



**Shah v Shah (Environment and Land Case Civil Suit 114 of 2013)  
[2024] KEELC 3940 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3940 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 114 OF 2013**

**J OMANGE, J**

**APRIL 22, 2024**

**BETWEEN**

**PRAFUL CHANDRA BHARMAL SHAH ..... PLAINTIFF**

**AND**

**SHURISH CHANDRA BHARMAL SHAH ..... DEFENDANT**

**RULING**

1. The Defendants application dated 10<sup>th</sup> February, 2023 which was later replaced by an application dated 10<sup>th</sup> June, 2023 seeks to extend the time limited by Order 3 Rule 2 to 10<sup>th</sup> March, 2023 with respect to the Defendants Amended list of witnesses and the witness statements of Nilan Shurishchandra Barmal, David Mutinda, Milton Okello Onyango and Martin Papa filed in this court on 15<sup>th</sup> August, 2022 and 10<sup>th</sup> March, 2023 respectively.
2. The application is premised on the grounds that, following the death of the defendant it has become necessary to call new witnesses as the Defendant is no longer available to testify. That, the Plaintiff has not closed her case, hence will suffer no prejudice if the application is allowed. The applicant depones that her statement was filed in court on 15<sup>th</sup> August, 2022 and that of Milton Okello Onyango, David Mutinda and Martin Papa were filed on 10<sup>th</sup> March, 2023.
3. Both parties filed submissions and highlighted the submissions in court. The Court has had occasion to consider the submissions.
4. The application is strenuously opposed by the Plaintiff for various reasons. Firstly, that David Mutinda was the Defendants advocate hence should not swear an affidavit on behalf of the Defendant as this would be contrary to Rule 9 of the *Advocates (Practice) Rules*. The second reason cited by the Plaintiff is that, it has not been proved that one of the witnesses sought to be introduced namely Milton Okello Onyango was an employee of Bakrania & Co. Advocates on behalf of whom he wishes to produce a



document. Lastly, the Plaintiff argues that Martin Papa is presented as an expert witness yet another expert witness had earlier filed a report.

5. In considering whether the application is warranted the court has identified the following issues; Whether an advocate can testify on behalf of a client Whether a second expert witness report can be obtained in respect of the same issue Whether in the circumstances of this case there are good grounds to extend the time limited to filing the amended list of witnesses and witness statements
6. The Plaintiffs contend that David Mutinda is an advocate who has been representing the Defendant hence cannot give evidence on behalf of the Defendant. Rule 8 of the *Advocates Practice Rules* provides; “No advocate may appear as such before any court or Tribunal in any matter in which he has reason to believe he may be required as a witness to give evidence, whether verbally or by declaration or affidavit and if while appearing in any matter it becomes apparent that he will be required to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: provided that this Rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”
7. Rule 8 provides that an advocate should not represent a client in a matter in which he may be required to give evidence. The use of the word “may” is instructive. The second limb of the Rule is even more relevant to the circumstances of this case. It expressly allows an advocate who has been appearing in a matter to give evidence the only caveat being that once it becomes apparent the advocate will need to appear as a witness they stop appearing for the client.
8. On the second issue raised by the Plaintiff on the expert report, I note that, the proviso to Order 3 Rule 2 (C) provides that an expert report shall be provided at least 15 days before the Trial Conference. In the present case the Plaintiff objects to a second expert report. The Defendant has laid the basis for the second report as the expert who prepared the report is deceased. In the circumstances I find that the application to have another expert testify is in order.
9. On the question of whether the Defendants application for extension of time is merited, I note that the application is brought on the grounds that the Defendant is deceased. This is not in dispute. It is also not in dispute that the Defendant had filed witness statements without leave. The court must determine whether sufficient grounds have been given for extension of time so as to consider the amended list and list of witnesses deemed to be duly filed.
10. Order 50 Rule 6 gives the court power to enlarge time even after the period for doing any act has expired. This discretionary power must be exercised judiciously. The Court of Appeal in *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] eKLR articulated that-

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State Officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the



interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

11. The court emphasized that, the court must at all times be preoccupied with dispensing justice. Justice demands that a party is availed an opportunity to be heard fully and present all the evidence available to him.

Equally, the opposing party should have adequate time to counter the evidence so that a decision is reached in which both parties have had equal opportunity to present their evidence.

12. In the instant case, the death of the Defendant and expert witness has necessitated the application. Some of the documents were marked for identification so already put to the Plaintiff. However, even if they were not, the Plaintiff will be given a chance to call additional witnesses if necessary to testify on her behalf. The Plaintiff will also have an opportunity to cross examine the witnesses the Defendant will call and also submit on the weight the court should place on their testimony. Regarding the specific issues which were raised on the witnesses I have addressed the issues in addressing issue 1 and 2.

13. On the question of whether the leave should have been sought before filing the witness statements I find that given that I have found that the application which was occasioned by the demise of the Defendant is merited, I have no hesitation holding that the amended list of documents and list of witnesses be deemed to be duly filed.

14. I therefore find that, the application has merit and is allowed in the following terms;

- a. The Defendant amended list of documents and list of witnesses to be deemed to be duly filed.
- b. The Plaintiff is granted leave to file any additional documents in response within 21 days from today.
- c. Costs to be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

Mr. Murithi for Plaintiff

Mr. Rebelo for Defendant

Court Assistant: Steve

