he did not have the proposed documents/statements prior to giving his testimony. It is argued that when the Plaintiff testified and tendered his evidence, he was of the opinion that he would only respond to the 1st Defendants' documents on record. The Plaintiff's counsel prays that the application be dismissed with costs to the Plaintiff for



being frivolous, vexatious, unmerited and waste of judicial time. This is because the 1st Defendant/Applicant has not demonstrated sufficient reasons for the delay.

Issues for Determination

8. Having carefully analysed the Application and the Plaintiff's response as well his submission, the only issue for determination is whether the 1st Defendant's application is merited.

Analysis and Determination

9. The *Civil Procedure Rules 2010* offer a comprehensive framework on how parties ought to approach court and present their evidence before the suit is set down for hearing. Order 7 Rules 5 provides that a defence and counterclaim must be accompanied by an affidavit provided for under Order 4 rule 1(2) where there is a counterclaim, a list of witnesses, witness statements signed by the witnesses and copies of documents to be relied upon at the trial.
10. Order 11 Rule 3 on the other hand provides that one of the objectives of a case management conference is to;
 - a. Promote the expeditious disposal of cases;
 - b. Afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;
 - c. Afford the parties an opportunity to settle the case;
 - d. Determine any other matter relating to the management, hearing or disposal of the case;
 - e. Deal with pre-trial applications at first instance or formulate a timetable to deal with them as the court may deem fit; and
 - f. Identify the issues for determination.
11. The purpose of pre-trial conference was restated by the Supreme Court in *Odinga & 5 others vs- Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment) as follows;

“.....(it) is a preparatory forum to lay the ground rules for the expeditious, fair and efficient disposal of the petition. The pre-trial conference enables the court, upon hearing the parties and, if need be, on its own motion, to make appropriate orders and give directions for ensuring fair determination of the dispute. the court is empowered to give preparatory directions touching on the scheme of evidence: the filing and service of any further affidavits, or the calling of some particular kind of evidence. The issuance of such directions is attuned to the constitutional imperatives of efficiency, expedition, fairness, finality.”
12. A perusal of the proceedings in this matter shows that when the Plaintiff was granted leave to amend his plaint, the Defendants were granted leave to file their appropriate defences, accompanying documents and the witness statements they wished to rely on. When the matter came up for pre-trial conference on 18th July 2023, the 1st Defendant was granted the last opportunity to comply with Order 11 of the *Civil Procedure Rules*. The court further specified that the hearing date would only be issued only upon mention to certify if the matter ready for hearing.
13. On 23rd October, 2023, the court proceeded to fix the matter for hearing because all parties had confirmed their readiness to proceed. The Plaintiff case was heard and closed on 9th May 2024.



However, the defense hearing scheduled for 3rd October, 2024 did not proceed as planned because the 1st Defendant filed the application which is the subject of this ruling.

14. Section 3A of the *Environment and Land Act* as well as Section 1A of the *Civil Procedure Act* stipulates that the court must facilitate just, expeditious, proportionate and affordable resolution of civil disputes.
15. The 1st Defendant/Applicant in its application alleges that the additional evidence it seeks to introduce will determine the real issues in controversy. Paragraph 4 of the affidavit of Cecila W. Koigu sworn in support of the 1st Defendant's application states as follows;

“That additionally, the Applicant has obtained further information and records that will shed more light into the issues arising in this suit for the court's just and complete determination.”

16. Despite the foregoing proclamation, the 1st Defendant/Applicant has not stated why they did not produce the intended additional evidence in support of their case within the specified timelines yet the court gave them sufficient opportunity to do so. Given that the proposed evidence is authored by the 1st Defendant/Applicant, then, it is logical to presume that they have always had it in their possession.
17. One other issue that the court must consider is the consequences of allowing the application. Would the Plaintiff be prejudiced? In answering this question, I am guided by the Supreme Court decision in *Odinga & 7 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 1 (KLR) (26 March 2013) (Ruling) where it was pronounced itself follows on the manner in which evidence produced outside the stipulated time ought to be dealt with.

“The parties have a duty to ensure they comply with their respective timelines, and the court must adhere to its own. There must be a fair and 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 inadvertences which were foreseeable or could have been avoided.

The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

18. While dealing with a similar matter, Justice Munyao Sila had this to say in *Too -vs- Tum* (Environment & Land Case 975 of 2012) [2014] KEELC 512 (KLR) (27 January 2014) (Ruling)

“There is no provision in the rules that permits the Court to accept a list of witnesses or documents filed outside the timelines provided in Order 3 rule 2 and Order 7 rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear-cut provision setting out the consequences of failure to comply. The rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the *Constitution* under article 50(1), provides that every party deserves a fair trial, and



it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.”

19. The 1st Defendant/Applicant application was filed after the Plaintiff had already tendered his evidence and closed his case. I agree with the Plaintiff submission that the application offends the objectives of the *Civil Procedure Act* and article 50 of the *Constitution* on a fair trial. It is unacceptable for a party to withhold information only to file it as and when they seek to fill in gaps in evidence and after the opposite party has already closed its case. The 1st Defendant’s application as filed amounts to a mockery of the justice system. This court will not aid the 1st Defendant in the bending or circumvention of rules of procedure because, as the Court of Appeal stated in the case of *Nicholas Kiptoo Arap Salat -vs- IEBC & 6 others* (2013) eKLR,

“.....while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..”

20. Accordingly, the 1st Defendant/Applicant Application dated 17th September, 2024 is hereby dismissed in its entirety with costs to the Plaintiff.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Irene Odhiambo h/b for Mr. Bake for the 1st Defendant/Applicant

Mr. Ng’ang’a for the Plaintiff/Respondent

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

