



**Teleposta Pension Scheme Trustees Registered v Hemed & 3 others (Environment & Land Case 229 of 2013) [2024] KEELC 4336 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4336 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 229 OF 2013  
SM KIBUNJA, J  
MAY 29, 2024**

**BETWEEN**

**TELEPOSTA PENSION SCHEME TRUSTEES REGISTERED ..... PLAINTIFF**

**AND**

**SAID HEMED ..... 1<sup>ST</sup> DEFENDANT**

**ISLAM ALI INVESTMENTS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR MOMBASA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff moved the court vide the notice of motion dated 2<sup>nd</sup> November 2023 for orders that:
  1. Spent.
  2. That the Honourable Court be pleased to grant the plaintiff leave to file supplementary list and bundle of documents.
  3. That the supplementary list and bundle of documents dated 2<sup>nd</sup> November, 2023 be deemed duly filed.
  4. That the costs be in the cause.

The application is based on four grounds on its face and supported by the affidavit of Stephen Kipkorir Bundotich, advocate for the plaintiff, sworn on the 2<sup>nd</sup> November 2023. It is the plaintiff's case that the delay in filing the documents was due to an oversight; that the documents are necessary and crucial to the plaintiff's case, and the application should be allowed; that the defendants will not suffer any prejudice as they will be at liberty to interrogate and counter their contents.



2. The 1<sup>st</sup> and 2<sup>nd</sup> defendant opposed the application through their grounds of opposition dated the 6<sup>th</sup> November 2023 inter alia that the application is misconceived, bad in law, mala fides, prejudicial, and filed late after the closure of pleadings and commencement of the plaintiff's case.
3. The learned counsel for the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their submissions dated the 16<sup>th</sup> January 2024 and 6<sup>th</sup> February 2024 respectively, which the court has considered.
4. The counsel for the plaintiff inter alia submitted that Article 159 (2) (a) (d) and (e) of the Constitution of Kenya, provides that justice shall be done to all irrespective of status, without due regard to technicalities and that the purpose and principles of the constitution shall be promoted; that section 1A, 1B & 3A of the Civil Procedure Act, provides for overriding objectives of the court; and that Order 50 Rule 6 of the Civil Procedure Rules, empowers the court to enlarge time where a limitation period has been fixed in the Rules. He further submitted that the defendants have not demonstrated mala fides and that they have not yet cross examined the plaintiff's witnesses. The counsel cited the decision in the case of Marcus Kiranga Nimrod v Nussy Kuthii Justus [2017] eKLR, where the court allowed the plaintiff to file a further list of documents in the course of trial, noting that the plaintiff had not yet closed its case. The court further noted that the defendant had an opportunity to file its own list of documents in rebuttal and cross examine the plaintiff on the new evidence. The counsel also relied on a similar decision in the case of Hangover Kaakwacha Hotel Limited v Philip Ndundo and Leonard Odundo t/a Hangover Kaakwacha Hotel Siaya 2022 eKLR.
5. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendant submitted inter alia that the application is bad in law as the plaintiff was granted a similar opportunity previously. That there is no basis for allowing the plaintiff to introduce evidence in piecemeal when hearing of the main suit has already begun. Further, counsel argued that section 19 (1) of the Environment and Land Court Act provides that the court should not have undue regard to technicalities, and not that the court should totally disregard the law and Order 11 of the Civil Procedure Rules. Counsel also argued that constant and persistent introduction of new evidence by the plaintiff will affect the defendants' constitutional right to fair hearing, and compromise the defendants' case. They also requested the court to disregard the authorities cited by counsel for the plaintiff as the facts in those cases were for introduction of new evidence that was not available before, and not evidence that had been overlooked.
6. The following are the issues for the court's determinations;
  - a. Whether the plaintiff has made a reasonable case for its application to file the documents at this stage to be allowed.
  - b. Whether allowing the application is likely to prejudice the 1<sup>st</sup> and 2<sup>nd</sup> defendants' case?
  - c. Who pays the costs?
7. The court has carefully considered the grounds on the application and of opposition, affidavit evidence, submissions by both counsel, superior courts decisions cited, and come to the following findings:
  - a. The application is indicated to be brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B, 3A and 63 (e) of Civil Procedure Act chapter 21 of Laws of Kenya. Order 51 Rule 1 provides the procedure of initiating applications, while sections 1A, 1B and 3A deals



with the objectives of the Act, duty of the court and inherent powers of the court respectively. Section 3A provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Section 63(e) provides that:

“63. In order to prevent the ends of justice from being defeated, the court may, if it so prescribed-

- (e) make such other interlocutory orders as may appear to the court to be just and convenient.”

The above provisions reiterates the court’s legal authority and obligation to make orders not only to prevent abuse of the process of the court, but also to assure the ends of justice is met.

- b. Section 100 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya provides that:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

Order 8 Rule 5 of the [Civil Procedure Rules](#) provides that:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

The court has indeed the power to allow amendments, or correct defects or errors on its own motion or application of any party. The guiding principle or purpose of such amendments or corrections is to ensure the real question or issue between the parties is determined.

- c. In the case of [Johana Kipkemei Too v Hellen Tum](#) [2014] eKLR the court held as follows:

“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 in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

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.”

In this suit, the plaintiff’s witness, Peter Kibiegon Rotich, has given his evidence in chief, but is yet to be cross-examined. If the application to allow the introduction of the report is allowed at this stage, the defendants will definitely be entitled to corresponding leave to file their responses, if any. Secondly, the plaintiff’s witness may be given an opportunity to speak on the report during the next hearing before he is cross-examined.

- d. The plaintiff has disclosed that its private surveyor came across documents they intend to introduce at the land registry sometime in January 2023, and prepared a covering report attaching it. That the said document was inadvertently not filed with the court, and counsel came to discover that fact on 1<sup>st</sup> November 2023, and he notified the learned counsel for the defendants. In my view, it is not too late to allow the plaintiff to file and serve the said document, as the defendants will have the opportunity to call evidence in rebuttal, in addition to cross-examine the plaintiff witnesses on its contents.
  - e. The plaintiff has clearly brought out the fact that the document will help the court in arriving at a fair determination of the issue in dispute. In the case of *Kiai Mbaki & 2 Others –VS- Gichuhi Macharia & Another* [2005] eKLR the Court stated that:

“the right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

Parties have a constitutional right to adduce and challenge evidence under Article 50 (2) (k) of *the Constitution* 2010. By allowing the plaintiff’s application to file the document subject matter of the application, the plaintiff will have exercised that constitutional right to adduce evidence. The defendant will also be entitled to corresponding leave to challenge that evidence.
  - f. That though the plaintiff has succeeded in its application, it will pay the costs of the notice of motion, the provision of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding, as the failure to file and serve the document in time was not occasioned by the defendants or the court, but was wholly its making.
8. Flowing from the foregoing, the court finds and orders as follows:
- a. That the plaintiff’s application dated 2<sup>nd</sup> November 2023 has merit and leave is hereby granted for the supplementary list of documents to be filed and served in seven days.
  - b. The defendants are granted fourteen (14) days to file and serve replies thereto if any, after service.
  - c. The plaintiff will meet the costs for 1<sup>st</sup> and 2<sup>nd</sup> defendant.

It is so ordered.



**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29<sup>TH</sup> DAY OF MAY 2024.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF:

PLAINTIFF : Mr Bundotich

DEFENDANTS : Mr. Taib for 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Mr Mwanjeje for Waswa for 4<sup>th</sup> defendant.

LEAKEY – COURT ASSISTANT.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

