



Doune Farm Limited v Soi & 4 others; Borop Multi Purpose Co-operative Society Ltd (Interested Party) (Environment & Land Case 142 of 2019) [2024] KEELC 781 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEELC 781 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 142 OF 2019
MAO ODENY, J
FEBRUARY 20, 2024**

BETWEEN

DOUNE FARM LIMITED PLAINTIFF

AND

RICHARD SOI 1ST DEFENDANT

JOSEPH RUNYA CHUMA 2ND DEFENDANT

JACSON MUTAI 3RD DEFENDANT

CHRISYNE LABOSO 4TH DEFENDANT

RICHARD SITIENEI 5TH DEFENDANT

AND

BOROP MULTI PURPOSE CO-OPERATIVE SOCIETY LTD INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated 28th September, 2023, by the Plaintiff/Applicant seeking the following orders:
 - a. Spent
 - b. That the supplementary list of documents dated 8th September, 2023 and filed on 11th September, 2023 be deemed as duly and properly filed.
 - c. That this Honourable court be pleased to give any such further orders as it may deem fit and just.



- d. That the cost of this Application be provided for.
2. The application was supported by the annexed affidavit of Richard James Kay Muir one of the directors of the Plaintiff herein and the grounds on the face of the application where he deponed that the Plaintiff/Applicant is the lawfully registered owner of the Land parcel number L.R No 9045/9 Rongai.
 3. It was the Applicant's case that the office of the Commissioner of Cooperatives while on inspection of the books and affairs of the Interested Party compiled a report dated 17th June, 2022 whereby amongst the findings was that the Plaintiff had legally and procedurally purchased the suit property from the interested party and hence its possession and ownership should not be interfered with. He stated that the report would be crucial in the just adjudication and determination of the suit.
 4. The Defendants opposed the application vide grounds of opposition dated 17th October, 2023 and stated that the inspection report being introduced was not sanctioned by this Honourable court and it is being introduced after the Plaintiff has long testified. They also stated that it is prejudicial to the Defendant as it violates the doctrine of sub-judice vis-à-vis the present suit. It was the Defendants case that the report makes final finding on the same issues pending before this Honourable court hence jeopardizes a fair trial of this suit.
 5. The Interested party also opposed the application vide grounds of opposition dated 16th October, 2023 and stated that the report sought to be introduced is an afterthought as the Plaintiff's director Richard James Kay Muir had testified and been cross examined. It stated that the report is not new or additional evidence but intended to fill a lacunae and that it would be prejudicial for such inspection to be carried out without the court's leave or directions.

Plaintiff's Submissions

6. Mr. Ogola, counsel for the Plaintiff relied on the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others [2018] eKLR and submitted that the Plaintiff instituted this suit against the Defendants for declaration of ownership and vacant possession of which the Plaintiff has produced a copy of the certificate of title to the impugned parcel and sale agreement as evidence in the case.
7. Counsel further submitted that it is trite that a certificate of title is not conclusive evidence of ownership and relied on the Court of Appeal case of Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009. He stated that it is important to allow the Plaintiff/Applicant to produce the Report of the Commissioner of Co-operatives dated 17th June, 2022 and deem the same as properly filed.
8. Counsel submitted that the additional evidence is directly relevant to the matter before this court and it would influence or impact the verdict as it clears any doubt on the ownership of the parcel by the applicant. He submitted that the report buttresses the applicant's claim that the sale of the subject property to the Plaintiff was proper and under the supervision of the Ministry of Co-operatives.
9. Counsel relied on Order 11 of the Civil Procedure Rules and the case of Johana Kipkemei Too v Hellen Tum [2014] eKLR and submitted that the report was not available at the time the Plaintiff/ Applicant was instituting this suit on 2nd April 2002 as it was availed on 17th June, 2022. He submitted that the documents proposed are not strange to the parties herein as they are part of the documents that had been filed by the Plaintiff herein in ELC No 13 of 2023.
10. Counsel relied on Article 50 (1) and 159 (2) of *the Constitution*, Order 18 Rule 10 of the Civil Procedure Rules and Section 146 of the *Evidence Act* and submitted that the report the applicant



intends to add is not voluminous being ten pages and it will not be difficult or impossible for the Defendants and interested parties to respond effectively. Mr. Ogola further submitted that the matter is yet to be heard and the parties therefore have equal opportunities to present and defend the case in light of the issues that would arise from the report.

Defendants' submissions

11. Mr. Orina, counsel for the Defendants' submitted that the inspection report that the applicant wishes to introduce at this late stage of the proceedings has a prejudicial effect against the Defendants for three reasons: firstly, the report touches on live issues before this Honourable court and likely to jeopardize a fair trial, secondly, the said report makes conclusive findings and judgment over the live land dispute before this court and thirdly, the Defendant/Respondents did not participate in the making of the Report.
12. Counsel submitted that chapter 3 of the report makes conclusive findings in the following terms:

“Doune farm is a private owned land and there should be no interference by the members of Borop Multipurpose Co-operative Society Ltd...”
13. Counsel therefore submitted that the above touches on the core of the land dispute before the court which will be prejudicial to the defendants.
14. Counsel relied on Order 3 and Order 7 Rule 5 of the Civil Procedure Rules, the case of Raila Odinga & 5 others vs IEBC and 3 others Petitions No 3, 4 and 5 of 2013, and urged the court to dismiss the application with costs.

Interested Party's Submissions

15. Counsel relied on the case of Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR where the court laid down the guiding principles for additional evidence in appellate courts in Kenya and submitted that this case does not meet the threshold for additional evidence.
16. Mr. Arusei, submitted that the inspection report sought to be introduced is sub-judice and pre-judicial to the interested party's right to a fair trial considering that the matter is pending in the court. He further submitted that the report was procured without the court's leave.
17. Counsel submitted that the report is dated 17th June, 2022 when litigation has been pending in court since the year 2002 and the present application runs afoul of the law on lis pendens and relied on the cases of Mawji vs US International University & Another [1976] KLR 185, Alois Oceano D'sumba v Rajnikant Narshi Shah & another [2017] eKLR, Mansukhalal Jesang Maru v Frank Wafula [2021] eKLR, Re Estate of Jebuigut Cheruiyot Jerich (Deceased) [2020] eKLR, Raila Odinga & 5 others v IEBC Supreme Court of Kenya, Petitions No 3, 4 and 5 of 2013 eKLR, Johana Kipkemei Too v Hellen Tum [2014] eKLR, P.H Ogola Onyango t/a Pitts Consult Consulting Engineers v Daniel Githegi g/a Quantalysis [2002] eKLR.
18. It was counsel's submission that allowing the application to introduce the report would be granting the Plaintiff a second bite at the cherry which would be prejudicial to the Interested party That further that the prejudicial effect of the report outweighs its probative value as the plaintiff has other avenues to enforce the said report like it has done in the Nakuru High Court Judicial Review Application No.E018 of 2023 Doune Farm Limited-Ex-Parte applicant v The Commissioner for Co-Operative Development & Another and Borop Multipurpose Co-Operative Society-Interested Party seeking to wind up Borop Multipurpose Co-operative Society Ltd .



19. Mr. Arusei submitted that the plaintiff is not without a remedy because it can still invite the State Department for Co-operatives under the Ministry of Agriculture, Livestock, Fisheries and Co-operatives to implement its report internally and administratively without escalating it to this court.

Analysis And Determination

20. The issue for determination is whether the court should allow the filing of a supplementary list of documents dated 8th September 2023 to include a report from the Commissioner of Co-operatives dated 17th June 2022.
21. The Plaintiff had filed a Notice of Motion dated 23rd November 2017 seeking amongst other orders to file and serve additional documents and the court be pleased to grant such further orders as it may deem fit and just for the protection of the Plaintiff's interest in the property pending the hearing and determination of the suit.
22. The application was heard and the court granted leave to the Plaintiff to file additional documents, list of witnesses and witness statements within 14 days from the date of the ruling. The court further ordered that the matter start de novo.
23. In the Supreme Court case of Hussein Khalid and 16 others v Attorney General & 2 others [2020] eKLR the court held as follows:
- “ Another principle in the de novo hearing is that it should not be taken as an opportunity to fill in gaps noted during the hearing by bringing a new set of evidence for the repeat trial. This is because a de novo hearing is a continuation of a trial and not a second trial.”
24. This court further in a ruling dated 9th November, 2022 issued several orders in respect of the hearing of this case. The court stated that in order to shorten the hearing period and avoid tedium, that: “No new documents or witness statements shall be included save those in the file record as at today.” These orders were issued after protracted arguments on why the parties had not filed documents and yet they had been given opportunities to do so.
25. In the case of Johana Kipkemei Too v Hellen Tum [2014] eKLR, (supra) the court observed as follows:
- “ This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159(2) (d) of *the Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.”
26. The report sought to be introduced after the Plaintiff has given evidence and cross-examined was procured on 17th June 2022 and this case was filed in 2002. Actually it is one of the oldest cases in this



court and this report is being sought to be introduced after 20 years since filing of the suit. Many Judges who have since retired handled this case but it did not reach the stage of hearing of witnesses due to many applications and objections.

27. This is the second application by the plaintiff to file additional documents in this suit. Preparation of hearing of a suit is provided for under order 11 of the Civil Procedure Rules where parties attend pre-trial conferences before a matter is set down for hearing. This being an old case it has been necessary to allow parties to file documents on request but the same has a limit to what the court can allow for proper administration of justice. Justice delayed is justice denied. A child born in 2002 is now 22 years and in University if such child followed the education path if not a married man or woman with children to boot. This shows how this matter has been in the court corridors for a long time.
28. In the case of *Mansukhalal Jesang Maru v Frank Wafula* [2021] eKLR, the court held that:

“.....I agree with the Respondent’s submissions that the Application is a backdoor way of circumventing the orders of the Court that were given on 23/10/2018. On that date, the Court rendered itself thus: “No further documents or statements will be filed, the Plaintiff having closed his case. The suit will proceed on the basis of the filed documents on 30/10/2018.” The Applicant neither Appealed from nor applied to set aside or review the Order. It still persists and binds the parties. The better step could have been for the Applicant to apply to review the said order, while justifying the reasons for failure to file the documents and witness statements on time or earlier. The upshot is that the Application dated 5/12/2019 is devoid of merit and is hereby dismissed with costs to the Respondent.....”
29. The court has discretion to allow additional evidence to be adduced by filing additional documents after a party has given evidence but the court must weigh whether the introduction of the new documents will prejudice the opposing parties who may not have a remedy. The document sought to be relied on is a report which was procured 20 years after the filing of the case, it was done while this case was pending before the court without the leave of the court, the contents of the report go to the root of the litigation before the court.
30. As it is, the same does not meet the threshold of additional evidence and as rightly stated by counsel for the plaintiff that it is meant to buttress the plaintiff’s evidence on proof of ownership of the suit land as title alone is not proof of ownership as the root of the title is key. It means that it is meant to fill the gaps after the plaintiff had given evidence and cross-examined.
31. Consequently, I find that the application lacks merit and is therefore dismissed with costs to the respondents. Parties to fix this matter for hearing on a priority basis.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF FEBRUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

