Kitiyo & another v Mwoi & 2 others (Environment & Land Case 184 of 2016) [2024] KEELC 4267 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4267 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 184 OF 2016

FO NYAGAKA, J

MAY 21, 2024

BETWEEN

MICHAEL FRANCIS CHEMONGES KITIYO ..... 1ST PLAINTIFF

BIBLE CHRISTIAN FAITH CHURCH ..... 2ND PLAINTIFF

AND

STEPHEN LOWASKOU MWOI ..... 1ST DEFENDANT

THE CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

THE ATTORNEY GENERAL ..... 3RD DEFENDANT

RULING

1. Before me is an oral application that has been made during the mention today, in which the court is supposed to fix a further defence hearing of this matter.

2. The learned counsel who has just come on record after two previous ones moved this court for prayers that this Honourable Court issues orders to call the Land Administration Officer to produce records relating to the suit land, at the time when this matter shall come for further hearing. He did not cite any provisions in support or basing his application although that is a mere technicality this court is prepared to overlook or excuse pursuant to Article 159(2) of *the Constitution* 2010.

3. His argument was that the plaintiff had closed his case but he noticed that the witness currently testifying in the matter, that is to say PW2, on behalf of the Commissioner for Lands was only giving evidence regarding the current situation on the parcel yet it is the Land Administrator who has the history about allocation or allotment of lands. Further he argued that the said officer was a public officer who should testify since the issue before the court was contestation of ownership of land. He is the one in custody of records relating to the land and the fear of the other parties about the evidence he will adduce would be allayed by their cross-examining the witness at the appropriate time. His further

submissions was that the role of such an officer was defined under the *Land Registration Act* and the court could take judicial notice thereof.

4. In the alternative he argued that if the court was not persuaded with the oral argument he would be filing an appropriate application thereon.

5. The application was opposed by learned counsel for the 1st defendant who argued that the application was made way after the plaintiff had closed his case and part of the defence case ongoing. Further, that the argument by the 1st plaintiff was unsupported by evidence and a mere argument from the bar, based on suspicion. Lastly, that the plaintiffs had applied to amend their pleadings to change the character of the suit but it was rejected. The application was premature.

6. Learned counsel for the 2nd and 3rd defendants opposed the application arguing the plaintiff had closed his case and he wondered for whom the witness was being called to testify. That the plaintiff/applicant had not applied to reopen his case hence the application improper.

7. The court has carefully considered the application, the record, the law and the submissions by learned counsel. The only issue for determination is whether the application is merited.

8. The Rules that govern the filing of pleadings and preparation or trial and the conduct of the trial process and even execution in this court are basically the *Civil Procedure Act* and Rules as envisaged in Sections 14 and 19 of the *Environment and Land Court Act*, Act No. 19 of 2011, and the *Practice Directions of this court as published under Gazette Notice No. 5178 of 2014 (dated 25/7/2014) - The Mutunga Rules*.

9. The issue in this oral application is that the applicant who is the plaintiff prays that this court does summon the Land Administration Officer to testify in relation to the suit land.

10. The law regarding the procedure and adduction of evidence in this court is now settled. The starting point is Order 3 Rule 2 of the *Civil Procedure Rules* which provides that all suits (and more so suits of the nature as the instant one) shall be accompanied by, under Sub rule (b) "a list of witnesses to be called at the trial" and (c) "written statements signed by the witnesses excluding expert witnesses". Provided the statement may, with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11. Order 11 of the *Civil Procedure Rules* then provides in the relevant part that, when pleadings close the parties shall within ten days complete and file and serve a pre-trial questionnaire and a case conference shall thereafter be held to consider compliance with Order 3 Rule 2 and Order 7 Rule 5 of the *Civil Procedure Rules*, among other issues. Thereafter, the matter shall be listed for hearing.

11. In the instant case, the plaintiffs filed the instant suit on 20/12/2016. After the defendants entered appearance and defence on 8/11/2017, Mr. Analo, learned counsel for the plaintiff informed the court as follows, "we had already complied.". The learned counsel for the 1st defendant stated, "we have filed the 1st defendant's statements and documents to be relied on. We can fix a date for hearing". The court indicated that since parties had complied the matter could be fixed for hearing, which it did for 10/4/2018. The compliance referred to by the plaintiff was that envisaged under Order 3 Rule 2 of the *Civil Procedure Rules*. B m m mmnj' ,y the date of compliance the plaintiff had by "The plaintiffs List of Witnesses" dated 16/12/2016 listed only one witness, Michael Francis Chemonges Kitiyo and "any other relevant witness". To the List he attached his written statement dated the same date.

12. First, it is worth of note that the *Civil Procedure Rules* and the *"Mutunga Rules"* do not provide for trial by ambush. Further, they do not provide for any uncertainty regarding the witnesses to be called at the trial. As noted above Sub-rule 3(2)(b) is clear that the List ought to be clear and contain the names of witnesses who statements shall be recorded and filed prior to the pre-trial conference, except those

of expert witnesses. In the instant case, the phrase "any other relevant witnesses" is thus meaningless and not envisaged in the law.

13. This matter came up for hearing of the plaintiffs' cases on a number of occasions. The first one when it proceeded in earnest was the 18/11/2021 when the 1st plaintiff testified. At the end of his re-examination, his learned counsel applied for adjournment "to call one more witness. He is an expert witness". When the adjournment was objected to for being misleading because only one witness was listed in the documents that accompanied the plaint, learned counsel specified the intended witness to be a private surveyor. The court adjourned the matter for reason of time inadequate of it being 6.25 pm. After that the matter came up for further hearing on some occasions but could not proceed for one reason or other. On 20/5/2022 the 1st plaintiff made an application to have the surveyor visit the site and make a report thereon. It was granted. But it would appear that either the surveyor never acted or his intended evidence became not useful since the 1st plaintiff remained silent about it and later the 2nd plaintiff testified. He too opted to call a private surveyor but the application was denied since the witness was not among the list of witnesses of the 2nd plaintiff. The parties closed their cases on 22/7/2022.

14. Thereafter the 1st defendant testified and closed his case. Upon the 2nd and 3rd defendants calling their first witness the instant application was made during the course of his testimony when he was stood down to testify on another date.

15. The above being the brief history of the matter as borne by the record, the issue still left for the court to determine is whether the application is merited or not.

16. Learned counsel for the 1st applicant submitted that the defence witness who was in the witness stand; that is to say, whose testimony was to be taken further had not given evidence of the history of the suit land hence the need to summon the Land Administrator. My humble view is that in the first place the witness 'in the dock' was not the 1st plaintiff's, and it was not open for the 1st plaintiff to direct the said witness which evidence to give on behalf of the party who called him to testify. The only opportunity the 1st plaintiff has with the said witness is the cross-examination stage whereat he could ask him any question relevant to the matter. Secondly, to argue that the evidence being given by the witness did not include the one on the history of the land was nothing but mere speculation, premature and aimed leading on witness called by the adverse party to giving a particular piece of evidence. This is unheard of in the Law of Evidence particularly Sections 148-154 of the *Evidence Act* which deal with the manner and purpose of cross-examination.

17. Thirdly, the 1st plaintiff did not at any one time list the said intended witness as his own. Needless, to say that during the pendency of the hearing of his case he did not indicate to the court that he ever intended to call him. Fourthly, the 1st plaintiff's case is closed just as the 2nd plaintiff's. The plaintiff did not apply to reopen the case nor did he apply to vary the earlier orders of closure of the case. As it is the application is brought "against a stone", that is to say it is sought to be patched into a closed prison.

18. Fifth, the 1st plaintiff aims, by this prayer, to "fix" the weaknesses of his case, which he ought to have done during the pendency thereof. Moreover, when the pretrial directions were taken as earlier summarized, the 1st plaintiff himself indicated to court that he was ready for hearing and had complied with the law. By then he was satisfied that the witnesses he intended to call were all in, that is to say, their record had already been captured. The instant application is not being made at least fifteen days before the pretrial conference as Order 3 Rule 2 of the Civil Procedure Rules, 2010 provides. This is one of those applications the plaintiff wishes to use to accomplish his fishing expedition. It is unmerited, premature and incompetent. It is dismissed. Further hearing on 30/10/2024.

19. Orders accordingly.

Ruling dated, signed and delivered at Kitale in Open Court this 21st day of May, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE