



Kalaiya v Cheruiyot & 5 others (Environment & Land Case E394 of 2021) [2024] KEELC 4741 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E394 OF 2021**

**JO MBOYA, J
JUNE 13, 2024**

BETWEEN

NEERAJ JAYATILALA KALAIYA PLAINTIFF

AND

DANCUN CHERUIYOT 1ST DEFENDANT

DIRECTORATE OF CRIMINAL INVESTIGATIONS 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

LAVINGTON SECURITY LIMITED 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

CHACHA J MARO 6TH DEFENDANT

RULING

Introduction:

1. The subject matter was scheduled for Defence hearing on the 22nd of May 2024 and 23rd of May 2024, both days inclusive. However, on the 22nd of May 2024, the instant matter could not proceed for hearing on account of another matter which had been confirmed for hearing and which matter was bound to take a better part of the day.
2. Consequently, the advocates for the respective parties covenanted to take out the matter and to have same [matter] be heard on the 23rd of May 2024. For good measure, the court adopted and endorsed the agreement by the parties and the hearing was re-scheduled to the 23rd of May 2024.
3. Nevertheless, learned counsel for the 2nd, 3rd, 5th and 6th Defendants, namely Mr. Oscar Eredi [chief litigation counsel] intimated to the court that same was desirous to file a substituted witness statement to replace the witness statement which had hitherto been filed by a previous Land Registrar. For



coherence, the chief litigation counsel submitted that the previous Land Registrar, who had filed a witness statement had vanished and switched off his phone and hence same was unreachable.

4. Suffice to point out that the application by and on behalf of the chief litigation counsel was not opposed by the advocates for the Plaintiff save that the advocate for the Plaintiff intimated that the substituted witness statement should not introduce and/or bring forth new evidence, taking into account that the Plaintiff had already closed his case.
5. Arising from the foregoing, the court proceeded to and granted liberty to the 2nd, 3rd, 5th and 6th Defendants to file a substituted witness statement, provided that same [witness statement] does not introduce and/or bring forth new/additional evidence.
6. Following the orders of the court, the chief litigation counsel proceeded to and indeed filed the substituted witness statement, which was thereafter served on the counsel for the Plaintiff.
7. Nevertheless, on the return date, namely, the 23rd of May 2024, learned counsel for the Plaintiff raised an objection as pertains to the propriety of the substituted witness statement and thereafter sought to have same [substituted Witness Statement] expunged from the record of the court.
8. Instructively, the objection by the and on behalf of the Plaintiff was opposed by the learned chief litigation counsel and thus the court directed that the parties do ventilate their respective submissions so as to enable the court to render a Ruling one way or the other.

Parties Submissions:

Plaintiff's Submissions;

9. Learned counsel for the Plaintiff submitted that even though the 2nd, 3rd, 5th and 6th Defendants were granted leave to file and serve a substituted witness statement, the substituted witness statement was not to introduce and/or add any new and/or additional evidence.
10. However, learned counsel for the Plaintiff observed that the 2nd, 3rd, 5th and 6th Defendants proceeded to and filed a substituted witness statement but in respect of which same [2nd, 3rd, 5th and 6th Defendants] have removed and/or omitted paragraphs 3, 4, 5, 6, 8 and 16 of the previous witness statement. In this regard, learned counsel contended that the 2nd, 3rd, 5th and 6th Defendants have therefore removed critical evidence that was contained in the body of the previous witness statement by the Land Registrar.
11. Furthermore, learned counsel for the Plaintiff contended that the omission of the named paragraphs from the substituted witness statement has the effect of taking away an accrued right in so far as the Plaintiff herein testified when the previous witness statement, now substituted was on record.
12. Secondly, learned counsel for the Plaintiff has submitted that the substituted witness statement, which has omitted various paragraphs from the previous witness statement, is contrary and in contravention of the order of the court made on the 22nd of May 2024. For clarity, learned counsel invited the court to find and hold that the substituted witness statement is therefore incompetent and ought to be expunged.
13. Thirdly, learned counsel for the Plaintiff submitted that the omitted paragraphs were essential and critical for the Plaintiff in so far as same related to and articulated the process that was undertaken by the Land Registrar, prior to and before the issuance of the certificate of title which is the subject of dispute beforehand.



14. Arising from the foregoing, learned counsel for the Plaintiff has therefore submitted that the removal complained of is prejudicial to the Plaintiff and thus impacts upon the Plaintiff's right to fair hearing. In this regard learned counsel contended that the utilization of the substituted witness statement would therefore subject the Plaintiff to unfair treatment, which ought not to be countenanced by the court.
15. In a nutshell, learned counsel for the Plaintiff has therefore invited the court to find and hold that the impugned substituted witness statement contravenes the directions and the orders of the court issued on the 22nd of May 2024 and thus same [substituted witness statement] ought to be expunged from the record of the court.
16. Alternatively, learned counsel for the Plaintiff contended that the court should compel the 2nd, 3rd, 5th and 6th Defendants, to rely upon and use the previous witness statement which was filed by the designated Land Registrar.

2nd, 3rd, 5th and 6th Defendants' Submissions;

17. On behalf of the 2nd, 3rd, 5th and 6th Defendants, the learned chief litigation counsel contended that the objection being raised and canvassed by the Plaintiff is mischievous and otherwise misconceived. Furthermore, learned chief litigation counsel pointed out that the Plaintiff herein cannot be allowed to usurp the mandate of the defence counsel and seek to direct same [defence counsel] on how to conduct the defence case.
18. Secondly, learned chief litigation counsel has submitted that the substituted witness statement which has been filed complied with the orders and direction[s] of the court, which directions were to the effect that the substituted witness statement was not to introduce new evidence. For coherence, learned chief litigation counsel pointed out that the substituted witness statement has not introduced any new evidence or at all.
19. Conversely, learned chief litigation counsel has pointed out that what has been done was to omit the paragraphs which related to the actions and/or activities that were undertaken by the previous Land Registrar in person and which actions could only have been spoken to by the said Land Registrar and not otherwise.
20. Furthermore, learned chief litigation counsel has submitted that it was not tenable to retain the said paragraphs because the current/substituted Land Registrar was not privy to the said actions and hence same [current Land Registrar], cannot speak to the said actions.
21. In any event, learned chief litigation counsel contended that the retention of the said paragraphs in the substituted witness statement would have amounted to hearsay, which is prohibited by dint of the provisions of Section 33 of the *Evidence Act*, Cap 80 Laws of Kenya.
22. Finally, learned chief litigation counsel has submitted that the court cannot be called upon to compel the Defendants to rely on a witness statement which has since been substituted and thus rendered redundant. In this regard, learned chief litigation counsel contended that the invitation by and on behalf of the Plaintiff is legally untenable and cannot be granted, either in the manner sought or at all.
23. Arising from the foregoing, learned chief litigation counsel has implored the court to find and hold that the objection by and on behalf of the Plaintiff is not only misconceived but same [objection] is tantamount to inviting the court to direct the Defendant in the manner in which same need to prosecute the defence case, which invitation is inimical to the rule of law.



Issues For Determination:

24. Having reviewed the submissions by the respective advocates and upon consideration of the applicable law, the following issues crystallize [emerge] and are thus worthy of determination:-
 - a. Whether the substituted witness statement is contrary to and/or in contravention of the direction of the court issued on the 22nd of May 2024 or otherwise.
 - b. Whether the substituted witness statement ought to be expunged from the record in the manner propagated or otherwise.
 - c. Whether the court can compel the named Defendants to rely upon the previous witness statement which was the subject of substitution.

Analysis And Determination

a. Whether the substituted witness statement is contrary to and/or in contravention of the direction of the court issued on the 22nd of May 2024 or otherwise.

25. On the 22nd of May 2024, learned chief litigation counsel intimated to the court that the previous Land Registrar who had recorded a witness statement and which witness statement was thereafter filed with the court, had vanished and indeed switched off his phone and thus the same [Land Registrar] could not be reached.
26. Owing to the difficulty pertaining to accessing and/or reaching out to the said Land Registrar, the learned chief litigation counsel implored the court to grant leave and thus allow same [learned chief litigation counsel] to file a substituted witness statement by another Land Registrar.
27. Suffice to point out that the application by the learned chief litigation counsel was conceded to by the Plaintiff. However, the Plaintiff herein invited the court to direct that the substituted witness statement to be filed ought not to include additional/new evidence, taking into account that the Plaintiff had already closed its case.
28. Arising from the foregoing, the court proceeded to and indeed granted liberty to the 2nd, 3rd, 5th and 6th Defendants to file a substituted witness statement. Nevertheless, it was ordered and directed that the substituted witness statement ought not to introduce new and/or additional evidence.
29. Pursuant to and in line with the leave granted by the court, the 2nd, 3rd, 5th and 6th Defendants duly proceeded to and filed a substituted witness statement and which was thereafter served upon the Plaintiff.
30. Be that as it may, the 2nd, 3rd, 5th and 6th Defendants omitted or excluded from the substituted witness statement certain paragraphs, namely, paragraphs 3, 4, 5, 6, 8 and 16 of the previous witness statement. For good measure, the learned chief litigation counsel pointed out that the omitted paragraphs related to evidence that was peculiarly within the knowledge of the previous Land Registrar and hence the current Land Registrar could not advert to same without infringing upon the rule of hearsay.
31. Having reviewed the rival submissions, [details in terms of the preceding paragraphs], the issue that must be grappled with and answered relates to whether the substituted witness statement has introduced new/additional evidence, which the court decreed not to be included.
32. To my mind, the introduction of new and/or additional evidence could only arise if the 2nd, 3rd, 5th and 6th Defendants, introduced additional paragraphs, which were not contained in the previous witness



statements. For good measure the introduction of new/additional evidence can not arise when what has been done is the removal or omission of certain paragraphs that were contained in the previous witness statement.

33. Pertinently, addition or introduction of new evidence is a positive act and not a negative one and hence, I am hard pressed to discern on what basis the Plaintiff's counsel contends that the substituted witness statement contravenes the court order made on the 22nd of May 2024.
34. Simply put, the court order barred and/or prohibited the introduction of new and additional evidence and not otherwise. Consequently, in this regard, it is my finding and holding the substituted witness statement does not contravene and/or run afoul of the orders of the court, either in the manner contained or at all.

b. Whether the substituted witness statement ought to be expunged from the record in the manner propagated or otherwise.

35. Further, the learned counsel for the Plaintiff had contained that the substituted witness statement ought to be expunged and struck out from the record of the court on account that the same [substituted witness statement] has contravened the orders of the court issued on the 22nd of May 2024.
36. However, while discussing issue number (a) above, the court has since found and held that the substituted witness statement, does not contravene the directions of the court which were issued in the presence of the respective advocates. Instructively, the said directions only prohibited the introduction of new and additional evidence but did not advert to removal of certain paragraphs from the previous witness statement.
37. To the extent that the court has since found and held that the substituted witness statement accords with the court order, the question of expunging the substituted witness statement therefore does not arise.
38. Consequently and in the premises, my answer to issue number (b) is to the effect that the prayer to expunge the substituted witness statement is not only misconceived but same is anchored on quick sand.

c. Whether the court can compel the named Defendants to rely upon the previous witness statement which was the subject of substitution.

39. Other than the request that the substituted witness statement be struck out and expunged from the record of the court, learned counsel for the Plaintiff has also made an alternative submission to the effect that the court be pleased to compel the 2nd, 3rd, 5th and 6th Defendants to rely on the previous witness statement, which was obtaining in the court file at the time when the Plaintiff's case was heard.
40. What I hear learned counsel for the Plaintiff to be saying is that the court should degenerate and/or descend into the arena of controversy and thus assume the mandate of guiding the named Defendants on what witness statement [evidence] to tender and produce before the court.
41. On the other hand, I also hear the counsel for the Plaintiff to be suggesting that the Plaintiff herein can assume the mandate of directing or guiding the adverse party [named Defendants] on how to conduct the defence case.
42. To my mind, there is no gainsaying that our jurisdiction embraces the common law system, which espouses the adversarial system wherein each party is chargeable with choosing the nature of pleadings to file and the evidence, if any, to tender and produce before the court.



43. For brevity, it is instructive to adopt and take cognizance of the holding of the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR where the court stated and held thus:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.

44. Likewise, the place and significance of the doctrine of departure and essentially the aspect that parties are the owners of their cases was espoused and highlighted by the Court of Appeal in the case of *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR.
45. For coherence, the court stated and held thus:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

46. From the foregoing position, what becomes apparent and evident is that the court must remain an impartial arbiter and allow the parties to bring forth and propagate their respective cases albeit taking into account the established rules of procedure and not otherwise. [See the provisions of Order 2, Rule 6 of the *Civil Procedure Rules*].
47. Having found and held that the court is an impartial arbiter and thus divested of the power to compel a party to rely on a particular piece of evidence, either in the manner propagated by learned counsel for the Plaintiff or at all; it is my finding that this court cannot purport to direct the named Defendants to revert back to and rely on the previous witness statement.



48. In any event, it is not lost on the court that the previous witness statement has since been superseded by the filing of the substituted witness statement and hence same [previous witness statement] has been rendered redundant and otiose. In this regard, it is deemed that that previous witness statement is now non-existent and thus cannot be reverted to on the face of the court orders made on the 22nd of May 2024.
49. Finally, there is also the perspective pertaining to the overreach by learned counsel for the Plaintiff, wherein same [learned counsel for the Plaintiff] is endeavoring to direct the named Defendants in terms of the manner in which same [named Defendants] should tender their evidence before the court.
50. In my humble view, the chief litigation counsel is the duly appointed counsel for the named Defendants and thus same [chief litigation counsel] is the one tasked to undertake the prosecution of the defence case, to the best of his knowledge and ability, subject only to the known provisions of the law and the constitution.
51. In the premises, it is my finding that the learned counsel for the Plaintiff cannot be heard to offer guidance and/or resort to the court to direct the named Defendants on what witness statement same [named Defendants] ought to adopt and rely on. For good measure, the witness statement to be deployed and relied upon by the Defendants belongs to and falls within the discretion of the authorized counsel.
52. To this end, it suffices to adopt and reiterate the succinct position taken by the Court of Appeal [while considering a near similar matter] in the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR, where the court stated and held thus;
83. In civil as in criminal proceedings, the plaintiff (prosecution) is solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person will be called as a witness in its case. (See *Dabbah -v- Attorney-General for Palestine* (1944) AC 156; *Whitehorn -v-R* (1983) 152 CLR 657). A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstance, a trial court cannot call any witness.
- In the instant case, the appellant's contestation that the respondent should have called Mr. Samuel Gitonga, Evelyn Mwaka and Antony Nganga Mwaura as witnesses has no legal foundation.
- In law, the appellant cannot compel the respondent to call a witness to support or rebut the respondent's case; all that the respondent is obligated to do is call credible and material witnesses to prove its case to the required standard.
53. Likewise and before departing from this issue, I beg to reiterate that the litigation before the court is a solemn process which is owned by the parties subject to the provisions of the law and thus each party, the Defendants herein not excepted, are/is the best driver of own case/cause.
54. Simply put, the court in the exercise of its jurisdiction is not tasked to decree how the matter should be conducted and what witnesses should be called by which party.
55. To this end, I beg to borrow and adopt the statement by the Supreme Court of Kenya [the Apex Court] in Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR, where the court stated and held as hereunder:-

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and



on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

56. In view of the foregoing, it is my humble position that neither the court nor the Plaintiff [the adverse party], can compel the named Defendants to revert to and utilize the previous witness statement, which in any event has since been superseded pursuant to the orders of the court made on the 22nd of May 2024.
57. Simply put, my answer to issue number (c) is to the effect that the request by and on behalf of the Plaintiff is inimical to the rule of law and in any event same [request], is contrary to the doctrine of departure and the adversarial nature of the common law system which Kenya subscribes to.

Final Disposition:

58. Flowing from the discussion [details in terms of the preceding paragraphs] what becomes evident and apparent is that the objection raised and canvassed by learned counsel for the Plaintiff is premature, misconceived and legally untenable.
59. Consequently, and in the premises, same [objection] be and is hereby dismissed. However, the costs occasioned by the objection under reference shall abide the outcome of the suit.
60. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2024.

OGUTTU MBOYA,

JUDGE

In the presence of:

Brian – court assistant

Ms Sheunda h/b for M. Osundwa and Mr. Orenge for the Plaintiff.

Mr. Oscar Eredi [chief litigation counsel] for the 2nd, 3rd, 5th and 6th Defendants.

