Musau v Mbole (Suing in her Capacity as the Personal Representative of Danson Paul Mbole) & another (Environment & Land Case 480 of 2017) [2025] KEELC 811 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELC 811 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 480 OF 2017

NA MATHEKA, J

FEBRUARY 25, 2025

BETWEEN

CHRISTOPHER MUSYOKA MUSAU ..... PLAINTIFF

AND

BENEDICTA NDUNGE MBOLE (SUING IN HER CAPACITY AS THE PERSONAL REPRESENTATIVE OF DANSON PAUL MBOLE) 1ST DEFENDANT

KASHMIR SINGH ..... 2ND DEFENDANT

RULING

1. The application is dated 17th October 2024 and is brought under Order 11, Order 18 Rule 10 and Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A and 1B of the *Civil Procedure Act*, Section 146 of the *Evidence Act*, Article 50 and 159 (D) of the *Constitution* of Kenya seeking the following orders;

    1. That this application be certified urgent be heard ex-parte.

    2. That this Honourable Court do grant leave to the defendants to file a supplementary list of documents, supplementary list of witnesses and a further witness statement.

    3. That, upon the granting of the preceding orders, the attached supplementary list of documents, supplementary list of witnesses and a further witness statement submitted by the Defendants/Applicants be deemed duly filed.

    4. That the costs of this application be in the suit.

2. It is premised on the following grounds that the matter before this Honourable Court is a dispute over the ownership of Plot No. Machakos Town/Block 1/303. The Plaintiff/ Respondent asserts that he purchased the plot from one Danson Paul Mbole, while the Defendants/Applicants contest this

assertion, maintaining that they are the rightful owners of the said plot. That the Defendant/Applicant seeks leave of this Honourable Court to allow filing of a supplementary list of documents in the form of a forensic report on the signatures of the sale agreement dated 14th May 1985 between Danson Paul Mbole and Christopher Musau, a supplementary list of witnesses and the defendant further witness statement. That the supplementary list of documents comprising of the forensic report and, supplementary list of witnesses and a further witness statement, is crucial for the determination of the authenticity of the sale agreement in question. That the authenticity of the sale agreement substantiates the Defendants/Applicants claim of individual ownership. The forensic report's admission is crucial to rectify any potential misapprehensions regarding the nature and ownership status of the property in question. That the forensic report could not be filed earlier as the need for a forensic examination of the signatures only became apparent after certain discrepancies and inconsistencies in the documentation were recently brought to light. These discrepancies were previously unknown and could not have been discovered without specialized analysis, which necessitated seeking expert forensic assistance. That consequently, the presence and testimony of the author of the forensic report is hereby requested to provide expert verification and detailed explanations of the said report, which are essential for the comprehensive understanding and adjudication of this matter. That in light of the newly discovered facts, it is imperative for the 1st Defendant do file a further statement to incorporate and accurately reflect the newly uncovered evidence. That parties are bound by statutes to disclose all material facts and evidence in their possession and knowledge to give the court a chance to reach a fair determination. That for the court to make a proper and just determination, it is paramount that the forensic report and the expert's testimony are admitted. That in the interest of Article 50 of the *Constitution* of Kenya, the admission of the additional evidence is imperative to ensure a fair and impartial adjudication of the matter. This safeguards the integrity of the judicial process and upholds the principles of substantive justice. That no prejudice will be occasioned upon the plaintiff if the orders sought are granted as he will be accorded fair chance to interrogate the documents and the witnesses in time.

3. This court has considered the application and the submissions therein. The applicant seeks leave of this Court to admit additional evidence in the form of a forensic report on the signatures of the sale agreement dated 14th May 1985 between Danson Paul Mbole and Christopher Musau (Attached is a supplementary list of documents and a copy of the Forensic report marked as "BNM 1(a) and "BNM I (b)" respectively). That the additional evidence is crucial as the same is an expert testimony which fundamentally challenges the assertion of the authenticity of the sale agreement in question and supports her claim of individual ownership.

4. The respondent stated that the proceedings are already at an advanced stage and he had already given his testimony. That fraud was never pleaded by the applicant and the forensic report is an afterthought. That he will be prejudiced as he has expended a considerable amount of resources since 2010 in pursuit of his rights in this case.

5. The applicant submitted that the additional evidence is crucial as the same is an expert testimony which fundamentally challenges the assertion of the authenticity of the sale agreement in question and supports her claim of individual ownership. That the forensic report could not be filed earlier as the need for a forensic examination of the signatures only became apparent after certain discrepancies and inconsistencies in the documentation were recently brought to light. These discrepancies were previously unknown and could not have been discovered without specialized analysis, which necessitated seeking expert forensic assistance.

6. The record shows that the plaintiff testified on 14th February 2023 before Justice Christine Ochieng. Mr. Ochola, Counsel for the plaintiff applied for adjournment to call one more witness. The case was

adjourned to 4th May 2023 when PW2 testified and was later stood down. The last witness for the plaintiff testified on the 5th February 2024 and the plaintiff closed his case. Even if the plaintiff's case is closed, the court can still open it up and have a particular witness re-called for further examination in chief or cross-examination or re-examination as provided by Section 146 of the *Evidence Act*. Section 146(4) of the *Evidence Act* states;

> The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

7. In the case of *Mzee Wanje & 93 Others vs A.K. Saikwa & Others* (1982-88) KAR, 462, Chesoni Ag JA (as he then was) observed as follows;

> The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd vs. Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:
>
> (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
>
> (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

8. In the case of *Mohamed Abdi Mahamud vs Ahemed Abdullahi Mohamed & 3 Others* (2018) eKLR the Supreme Court stated as follows at paragraph 79:-

> Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
>
> (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> (e) the evidence must be credible in the sense that it is capable of belief; (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

9. I have noted the documents the applicant wishes to file as additional evidence and do appreciate that there may be need for the defendants to cross examine the plaintiff on those documents. In my view, the court should allow a party to prosecute his/her case to the party's satisfaction. This includes the calling of witnesses and production of documents a party deems necessary in proving or aiding their case. From the above authorities and the circumstances of this case I find that the production of the documents by the applicant will not prejudice the plaintiff's case. Allowing the application will go a long way in serving substantive justice for the parties. I consequently find that the application dated October 17, 2024 is merited and the same is hereby allowed. Costs shall follow the outcome of the main suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE