Mbithi v Mureithi & another; Nairobi City County (Interested Party) (Environment & Land Case 346 of 2019) [2024] KEELC 3448 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3448 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 346 OF 2019

MD MWANGI, J

APRIL 23, 2024

BETWEEN

JONATHAN MBITHI ..... PLAINTIFF

AND

CAROLINE WANJIRU MUREITHI ..... 1ST DEFENDANT

ISAAK GITONGA RINGERA T/A VIEWLINE AUCTIONEERS .... 2ND DEFENDANT

AND

NAIROBI CITY COUNTY ..... INTERESTED PARTY

RULING

(In respect of the Interested Party's application dated 2nd February, 2024 seeking leave of the court to file and serve its witness statement and list and bundle of documents out of the time and after the Plaintiff had closed its case)

Background

1. Vide a Notice of Motion application dated 2nd February, 2024, the Interested Party seeks substantively for orders that:

    a. The Interested Party be granted leave to file and serve its Witness Statement and List and Bundle of Documents out of time.

    b. That the Witness Statement and the List and Bundle of Documents de deemed as properly on record after filing.

    c. The costs of this Application be in the cause.

2. The application is premised on the grounds *inter alia*; that the Interested Party instructed its previous advocates to represent it in the matter. The Interested Party subsequently prepared a Witness Statement and compiled a list and bundle of documents for a fair administration of justice.

3. The Interested Party alleges that to its dismay, it realized that its then Counsel on record had not filed any documentation. That the Interested is in custody of documents that would help the court in determining the dispute herein. It argues that although the hearing of the suit has commenced, it is in the interest of justice that the application be granted for the court to determine the real issues in controversy between the parties.

4. The Application is further supported by the Supporting Affidavit of Boniface Waweru deponed on the 2nd February, 2024 restating the grounds on the face of the application stated above.

5. The Plaintiff opposed the application vide the grounds of opposition dated 8th February, 2024 on the grounds that:

    a. The application violates the provisions of Article 50 (1) of the *Constitution*.

    b. The evidence that the Interested Party seeks to introduce in new evidence which amounts to an ambush after the Plaintiff has already testified and made its case.

    c. The Application offends the provisions in the rules that permit the court to accept a list of Witnesses or documents filed outside the lines provided in Order 3 Rule 7 and Order 7 Rule 5, which provisions are meant to curb trials by ambush.

    d. The reason adduced by the Interested Party for filing the application after close of pleadings and after the Plaintiff has testified does not fall under the provisions of Article 159(2) (d) of the *Constitution*.

    e. The Application will greatly prejudice the Plaintiff as the trial has progressed.

    f. The application herein is scandalous, an afterthought, a non-starter, speculative, vexatious and premature.

    g. The Application herein lacks merit, and the same ought to be dismissed with costs.

6. The Defendants did not file any document in response to the Application.

Court's Directions

7. The Court directed that the application be canvassed by way of written submissions. Both parties complied. The Interested Party/Applicant's submissions filed its submissions dated 5th April, 2024 whereas the Plaintiff's submissions are dated 2nd April, 2024.

Interested Party's/Applicant's Submissions

8. The Interested Party's identifies three issues in its submissions. The first part is on the effect of the mistake of the Advocate to the Client. The Applicant submits that failure to file the Witness Statement and Bundle of Documents on time was solely the fault of its previous Advocate. It is argued that the mistake of Counsel ought not to be visited on an innocent litigant who was under the belief that the Advocate would zealously defend its interests. The Applicant cites the case of *Leonard Munyua Mbugua & Another –vs- Equity Bank Limited* (2020) eKLR.

9. The second aspect submitted on by the Applicant is that no prejudice will be suffered by the either the Plaintiff or Defendant should the Interested Party be allowed to file its Witness Statement and

documentation out of time. The Applicant argues that parties will have the chance to respondent/ revert to the filed documentation by the Interested Party. It argues that the parties will also have a chance to cross-examine the Interested Party's Witness on her evidence. Further, that parties can recall their witnesses or file any additional documents if they so wish as they are yet to close their respective cases.

10. Finally, the Applicant submits that the documents it intends to file is crucial evidence in assisting the court in determining who between the parties herein owns the suit property. That as a custodian of the documents, it is essential for the Interested Party to provide the documents to assist in resolving the dispute. The Applicant contends that Article 159 of the *Constitution*, the instant application ought to be allowed with costs.

Plaintiff's Submissions

11. The Plaintiff submits that the only issue for determination is whether the Application is merited. It is submitted that the matter already proceeded for hearing on 4th October, 2023 when the Plaintiff testified and was cross-examined. The Plaintiff's counsel argue that the orders sought violate the provisions of Article 50 (1) of the *Constitution* on fair hearing. It is argued that the applicant seeks to introduce new evidence which was not present before the Plaintiff testified and the same amounts to an ambush. Which the provisions of Order 3 Rule 7 and Order 7 Rule 5 of the *Civil Procedure Rules* intends to curb. The objective of the said provisions is to make clear to the other party, the nature of evidence that he will face at trial.

12. The Plaintiff maintains that the Interested Party has always been represented by a counsel and the applicant is only trying to steal a match from the Plaintiff. The new evidence will alter the character of the case since the trial has progressed as the Plaintiff has already testified. As such the Plaintiff will be highly prejudiced if the application is granted. Counsel cites the court's findings in the case of *Johana Kipkemei Too –vs- Hellen Tum* (2014) eKLR in support of his case.

Issues for Determination

13. I have considered the Application, the Law and submissions of the rival parties herein. Only two issues lie for determination and I will analyze them sequentially:

    a. Whether the application is merited;

    b. Who to bear the costs

Analysis and Determination

A. Whether the Application is Merited;

14. Regarding the first issue of merits or otherwise of the application, it is not in dispute that the instant application has been brought after the Plaintiff has already testified. This was after the matter had gone through the stage of pretrial directions in which the parties indicated to the court that they were ready to proceed. This was in compliance with Order 11 of the *Civil Procedure Rules*.

15. Among the prerequisites of compliance of Order 11 is the filing of the documents parties to a suit intend to rely on. That means that for Plaintiff ought to have complied with Order 3 Rule 2 regarding the filing of lists of documents and witness statements, and both witness statements and copies of documents.

16. For Defendants, they ought to have complied with Order 7 Rule 5 of the *Civil Procedure Rules*. Relevant for the instant application then is the application of Order 7 Rule 5. It provides that:

> " The defence and counterclaim filed under rule 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 witnesses; and
>
> (d) copies of documents to be relied on at the trial.
>
> Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11."

17. It will be seen from the above provision that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7 of the *Civil Procedure Rules*. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.

18. There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided for under Order 3 Rule 7 and Order 7 Rule 5 of the *Civil Procedure Rules*. 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 fair trial, but 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 court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 Others vs IEBC & 3 Others*, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR, where the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

20. 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 for 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.

21. In order to arrive at a just conclusion this Court needs to consider two important points. One is whether the Applicant had opportunity to file the documents at the point required by law but squandered it. Two is whether if it had the opportunity or not it would be prejudicial to the Plaintiff to grant the Applicant chance to introduce the documents at this stage of the proceedings.

22. I discuss the first point by analyzing both the record and the reason given by the Applicant for failure to file the documents he seeks to introduce. The record bears that Interested Party/Applicant has always been represented by a Counsel, one Mr. Mokua, from the onset. On the 28th September, 2021, the Court set down the matter for pre-trial conference before the Deputy Registrar on the 4th November, 2021. When the matter came on 4th November, 2021, Counsel for the Interested Party sought 14 days to comply, which leave was granted.

23. The matter came up again on the 2nd February, 2022 to confirm that parties had complied with Order 11, parties had still not complied and a final Pre-trial conference was slated for 19th April, 2022. Come 19th April, 2022, counsel for the Interested Party informed the Court that they did not intend to file any documents. This position by the Interested Party's counsel was reiterated on 28th April, 2022 before Okong'o J. when the matter came up for directions on the hearing who subsequently the transferred the matter to this court for hearing.

24. On the 27th October, 2022, when the matter came up for hearing, counsel for the Interested Party's informed the court that he was ready to proceed with the hearing. He was clear that the Interested Party would not be calling a witness. The matter came up for hearing twice, thereafter, but was adjourned as the court was either not sitting or the Plaintiff was not ready to proceed. In all the instances, the Interested Party's Counsel was always ready to proceed.

25. The hearing proceeded on the 4th October, 2023 when the Plaintiff testified and was cross-examined by the Defendant's Counsel. Counsel for the Plaintiff then sought an adjournment and informed the court that they shall be calling 2 more witness. The matter was set for further hearing on 5th February, 2023 but the instant application was filed.

26. From the foregoing, it is evident that the Interested Party was given many chances to comply but categorically waived it.

27. I now turn to the reason given for non-compliance. The Interested Party has alleged that the reason for non-compliance was due to indolence on the part of their then counsel on record. The question therefore is, is the mistake of the advocate in this case reasonable or *bona fide* and has it been explained to the satisfaction of the Court? I think not in this case. The Applicant has merely cited a failure to comply its counsel. The applicant had a duty to follow up and find out the status of its case. No evidence of any tangible steps taken to follow up the matter with its Advocate or at the Court's registry.

28. Merely claiming inaction on the part of its advocate is not sufficient reason and this is a position that was also taken by the Honourable Justice Odunga in *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR which decision I cite with approval. He stated that:

> " 33. .....This seems to be a case of mere inaction and as was held in *Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client."

29. To this end, courts have repeatedly emphasized that mistakes of counsel not amounting to *bona fide* mistakes are punishable as professional negligence.

30. Further, the Applicant remains the owner of the suit and the prosecution thereof is his responsibility. It is for this reason that the Court of Appeal in *Rajesh Rughani vs Fifty Investments Limited & Another*

[2016] eKLR which decision I cite with approval, declined to simply blame inaction on the mistake of counsel instead stating:

> " Our re -evaluation of record lead us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay"

31. In *Edney Adaka Ismail –vs- Equity Bank Limited* [2014] eKLR, the court similarly declined to exercise its discretion simply because the Applicant claimed a mistake of counsel. The Court stated:

> " It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter".

32. The second question is whether it will be prejudicial to the Plaintiff to grant the Applicant the chance to introduce the documents at this stage of the proceedings.

33. When the Plaintiff testified and tendered his evidence, he had in mind that all that the defendant would be relying on was the documents already on record and that the Interested Party will not be filing any document or call any witness. The documents sought to be introduced was not in his contemplation. He was not cross-examined on it. The Plaintiff, who is the main witness in his own case, he will not have an opportunity to rebut the new evidence. It will be unfair to the Plaintiff, if this court allows the Interested Party/ Applicant, at this late stage of the proceedings, to fundamentally alter the character of its case, to one that the Plaintiff never contemplated when tabling his evidence. In essence, the trial will end up being unfair to the Plaintiff and will violate the provisions of Article 50(1) of the *Constitution*.

34. It is important to note that the Applicant herein is Interested Party. The Applicant will not suffer any prejudice if the application is not granted as the issues for determination are as set by the primary parties. That is between the Plaintiff and the Defendants herein.

35. This court is guided further by an excerpt in the holding by the apex court in *Francis Karioko Muruatetu & Another v Republic & 5 Others* [2016] eKLR the court pronounced itself on the extent to which an Interested Party may participate in the proceedings as follows:

> " any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
>
> Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court".

36. Therefore, allowing the Interested Party to file documents that alters the nature of the suit, amounts to allowing an Interested Party to introduce new issues not as framed by the primary parties.

37. Based on the foregoing, the Application by the Interested Party dated 2nd February, 2024 is disallowed and dismissed with no orders as to costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF APRIL, 2024.

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M. D. MWANGI

JUDGE

In the virtual presence of:

Ms. Esami for the Plaintiff.

Mr. Munai holding brief for Mr. Kiprop for the Interested Party

Ms. Mutuli holding brief for Muhatia Farah for the 2nd Defendant

No appearance for the 1st Defendant

Court Assistant: Yvette