



REPUBLIC OF KENYA



KENYA LAW
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Ngilu & 3 others v Kombo & 18 others (Environment and Land Case Civil Suit E095 of 2022) [2024] KEELC 1010 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT E095 OF 2022
LL NAIKUNI, J
FEBRUARY 20, 2024**

BETWEEN

**CHARITY KALUKI NGILU 1ST PLAINTIFF
LUNDE JEMI MWENDWA 2ND PLAINTIFF
MWENDE KATETHIA MWENDWA 3RD PLAINTIFF
SYALO NGILU MWENDWA 4TH PLAINTIFF**

AND

**MISHI KEAH KOMBO 1ST DEFENDANT
JACKSON MWAMBAJI KAILO 2ND DEFENDANT
REBECA MUIA 3RD DEFENDANT
SALMA MBEYU 4TH DEFENDANT
ABDALLA MWACHINGIT 5TH DEFENDANT
MERCYLINE KWAMBOKA 6TH DEFENDANT
AMINA M. MWANG'OMBE 7TH DEFENDANT
TSUMA TSUMA 8TH DEFENDANT
ROBERT K.GOSHI 9TH DEFENDANT
ANDREW SIMIYU 10TH DEFENDANT
KARISA KENGA 11TH DEFENDANT
MWIJUMA MBWANA 12TH DEFENDANT
NJIRA NGALA 13TH DEFENDANT
DUNCUN OUKO 14TH DEFENDANT**



KADAMA TOYA	15 TH DEFENDANT
SOFIA RAMADHAN SALIM	16 TH DEFENDANT
ABEL KILONZO	17 TH DEFENDANT
MANGI KATANA CHENGO	18 TH DEFENDANT
OMAR KAI	19 TH DEFENDANT

RULING

I. Introduction

1. In this Ruling, the Honorable Court was called upon to make a decision following a strong objection raised by the Learned Counsel for the Plaintiff – Mr. Gathu to an application sought by Mr. Mr. Khamisi Salim, the Learned Counsel for the 1st to 19th Defendants. This happened immediately upon the closure of the Plaintiff's case on the 14th February, 2024 and it was the turn for the Defence case. At that juncture, Mr. Salim Advocate applied for adjournment to accord himself ample to properly prepare for the Defence case. The Learned Counsel indicated that it was a matter that was being handled from its inception by his colleague Mr. Aboubakar Mwanakitina Advocate. He needed to fully acclimatize himself with the case accordingly. Further, he indicated that although the Defendants were physically in court but it was incumbent that he spend a little bit time with them on a few necessary nitty gritty of the case whatsoever. It was this application that Mr. Gathu Advocate vehemently opposed.
2. While opposing the said application, Mr. Gathu Advocate also observed that from the record the Defendants had not only failed to file any witness statement as required by law but at the same time not fully complied with the provision of Order 11 of the Civil Procedure Rules 2010, a fact which was admitted by Mr. Khamisi Salim Advocate. Mr. Gathu Advocate argued that although the Defendants had filed their statement of Defence dated 3rd December, 2023 and filed on 5th December, 2023 they had failed to fully adhere with the law and hence could not be allowed to testify in court. He further averred that this was not a procedural technicality to be cured under the provisions Article 159 (2) (d) of *Constitution of Kenya, 2010*. His contention was that Mr. Abuorbakar Advocate for the Defendants was such a seasoned litigation Advocate to have failed to see this rather obvious legal lacuna being a legal requirement. To the Learned Counsel, this only tantamount to a deliberate disobedience of the cardinal aspect of the law and Pre-trial conditionalities. To the Counsel, these acts of omission and commission perpetrated by the Defendants continued to prejudice the Plaintiffs who though had already testified but being extremely keen and interested with their matter, would be physically attend to all the court proceedings and hence continued incurring huge resources – time, monies and man – hour at the chagrin of the Defendants.
3. He further apportioned blame upon the Defendants who he wondered how comes they just sat pretty comfortable without ever getting to inquire from their Advocates why they never at any time been given any documents to read and append their signatures or thump print pertaining to the case.

In the given circumstances, therefore, Mr. Gathu Advocate urged court to disallow the application for adjournment by the Defendants. Juxtapose, instead the Court should order that the Defendant closes their case and provide direction with regard to filing of written submissions and take a Judgment date.



4. As a quick and short rejoinder, Mr. Salim Advocate admitted the failure to adhere with the law on filing of the witness statements which he indicated to Court only just came to his attention instantly upon perusing the records. Be that as it may, he was of the view that the Defendants to be allowed to testify on the contents of the filed Defence. Besides, he urged Court to find that the error by an Advocate should not be visited upon the clients. He underscored and called Court to take Judicial notice to the fact that the instant Case was extremely sensitive and emotive as it involved livelihoods and shelter to numerous families and it would be unfair to deny them to have their day in court through tendering of oral (*Viva voce*) evidence. For the Court to grant the orders sought by the Plaintiff would not only prejudice the Defendants from enjoying the principles of natural justice – right to be heard but it should be perceived as procedural technicality curable under the provisions of Article 159(2) of the Constitution of Kenya 2010. He beseeched Court to allow the application as sought.

II. The Issues for analysis and determination

5. Having heard the oral submissions by the Learned Counsels by the Learned Counsels for the Plaintiff and Defendants. I have considered the Provisions of the Constitutions of Kenya 2010 and statutes and to reach an informed, just and fair decision I have crafted two (2) salient issues:-
 - a. Whether failure to file witness statements and other documents in a suit is so fatal to deny the party to testify orally.
 - b. Whether the anomaly under (a) above may be cured in the interest of serving substantive justice

Issue No. (a) Whether failure to file witness statements and other documents in a suit is so fatal to deny the party to testify orally.

6. Under this Sub – heading, the Honourable Court deciphers the main substratum of the issue at hand is on effect for failure to file witness statements and other supporting documents by the Defence and the consequences in law. From the very onset, I wish to point out that the matter is still at the trial stage and whereby I need not recount on the facts of the case as yet until at the very tail end of the matter. However, I will proceed to point out some basic fundamental facts which are “*pari material*” herein. The Plaintiff instituted the suit by filing a Plaint dated 1st August, 2022 and filed on 23rd August, 2022. It was on against the 1st to 19th Defendants. The Plaintiff moved court under Certificate of Urgency and an interlocutory Notice of Motion application seeking to be granted Interim injunctive Orders restraining the Defendants and their agents from causing any dealing and/or further interference with the suit land – all that property known as Sub-Division No. 2427 (Original No. 2402/5) Section VI Mainland North Msa. (Hereinafter referred as “The suit land”).
7. Indeed, upon effecting service the Defendants replied to the application and the same was argued before this Court. Subsequently, a comprehensive ruling was delivered granting the orders in favour of the Plaintiffs as sought. Additionally, I have noted that the Defendants were served with Summons to Enter Appearance dated 22nd September, 2022. Pursuant to that they filed statement of Defence and Counter Claim dated 3rd December, 2022. I believe these facts will be sufficient for the moment.
8. Now turning back to the issues at hand. The law governing the filing of the witness statements is founded under the provisions of Orders 7 Rule 5 and 11 of the Civil Procedure Rules 2010. Order 7 Rule 5 provides as follows: -

“The Defence and Counterclaim filed under Order 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's witnesses and
 - d. Copies of documents to be relied on at the trial provided that the statements under Sub-Rule (c) may the leave of the Court be furnished at least fifteen (15) days prior to the trial conference under Order 11”
9. Further, the provision of Order 11 of the Civil Procedure Rules, 2010 holds that some of the issues to be dealt with by the Court during Pre-trial Conference include whether a party has given full disclosure of documents to the other party; whether the inspection of documents has been done; whether a party has filed and exchanged all witness statements among other things. It's all meant to avoid ambushing the other party in the dispute.
10. Additionally, the provision of Order 11 (2) (a) to (d) of the Civil Procedure Rules, 2010 on case management checklist empowers the court to order for the filing and service of any necessary particulars during a Pre-trial conference. The court can also give any equitable directions to facilitate expeditious disposal of the suit.
11. The provision of Order 7 Rule 11 is clear that non filing of witness statements does stop the holding of a Pre-trial conference. The intentions for the Pre-trial conference is to find out whether the suit is ready for hearing or not and to sort out all the preliminaries. At that stage a party may request for time to comply of other rules for instance filing of other documents. Therefore, from the provision of Order 7 the failure to file statements does not lead to striking out of the Defence. In view of the foregoing, and the honest admission and disclosure by the Learned Counsel for the Defendants, its definite that the Defendants failed to comply with the law.

Issue No. (b) Whether the anomaly under (a) above may be cured in the interest of serving substantive justice

12. At all times, this Honorable Court and particularly dealing with such an emotive issue at hand it must be guided by the Interest of Justice and be seen to be eager to serve substantive justice – the great promise of the Constitution made under the provision of Article 159 (1) and (2) of the Constitution of Kenya, 2010. However, I should be understood to state that the provision of Article 159 (1) and (2) of Constitution of Kenya, 2010 was not meant to aid defaulters on court orders or provisions of the law. Nay. Far from it.

However, there are certain circumstances that its imperative such as in the given circumstances of the instant case, that the Court is compelled to invoke the principles of Overriding Objectives (Oxygen Rule) here as founded under the provision of Sections 1A, and 1B of the Civil Procedure Act, Cap. 21 and Sections 3 and 13 of the Environment & Land Court Act No. 19 of 2011 and Sections 101 of Land Registration Act No. 3 of 2012 and Section 150 of Land Act No. 6 of 2012. These provision of the law are all on the need to attain an expeditious, affordable, proportionate, just, fair and accessible resolution of disputes and the jurisdiction of this Court respectively.

(See the cases of Francis Githinji Karobi –Versus- Stephen Kagani Gitau (2014) eKLR, Merry Beach Ld. –Versus- Barclays Bank of Kenya Ltd. & Another (2014) eKLR, and ELC. (Machakos) No. 33 of 2016, Richard Daudi Nzuko & Another –Versus- Rachel Kailu Nzioka & 2 Others 2016 KRL



13. Upon assessing the file, I have noted that while responding to the afore stated Interlocutory application dated 1st August, 2022 by the Plaintiff herein, the Defendants filed and swore several detailed Replying Affidavits being as follows:-

- a. Mr. Mishi Keah Kombo - Sworn and dated on 3rd December, 2022
- b. Mr. Jackson Mwambaji Kailo – Sworn and dated on 3rd December, 2022.
- c. M/s. Rebecca Muia - Sworn and dated on 3rd December, 2022.
- d. M/s. Salima Mbeyu (Unsworn and undated).
- e. Mr. Abdalla Mwachingit (Unsworn and undated).
- f. M/s. Mercyline Kwamboka (Unsworn and undated).
- g. M/s. Amina M. Mwang’ombe (Unsworn and undated)
- h. Mr. Tsuma Tsuma – Sworn and dated on 3rd December, 2022.
- i. Mr. Robert K. Goshi – Sworn and dated on 3rd December, 2022.
- j. Mr. Andrew Simiyu – Sworn and dated and on 3rd December, 2022.
- k. Mr. Karisa Kenga - Sworn and dated on 3rd December, 2022.
- l. Mr. Mwijuma Mbwane - Sworn and dated on 3rd December, 2022.
- m. Mr. Njira Ngale - Sworn and dated on 3rd December, 2022.
- n. Mr. Duncan Ouko - Sworn and dated on 3rd December, 2022
- o. Mr. Kadama Toya - Sworn and dated on 3rd December, 2022
- p. M/s. Sofia Ramadhan Salim - Sworn and dated on 3rd December, 2022.
- q. Mr. Abel Kilonzo - Sworn and dated on 3rd December, 2022.
- r. Mr. Mangi Katana Chengo - Sworn and dated on 3rd December, 2022.
- s. Mr. Omar Kai – Sworn and dated on 3rd December, 2022.

And annexures attached thereof.

14. From the intuition by the Honourable Court, perhaps as it’s a conventional practice while filing of Originating Summons under the provision of Order 37 (1) and (2) of *Civil Procedure Rules* 2010 after filing these Replying Affidavits and attaching annexures on them, the Learned Counsel for the Defendants assumed he had fully complied with the provisions of Order 7 Rule 5 of *Civil Procedure Rules* and over looked the required provisions of the law.

15. Certainly, it has now been held by the Courts that the mistake of an Advocate should not be visited on the clients/parties. In saying so, I wish to refer you to the other cases bearing the same legal ratio being those of: ”*Belinda Mural & 9 Others - Versus – Amos Wainaina* (1978)”; “*Joseph Wekesa Tulula –Versus Hilda Wanjiru Tulula* ELC 52/2013) the Courts held as follows:-

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of



justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”

16. My personal view is that in the instant case and from the pleadings already filed by the Defendants, some of which bear detailed averments on the case, it was a bona fide mistake of the Counsel for the Defendants. I strongly feel he needs to be accorded some benefit of doubt whatsoever. Besides, how would the Defendants apart from the few who had not signed the court pleadings be explained to that they may not testify in court where they came to seek justice – from the Temple of Justice simply because they never filed witness statements?. As stated before I reiterate that this court must be seen to serve substantive justice and concerned on balancing the competing interests of all parties. In the given circumstances, I strongly feel I should not deny the Defendants an opportunity to be heard and observed that I see no prejudice the Plaintiff stands to suffer having waited all this period from 2020 – as stated under Paragraphs 5, 6 and 7 of the Plaintiff holds: -

Paragraph 5 – The Plaintiff avers that in the year 2020 they were informed that unknown persons had trespassed and were attempting to put up structures thereon.

Paragraph – 6 the 2nd Plaintiff avers that she visited Chaani Police Station and the offices of the District Officer in November, 2020 and sought their assistance in having the trespassers vacate the premises.

Paragraph 7 – The 2nd Plaintiff avers that on or about November, 2020 she visited the suit property wherein she found approximately 5 temporary structures that were yet to be completed.

17. This position was well corroborated by the evidence of PW-1 during the hearing of the Plaintiff's case. Suffice it to say the court may invoke Section 95 of *Civil Procedure Act*, Cap. 21 and Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010.

III. Disposition & Directions.

18. Consequently, having caused an elaborate analysis to the issue at hand and based on the surrounding facts and inferences of the case, I now proceed to direct as follows: -
- a. That the Defendants be and are hereby granted leave to file and serve witness statements and list of documents they intend to rely on in their case out of time under Provisions of Section 95 of *Civil Procedure Act*, Cap. 21 and Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010 within the next 14 days from the date of this Ruling.
 - b. That the Plaintiff be and is hereby granted corroborating leave to file any further documents within 7 days thereafter and be at liberty to recall any of the Plaintiff's witness to counter any new evidence adduced by the Defendant pursuant to the Provisions of Order 18 Rule 10 of Civil Procedure Rules and Section 146 Rule (4) of the *Evidence Act* Cap 80.
 - c. That the matter to be mentioned on 20th March, 2024 for compliance of this orders and further directions.
 - d. That there be further hearing on 29th and 30th April, 2024 without fail.
 - e. That failure to adhere with any of the above pre-conditions, the Defendants case to be deemed as closed and court to provide direction on filing of written submissions and reserve a date to render its Judgment on the matter.



It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF FEBRUARY 2024.

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**HON. JUSTICE MR. L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT, AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Gathu Advocate for the Plaintiffs.
- c. Mr. Khamis Salim Advocate for the 1st to 19th Defendants.

