Lapana Limited v County Government of Trans-Nzoia (Environment and Land Case 8 of 2023) [2024] KEELC 881 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEELC 881 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND CASE 8 OF 2023

FO NYAGAKA, J

FEBRUARY 23, 2024

BETWEEN

LAPANA LIMITED ..... PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TRANS-NZOIA ..... DEFENDANT

RULING

1. On 18/01/2024 this Court delivered a Ruling herein determining an application on alleged contempt of Court. By the said Ruling the Court found the County Secretary of the Defendant guilty of disobedience of its orders issued early the previous year.

2. In the course of analysing the law, evidence by way of affidavit evidence and the submissions of the parties, this Court noted that one set of the Applicant's submissions were not before it. Consequently, it determined the application on the merits, by considering the submissions that were availed to it. While noting so, it is not lost sight of the fact that earlier in the course of preparation of the previous application for determination learned counsel for the Applicant had indicated that he had filed the submissions now sought to be considered and served the Respondent's learned counsel. He sought leave to file Supplementary Submissions and it was granted although he delayed in filing it, causing a number of mentions in the matter.

3. Once he filed them, the Court heard the Application on 31/10/2023, in the believe that the Supplementary Submissions completed the set of documents the Court would consider, it fixed the Applications for Ruling. When it prepared the Ruling, it found, and indeed it was so, that the Submissions alleged to have been filed by the Applicant were not before it. It indicated as much but went on to prepare and deliver the Ruling impugned now. Hot on the heels of the delivery was the instant application, dated 24/01/2024. It sought the following orders:-

    1. ...spent

2. That the Honourable Court be pleased to admit and consider the submissions of the Defendant.

3. That the Honourable Court be pleased to review and set aside its orders that were issued on 18th January, 2024.

4. ...spent.

4. The Application was based on the grounds that when the application came up for hearing on 31/10/2023 and the Court confirmed that the Defendant's Submissions were on record and set a Ruling date; the Defendant was found in contempt and while the Court did so it observed that, save for the Supplementary Submissions dated 04/08/2023, the initial submissions were "boom, magically" not placed in the file yet they were paid for and filed and sent to the official court email, kitaleelccourt@gmail.com; that the Defendant believes that had the submissions been on record the Court could have arrived at a different finding from that of citing the Defendant for contempt; it was in the interest of justice that the Ruling of 18/01/2024 be reviewed and the submissions considered; and that the Plaintiff would suffer no prejudice or harm if the review was granted.

5. In the Supporting Affidavit sworn by learned counsel, V. Obuli on 24/01/2024, the deponent deponed that he practiced in the law firm which was on record for the Applicant. Further, that he prepared the written submissions dated 05/06/2023 and paid for and served the same on learned counsel for the Respondent. He annexed and marked ONV-1 a copy of an email sent on 05/06/2023 at 14:42 to the email address of the Respondent' learned counsel. The email titled Submissions had an attachment of a pdf document titled "ELC Case No. 8 of 2023 Submissions pdf". Its contents were:

> " Dear Sir/Madam,
>
> Kindly find the attached.
>
> Regards"

6. He annexed and marked ONV-2 another copy of an email of the same date with similar content save that the latter shows that it was sent to the Court email address at 14:32, an earlier time than the one sent to learned counsel. He then annexed and marked as ONV-3 a copy of an Invoice titled "Order Summary" which was issued by the Judiciary of Kenya to the Defendant to pay a sum of Kshs. 850/=. The details show that the sum due was for the payment for a Notice of Appointment and Submissions. It was dated 06/06/2023 and shows it was released at 10:50:44. He attached and marked as ONV-4 a copy of a receipt of payment for the sum. It was issued on 03/07/2023 at 09:43:53 in favour of the Defendant/Applicant.

7. The Applicant deponed further that he had read the Ruling and was so worried that the Court could not see the Submissions properly paid for. He also wondered who was interfering with the Court documents hence he believed that if the Court had considered the submissions it would have arrived at a different decision. He deponed further that someone must have removed the same from the Court file.

8. At paragraph 6 learned counsel made an extensive deposition on how the Court went wrong or erred in its decision. In it, his further deposition was that the County Secretary had deponed that one Moses Mtange was not an employee of the County. His deposition was why the Court would doubt such a person who was the head of public service. He stated that if the Court was in doubt it could have summed the deponent for cross-examination. His further deposition was that the Court's interpretation of the said relation was a blatant ignorance of the fact that even it courts of law and its

corridors there exist masquerades who assert to know judges yet there are there to make a living. His further deposition was that it was in the public domain that "we have also seen some pretend to be head of Police (the (in)famous Waiganjo." He deposed further that the Court relied on pure assumptions to come to such findings. He deponed further that the Court must apply the law to the facts presented to it and apply the test of beyond the balance of probability but almost below reasonable doubt.

9. With such a deposition, he swore further in paragraph 7 that it was in the interest of justice that the submissions be placed on record and the Court reviews its Ruling and grants the orders sought.

10. The Respondent opposed the Application through the Affidavit of Fredrick Sululu Masinde which he swore on 31/01/2024. He deposed that the application was devoid of merits. That it was the Applicant's responsibility to ensure that once the submissions were filed online they reach the Court file for consideration. He stated that Submissions were not pleadings and that the judge carefully considered the pleadings of the parties, particularly, the parties' affidavits and made findings on the same. He swore that there was absolutely no error apparent on the face of the record to warrant a review of the Ruling of 18/01/2024 and that failure of the Court to consider submissions which were not on record was not an error apparent on the face of the record. His further deposition was that the Applicant had not been prejudiced in any way.

11. The Application was disposed of by way of written submissions which the Court had to insist this time round that the parties ensure they put on record. The Applicant filed its submissions dated 07/02/2024 on 14/07/2024 while the Respondent filed its dated 09/02/2024 the same date.

12. The Applicant began his submissions by summarizing in paragraph 1-3 the application. Then it gave the Rule or the law which is Section 80 of the *Civil Procedure Act*, Chapter 21, but which it stated was Chapter 15 (sic), of the Laws of Kenya. It gave the text of the provision. He also cited in full text Order 45 Rule 1 of the *Civil Procedure Rules*. This Court shall not reproduce the texts of the two provisions.

13. It then set out a number of issues for determination. One wads whether there was a mistake or error on the face of record. In analysing the issue, he repeated the summary of the content of Order 45 Rule 1. It relied on the case of *Francis Njoroge v. Stephen Maina Kamore* [2018] eKLR which by citing the Court of Appeal decision of *Muyodi v. Industrial and Commercial Development Corporation & Another* [2006] 1 E.A. 243 repeated the definition of an error apparent on the record.

14. The Applicant then submitted that "the overlook of their submissions resulted in an error/mistake apparent on the face of the record." It submitted further that in terms of sufficient reason for review the failure by the Court to consider the position of the County Secretary that Moses Mutange was not an employee of the Defendant was a reason sufficient enough because the County Secretary was the custodian of the records of the Defendant hence the Court should have listened to the Secretary. That the conviction of the County Secretary on clearly disproved facts was sufficient reason for the review. It relied on the decision of *Omote & Another v Ogutu* (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling).

15. The Respondent summarized the content of the application and proceeded to argue that an Applicant who seeks review under Section 80 of the *Civil Procedure Act* and Order 45(1) of the *Civil Procedure Rules 2010* should demonstrate to the satisfaction of the Court four requirements, which I summarize here as (a) discovery of new and important matter or evidence which it could not have or would be within its knowledge after due diligence, (b) some mistake or error apparent on the face of the record, (c) any other sufficient reason, and (d) he must bring the application without undue delay.

16. After giving the summary learned counsel argued that the contention that the submissions were not on record should not hold any water. That the Applicant's counsel cannot as a fact confirm that the

submissions were on record but were removed as he deponed. He submitted that the deponent could not purport to state on oath that the submissions were removed from the record without knowing who and when he removed them. Again, that from the Applicant's own affidavit in paragraph 2 it was evidence that the submissions were not placed on record. Further, that it was his obligation to ensure that the submissions were on record, and lastly, that submissions are not pleadings hence the application failed miserably. He relied on the decision of ELC at Kitale in Land Case No. 50 of 2017 *Benson Kaos & 72 Others versus The Attorney General* regarding submissions in which this Court held that submissions are a marketing language and not pleadings. He submitted that the application did not meet the threshold of a review and urged the court to dismiss it.

17. I now turn to the issue before the Court. Other than who to bear the costs of the instant application the only issue is whether the argument that failure to consider the Applicants' submissions (which were not placed before the judge) is an error meriting the setting aside of the Ruling of the Court. The Applicant argues that it had filed submissions which were not considered at the time of preparing the impugned Ruling, and further, had they been taken into account the Court would have arrived at a different conclusion that it did in the impugned ruling. That for this reason this Court should set aside the Ruling delivered on 18/01/2024.

18. In my view, it is important for parties to underscore the place of submissions in the place of decision-making by a court or indeed any other body clothed with the power to make a decision over a dispute. It should go without saying that submissions are arguments which parties to a matter make in order to convince the Court to decide in their favour. They only constitute the maker's view of both the law and facts of the dispute. The Court is not bound to agree to the party's arguments because, more often than not, a party will identity the strengths of his case and maximize on them and the weaknesses of the adverse party and capitalize on them. At times it goes to the extent of skewing the facts and misinterpreting the law to his/her advantage. Thus, unlike the Court or arbiter who is obligated to analyze the issue before him/her with a balanced mind, in submissions, parties to a matter have often have a leaning toward their side of the case.

19. Again, it is noteworthy that while a Court may direct parties to file submissions, it is not a compulsory event for compliance. A party may or may choose not to file. What remains clear is that it is not fatal to a party's case in the event of failure to file any submissions. This because the Court has to, at all times, decide on the issues before it based on the law and evidence - that is what is known as the merits of the case. And where it is a preliminary objection the Court is bound by law to analyze he law and the pleadings of the parties. Submissions are like a coat of paint to beautify the building. The building structure can house people irrespective of whether it has a coat of paint or not.

20. The meaning of submissions and their import was underscored by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR. The Court stated thus:-

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

21. Guided by the decision above, it is beyond peradventure that there is a difference between submissions and evidence. For the applicant to argue that the Court arrived at a different by considering the submissions (only) is to not only place the submissions on the same level as pleadings and also fetter and fix the reasoning of the Court and its discretion to that of the Applicant. It would be akin to holding

that only the applicants' arguments (in the submissions) were right while forgetting that the said party only urged its case. In any event, I have carefully read severally the Supporting Affidavit to the instant application and even the grounds thereof to find out how, in the Applicant's view, the Court erred in its analysis of both the law and facts when it did not consider the submissions.

22. On the contrary, in the instant Application the Court finds that the Applicant faults its finding for the mere absence of the initial submissions from the record at the time of preparing the Ruling. On this issue that Applicant submits that the failure to consider the submission was an error or mistake apparent on the face of the record. Additionally, it submits that the finding which was contrary to the contention by the County Secretary that one Moses Mutange was not an employee of the County was sufficient reason to warrant a review of the finding on conviction because the County Secretary was the custodian of the employment records of the Defendant.

23. On the latter limb on sufficient reason as submitted, this Court is of the view that clearly the Applicant wishes this Court to sit on appeal on its finding. It thinks the court should have agreed with the assertion by the County Secretary and arrived at a different view. I disagree with this submission. Actually, the Court deeply considered the assertion in detail vis-à-vis the totality of the circumstances surrounding the confiscation of the mobile phone of the person who allegedly took a video of the demolition and the retrieval of the same phone and discovery by the person that the video had been deleted, it arrived at a reasoned conclusion. That cannot be a matter of review before this Court.

24. With regard to what counsel submits as overlook of submissions, it is this Court's view that the Applicant's contention and its submissions on it are faulty. To this date the said submissions have never been placed on the record. All that the Applicant has done is to show that he paid for the submissions. But as pointed out elsewhere in this decision, there is no evidence whatsoever that when the Applicant paid for the submissions almost a month after emailing them to Court he made conscious efforts to print them and the receipt and place them on the record.

25. Again, even in absence of the submissions the Court went into great lengths to consider on merits each and every assertion of the Applicant in the previous or determined application. This Court expected, and indeed in any future arguments before any other Court that submissions have not been considered or have been omitted, the Applicant (must be obligated always) to point with particularity which part of the decision failed to take into account the arguments the submissions were about, so much so that if the court considered the issue, absent of the submissions, and arrived at a different conclusion than was mooted in the submissions though not considered, the Applicant should throw in the towel or accept the decision and move on or appeal therefrom. That cannot be an error or mistake apparent on the face of the record.

26. This, in this matter I see no prejudice that was occasioned to the Applicant by that failure to consider the document which, in the first place, was not placed by the Applicant before me. This Court considered the merits of the assertions of the Applicant. And at this point it is worth noting and discouraging the practice of parties serving the adverse parties with documents that have not been filed in or not been made part of the Court record. Such documents can never be the basis for the other party to act in a certain way in a matter before the Court. For instance, in this matter, on the material date, 05/06/2023 at 14:42, the Applicant emailed, as evidenced by annexure ONV-1, to the Respondent's learned counsel's address a set of documents in pdf format he titled "Submissions". They were not filed until 03/07/2023 as evidenced by annexture ONV-4. Thus, was the pdf document attached to annexture ONV-1 submissions properly so called that could be relied on? In my humble view, they were not, until when they were paid for.

27. Even if the submissions were proper ones did failure to consider them occasion any prejudice to the Applicant? I have stated before that I saw none of the depositions in the Affidavit in support of the instant Application on how the Court erred in not considering the facts before it and the law. Instead, learned counsel made an elaborate deposition in paragraph 6 of the Supporting Affidavit to the instant application regarding what, in his view, the Court erred at.

28. I have carefully analyzed the deposition. All that the Applicant raises in the paragraph singled out were matters the Court considered in detail, applied its reason on them vis-à-vis the law and arrived at a finding. Such a finding cannot and does not in any way constitute an error apparent on the record or sufficient reason for reviewing the Ruling. If the Applicant felt aggrieved by the finding of the Court on them it knew well the best course of action. What learned counsel had done in paragraph 6 is to introduce new evidence and tried to have a second bite at the cherry (in the application dated 24/03/2023). It cannot legally hang on absence of the submissions from the record to get a second bite.

29. There are a number of ways to present evidence before the Court. Unless learned counsel has been called by a party as a witness he/she cannot give evidence from the Bar: but he can, as a witness testify or swear an Affidavit on facts what are within his/her knowledge. Additionally, evidence may be received by a Court through oral testimony, written witness statements adopted by the makers thereof or through affidavits sworn or notarized and filed by parties in a matter. As this Court held in *Patrick Simiyu Khaemba v Kenya Electricity Transmission & Another* [2021] eKLR:-

> "Evidence of parties comes into a matter in one of many ways, namely, by way of oral testimony, filed written witness statements that have been adopted as evidence of the parties in accordance with the rules of procedure and evidence, and affidavits of whatever nature as long as they have formed part of the Court record. Further, in relation to Applications or issues that come up before Courts for determination on such, submissions do not and cannot be equated to and be seen to be an Affidavit, Replying Affidavit, Supplementary Affidavit, Further Affidavit, Grounds of Opposition or Preliminary Objection. Moreover, submissions neither exist in nor are they made in a vacuum: they must be anchored on the filing of any or a combination of the above documents as relate to Applications in case they are filed. Where any such issues are raised orally, submissions must be based on the points or issues that are raised."

30. That being the position in law regarding submissions, this Court turns to the argument herein that it ought to set aside the impugned Ruling on account of having not considered the submissions filed by the applicant. First, it is clear to me that the confusion regarding the submissions that were not considered was occasioned by learned counsel for the Applicant. This is because when they sent the written submissions for assessment and payment. They did nothing, even after the assessment was done, and communicated to them. They took not step until 03/07/2023, almost a month later, to pay for the submissions. It is not indicated anywhere or in any way at all whether upon payment for the submissions the Applicants took the step of regularizing this late payment and drawing it to the attention of the Registry and indeed the Court that the submissions emailed to the Court a month before had since been paid for and ought to be printed and placed in the Court file.

31. The record is clear that on 06/06/2023 when the application which gave rise to the Ruling sought to be set aside herein currently came up for inter partes hearing, learned counsel Mr. Kisuya who held brief for learned counsel for the applicant then actually misled the Court by indicating that the Applicant had since filed submissions. On the said date, he said that he had no objection to the Respondent filing both a further and supplementary affidavit within three days of that date and learned counsel for the Respondent filing submissions. Then he sought leave to file Supplementary Submissions after service

of the Respondent's said Affidavits and submissions. At no point in time except on 07/08/2023 when he filed both the Supplementary Submissions and a Replying Affidavit to the Further Affidavits of the Respondent did learned counsel for the Applicant place on the file the submissions paid for later. It was after that that learned counsel made further requests to file other Affidavit and the Supplementary Submissions. On 31/10/2023 he confirmed that he had filed the Supplementary Submissions and proceeded to address the Court on other issues he considered emerging regarding the conduct of the proceedings. After that the Court fixed the matter for hearing.

32. Clearly, from the conduct of the Applicant, the fault was on its part in not following up with the Registry to cause the Submissions paid for late to be placed in the file. And, to date neither the original or a copy of the receipt referred to in the instant application nor the printed submissions have been placed on the file. Actually, and in the interest of justice, this Court has perused the Submissions as were in the Court email system and found no argument or substance that would have made it arrive at a different finding than it did in the Ruling delivered on 18/01/2024.

33. Worth repeating is that submissions are "marketing tools" for parties: their content is only what is being marketed to the decision maker. Learned counsel, and learned for that matter, often market their clients' issues to judges and judicial officers generally through submissions. Since submissions are not evidence, courts are not bound to even consider them since there are numerous decisions that have been made without submissions. The instant one cannot be an isolated case.

34. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 his Lordship stated as follows:

> " Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case."

35. Again, *Ngang'a & Another vs. Owiti & Another* [2008] 1 KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

36. I can only end it here by citing Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007, where he states that

> " Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided." In so coming to the closing point regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the

> props and environment generally to direct the guests' attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon.

37. Of relevance to the instant issue is the procedure regarding Applications generally. The provisions on making or the filing submissions is Order 51 Rule 16. It does not guide on how many sets of submissions parties may file. However, going by the practice of making submissions, this is done once by each party, unless exceptional circumstances compel the Court to exercise its discretion to permit more than one set. The Rule cited above provides as follows: "The court may, in its discretion, limit the time for oral submissions by the parties or their advocates or allow written for submission submissions." Further, 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*, [Mutunga Rules, 2013] provide the manner in which applications should be disposed of before this Court. Rule 33 provides as follows:

> 33. "In order to expedite trial:
>
> (a) The Judge shall encourage parties to proceed by way of written submissions in regard to all interlocutory applications. Oral submissions shall be permitted only in exceptional cases.
>
> (b) Parties shall submit written submissions that summarize their argument, and which do not exceed 10 pages (unless the Judge certifies the matter as complex and parties are granted leave to file lengthy submissions owing to the nature of the case). In all cases the submissions shall be paginated. Hard copies of all cited cases must accompany the submissions.
>
> (c) Where parties have filed written submissions and wish to highlight the same, the Judge shall be at liberty to allocate and cap the time for every party".

38. In the instant case, learned counsel faults the Ruling delivered herein on account of not considering Submissions he filed earlier. He does not in any way point out which point of argument he made in the submissions and which for failure to consider the submissions the Ruling was fundamentally flawed. In any event even if the Ruling was flawed on account of such a failure, it cannot form the basis of a review of the same.

39. The upshot is that the Applicant lacks merit and it is hereby dismissed with costs to the Respondent. The matter is fixed for mention 14/03/2024 when the County Secretary County Government of Trans Nzoia is required to attend this Court in person for purposes of mitigation and sentence as per the earlier orders of this Court.

40. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23RD DAY OF FEBRUARY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE.