Claassen v Commissioner of Lands & 6 others (Environment & Land Petition 7 of 2015) [2024] KEELC 4660 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4660 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND PETITION 7 OF 2015

FO NYAGAKA, J

JUNE 13, 2024

BETWEEN

KARL WEHNER CLAASSEN ..... PETITIONER

AND

THE COMMISSIONER OF LANDS ..... 1ST RESPONDENT

THE REGISTRAR OF TITLES ..... 2ND RESPONDENT

THE COMMISSIONER OF PRISONERS ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

KIPANGENGE OF KALENJIN ESTATES LIMITED ..... 5TH RESPONDENT

NOAH WEKESA ..... 6TH RESPONDENT

COUNTY GOVERNMENT OF TRANS-NZOIA ..... 7TH RESPONDENT

RULING

1. By a Notice of Motion dated 13/04/2023 and brought under Article 159 (2)(d) of *the Constitution* of Kenya, Rule 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure and "all enabling provisions of the law" the Petitioner sought the following orders:-

    a. ...spent.

    b. That the petitioner be granted leave to put in a Further Supplementary Affidavit in support of the Petition.

    c. That the costs of this application be provided for.

2. The Application was based on five grounds. One, the Petitioner had since come across new information never addressed by this Court before. Two, the Further Supplementary Affidavit intended to bring to the attention of the Court the said information. Three, no harm would be caused to the respondents if the application was allowed. Four, the supplementary affidavit is made in the interest of justice and fairness. Five, the Application was made in good faith.

3. The Application was supported by the Affidavit of the Petitioner sworn on the same date. He deposed that he was the Administrator of the Estate of the late Nicolaas Hendrik Claasan (sic). On 28/03/2023 he received a letter from the Ministry of Lands. He annexed and marked KWC1 a copy of the letter which, to him, disclosed new information which was supposed to be brought to the attention of the Court. It was of utmost importance that he be given leave to put in a Further Supplementary Affidavit to address the new issues brought to his attention. The new Supplementary Affidavit would disclose information key to the determination of the Petition. The Application had been brought in utmost good faith, the interest of justice and the Respondents would not be prejudiced if it was granted. Further, the Petitioner had neither closed his case nor been cross examined, and Respondents would have corresponding leave to file their Affidavits if they wished.

4. The 1st to 4th and 7th Respondents opposed the Application through Grounds of Opposition dated 07/06/2023 and filed on 08/06/2023. The first ground was that the application was a non-starter, misconceived and an abuse of the process of the court, a grope in darkness and a clear ambush to the Respondents. It demonstrated that the Petitioner's bad faith and assailed the fair hearing as provided for under Articles 47, 48 and 50 of *the Constitution* by seeking to introduce a document made during the pendency of the matter. It was tailored to suit the Petitioner's desires. It offended Sections 8, 9 and 10 of the Access of Information Act, 2016. It would prejudice the Respondents by taking away the right of fair trial by tailoring evidence and protracting a very old matter. It was bad in law and had no basis for filing the Further Supplementary Affidavit. It amounted to a fishing expedition.

5. The 5th Defendant did not oppose the Application.

6. The application was disposed of by way of written submissions. The Petitioner filed his own 24/10/2023. He summarized the content of the Application. He argued that the Court had not proceeded with the matter. Further that the Petitioner was stood down to avail clear copies of exhibits. Therefore, the intended Supplementary Affidavit would not be curing any holes in the case. He relied on the Article 159(2)(d) of *the Constitution* and submitted that the Grounds of Opposition were misguided as the Petitioner did not intend to take away the Respondents right to fair trial. Further, the information sought to be introduced was obtained as a result of a letter from the Ministry of Lands, dated 28/03/2023. He did not have the information at his disposal until that date and had he had it be before he would have brought it to the attention of the court before instituting the suit.

7. He relied on the case of Arthur Kibira Apungu & Another Independent and Electoral Boundaries Commission & 2 Others [2013] eKLR where the court was of the view that the two affidavits sought to be introduced did not raise new issues which departed from the Petition since some merely elaborated alleged malpractices hence they would not prejudice the other parties. It allowed them. He also relied on Kapusia ole Saloni v. James Kipas Langues & 2 Others [2017] eKLR. It also arrived at a similar conclusion under similar circumstances and was of the view that the evidence would be tested on cross-examination and enable the court consider all materials in controversy. Further that in Johanna Kipkemei Too v Helen Tum [2014] eKLR the Court opined that it did not mean that under no circumstances could the Court not permit a party to adduce additional evidence. That it would overlook procedural technicalities as provided for under Article 159(2)(d) of *the Constitution* as long as the evidence would not prejudice another party. In Gituma Kaumbi Kioga v Kenya Revenue Authority

& Another [2020] eKLR where the Court held that the documents in question would not prejudice the Petitioner and to ensure he was not prejudiced he would be given opportunity to reply to the documents. In Raila Odinga & 5 Others v. I. E. B. C. and 3 Others [2013] eKLR the Supreme Court of Kenya held that the Court must consider the nature, extent and context of the new material intended to be introduced. If it was small and could be replied to the Court could allow but if it would make it difficult or impossible for the other party to respond effectively the Court must act with abundant care and caution.

8. He submitted that the application was meritorious.

9. On their part the Respondents submitted that at the center of the instant application was the law governing abduction of additional evidence. In particular it was whether courts should accept into evidence documents procured several years after the institution of the matter. They submitted that it was in contravention of Articles 47, 48 and 50 of *the Constitution* and Sections 8, 9 and 10 of the *Access to Information Act*. Further, that *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 had no provision for adduction of additional or supplementary affidavits. They contended that the evidence sought to be introduced in the application had been tailored during the pendency of the litigation to assist the Petitioner to fill the loopholes apparent in the case.

10. Further, that the Petitioner sought the information suo moto concerning the Power of Attorney in favor of RF Lindsell. That was how the letter dated 28/03/2023, signed on 29/03/2023 about ten (10) years after the institution of this litigation. In the letter a Registrar by name Kiera's purported to respond and provide information surrounding the Power of Attorney. The letter sought to introduce to be part of the record evidence which could not be allowed for a number of reasons. One, it was manufactured over 10 years post ventilation of the case hence designed to assist the Petitioner. It was not made in goods good faith. They relied on the case of *Mwangi v Karanja (Civil Appeal 05 of 2018*) [2022] KEHC 454 KLR (10 May 2022) (Ruling) and Wanje & Others v Sakwa & Others [1984] KLR 275, where the Court said that the rule of allowing evidence is not to assist a party who has discovered fresh evidence to import it nor for an unsuccessful litigant at the trial to patch up his weak points in his case or fill up omissions.

11. Second, the document consisted of hearsay, contradictions and unsubstantiated allegations. The author did not provide the basis of the contents of the letter yet he was not a witness to the Power of Attorney. He did not know the purport and import of the Power of Attorney or even interact with it. Thirdly, the letter was prejudicial to their 1st to 4th and 7th Respondents since it sought to affirm contested allegations without any basis or representation from RF Lindsell and Nicolas Hendrick Claassen and several other third parties listed therein. Further, it was extremely prejudicial and contrary to the parole evidence rule. The letter was made during the pendency of the instant litigation. Finally, that the letter could not be allowed to be on record since the Petitioner's contention was not whether there was a Power of Attorney between RF Lindsell and Nicolas Claassen, rather, the contention between the parties was whether the suit land was taken over by government without compensation. The petitioner had never applied to amend his pleadings to plead a Power of Attorney. In any event, the impugned letter confirms that there was a relationship between Nicolas Claassen and RF Lindsell hence the letter was irrelevant to the proceedings. This court should restrict the admission of that evidence relied on. He submitted that the application be dismissed with costs. That the letter was an intent to mutate the case and delay the hearing.

12. They relied on the case of Isaac Gichunge Leakey v. Njogu Titus Gichuru [2020] eKLR which stated that the "permission to introduce new evidence must be used sparingly and with caution as the Supreme Court held in Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others..."

Lastly, that the decision to rely on the new document was made by the Petitioner without leave of the Court.

Issue, Analysis And Determination

13. I have considered the application, the facts in support and opposition thereto by way if Affidavits, the submissions by parties and the law. I am of the view that only two issues lie for determination. They are whether the Application is merited, and who to bear the costs of the application.

14. Starting with the first issue, in the High Court and Courts of equal status and the subordinate ones, the law regarding the filing of pleadings and the documents that accompany them is Order 3 Rule 2 of the Civil Procedure Rules for the case of the Plaintiff, Claimant or Petitioners, and Order 7 Rule 5 of the Civil Procedure Rules for the cases of Defendants or Respondents. Order 7 Rule 5 provides for similar requirements in regard to filing of counterclaims. This applies to all suits except small claims. Then Order 11 obligates the Court and parties to take directions and certification that a matter is ready or not for hearing.

15. In regard to a plaintiff or petitioner's case, Order 3 Rule 2 provides that:

> " All suits filed under rule 10) including suits against the government, except small claims, shall be accompanied by -
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> (a) the affidavit referred to under Order 4 rule 1 (2);
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> (b) a list of witnesses to be called at the trial;
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> (c) written statements signed by the witnesses excluding expert witnesses; and
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> (d) copies of documents to be relied on at the trial including a demand letter before action:
>
> Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11."

16. The Rule is to the effect that at the time of filing suit or Petition the documents that accompany the pleading include a List of Documents and copies of documents listed in it. A plain reading of the Rule renders the import that there is no provision or exception that documents be filed later than the Plaint. And this is for good reason: when a party sets out to file a claim in which he or his supported by documents it is clear that the document out to be in existence so as to form the basis of a factual position that the claim exists. It ought not to be a document that is obtained later to support the claim. That would be a fishing expedition or a document tailored to fill in a gap regarding the claim or defence. Except for a document which is prepared by a professional and under the direction of the court in order to aid it understand the issue before it better, such other non-professional-document is often prepared within a certain mindset or frame with the aim of bringing out a specific line of thought or 'pointed' fact and is often riddled with (distorted or selected) information tailored to suit the narrative of the claim or defence hence should not be taken seriously.

17. Be that as it may court may, in exceptional cases, permit a document that was in existence before the filing of the suit or claim but which with due diligence could not be available or be within the reach of the claimant or defendant for that matter. It has to be done when it is clear that even with due all diligence such a document could not have been in the hands of, accessible by or within reach of the Applicant at the time of filing the Plaint or Claim or Defence.

18. When the above view is compared with the instant case, certainly the facts are divergent: it is not the case herein. Instead herein, the Petitioner, suo moto, after almost seven years prompted the authorship of the document sought to be introduced vide the prayers sought herein. This, in my humble view, differs materially from the import and intent of the provisions this Court has alluded to above regarding the filing of documents with a Plaint or Petition.

19. After laying the basis for filing of documents the Rules Committee enacted the provisions regarding compliance with the previously alluded to rulings. Order 11 Rule 7(3) of the Civil Procedure Rules makes provision on the consequences of failure of parties to comply with the provisions as to the filing of documents and written statements where necessary. It stipulates that any party or Advocate who fails to comply shall be deemed to have violated the overriding objective of the procedure as provided for in Sections 1A and 1B of the *Civil Procedure Act*. In summary the overriding objective is facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. An immediate sanction provided for is the payment of costs by the defaulting party or Advocate.

20. In specific regard to the practice before this Court, the regulations made pursuant to the provisions of the Environment and *Land Act*, 2012 strengthening the process of hearings and even the receipt of evidence in the Court. There are the Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to the Environment and he Use and Occupation of, and Title to Land and Proceedings in Other Courts (the Mutunga Rules), published in Gazette No. 5178. Rule 28 (b) thereof provides that,

> "In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference: (b) The issuance of an Order striking out pleadings or imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines."

21. That said, the Applicant argued and submitted that he received from the Ministry of Lands the letter in issue marked KWC1 on 28/03/2023. He argued that it disclosed new information which was supposed to be brought to the attention of the Court. On their part the Respondents argued that the letter was a fishing expedition and obtained in the course of the matter. It was tailored towards achieving a certain result and was prejudicial to them as it contained hearsay and the maker was not party to the information her supplied in it.

22. I have carefully taken into account the submissions of both parties and the authorities relied on by them.

23. It is worth noting that ever since the filing of the matter in 2015, in terms of Order 11 of the Civil Procedure Rules, the directions in this matter were given on 03/10/2022. On the material date the Petitioner certified to the Court that his matter was ready for hearing and that he had filed all is documents, which he undertook to bind and paginate in seven (7) days. After that he began is oral testimony on 21/11/2022 when he was willing to testify to the end but had the predicament of relying on some documents which were so feint as to be illegible. It was for that reason that the Court adjourned the Petition.

24. The Petitioner did not indicate at any point in time before then or on the material date that he was intent on seeking further information about the matter. He did not seek leave of the Court either.

25. This court has carefully analyzed the copy of the document marked as annexture KWC1. It is a copy of a letter dated 28/03/2023. It refers to another letter dated 05/12/2022 written by Karl W. Claassen, the petitioner herein allegedly seeking information as to whether one R.F. J. Lindsell (Advocate) was

given a Power of Attorney by Nicholas Hendrick Claassen. Then the author gives answer thereto to the effect that the preferred number does IP/A10734/1 did not have a volume number to support the document. After that he proceeds to give a wide range of other information not solicited (from the author's own summary of the import of the letter by Karl Claassen) by the said letter of 05/12/2022. Finally, he concludes that the said Mr. Lindsell was working as a Land expert advocates and that if the office was not given more information regarding the volume number it would not be easy to tell who was given the Power of Attorney. Further, that no copy nor was the volume number as stated above presented in the meetings (he referred to as having taken place in 1969).

26. Clearly, the document purports to be an extraction of information contained in various documents alleged to be in possession and power of the author. However, it is unclear as to whether and how, in absence of crucial information which the author argues he was not given he was able to get the information he authored in the letter sought to be introduced in the record. Even the contents of the letter dated 05/112/2022 are not disclosed. The additional information given in the letter dated 28/03/2023 whose source is not disclosed by way of annextures of the said minutes and other documents that are supposed to back the information makes the document not only full of hearsay but highly suspect that it was intentionally carefully authored in a design to suit the narrative of the Petitioner. This is particularly so given that it was authored in the course of the Petition.

27. This court therefore finds, as submitted by the 1st to 4th and 7th Defendants, that the annexture KWC1 sought to be introduced as part of the documents the Petitioner is to rely on in evidence is prejudicial to them. It is one authored as a fishing expedition and a design to favour the Plaintiff's side of the version of things. Its process of introduction into the proceedings or record herein does not fall within the parameters of both Order 3 Rule 2 and Order 11 of the Civil Procedure Rules.

28. The upshot is that the Application fails and is hereby dismissed with costs to the Respondents who opposed it.

29. Further, this matter is hereby fixed for mention virtually on 16/07/2024 for purposes of fixing a further hearing date.

30. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY ON THIS 13TH DAY OF JUNE, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

Delivered virtually in the Presence of:

Ms. Kinyanjui for Mathai----------for the Petitioner

Odongo----------for the 1st to 4th and 7th Respondents

Kessei----------for the 5th and Respondent