Mohamed & 5 others v Masinde Muliro University of Science and Technology & 4 others; Mount Kenya University (Interested Party) (Environment & Land Case 48 of 2019) [2024] KEELC 4578 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4578 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 48 OF 2019

FO NYAGAKA, J

JUNE 11, 2024

BETWEEN

MUDE HUSEIN MOHAMED .... 1ST PLAINTIFF

RODGERS SAMANYA .... 2ND PLAINTIFF

HASSAN ABDULAHI ALI .... 3RD PLAINTIFF

JAMES NJENGA NYAGA .... 4TH PLAINTIFF

ABDULRAHMAN WAMALA .... 5TH PLAINTIFF

THE PUBLICAN (AFRICA) LTD .... 6TH PLAINTIFF

AND

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY .... 1ST DEFENDANT

TURKANA UNIVERSITY COLLEGE (BEING SUED AS A CONSTITUENT COLLEGE OF THE 1ST DEFENDANT) .... 2ND DEFENDANT

COUNTY GOVERNMENT OF TURKANA .... 3RD DEFENDANT

COMMISSIONER OF LAND .... 4TH DEFENDANT

COUNTY SURVEYOR TURKANA COUNTY .... 5TH DEFENDANT

AND

MOUNT KENYA UNIVERSITY .... INTERESTED PARTY

RULING

1. By a Notice of Motion dated 02/05/2024 the Plaintiffs moved this Court under Articles 50 and 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 50 (sic) of the Civil Procedure Rules and all other enabling provisions of the law. They prayed for the following orders:

    1. ...spent

    2. That the Honorable Court be placed to set aside its Ruling of 15/02/2024 and the consequential orders there from.

    3. That this Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to file a further list of documents out of time.

    That the costs of this application be in the cause.

2. The application was based on a number of grounds being that, this suit came up for hearing on 15/02/2024 when it was adjourned to 22/05/2024. Prior to the hearing, the plaintiffs/applicants filed and served a further supplemental list of documents and supplementary list of documents both dated 12/02/2024 containing a Survey Report dated 11/09/2022. The plaintiffs are keen to use this available report to advance their claim against the defendants. They presented the Survey Report to their advocates for filing in court for purposes of use, but due to inadvertence by counsel, it was not filed. The witness discovered this when he was preparing for trial on 12/02/2024. That the document was not among the listed documents and sought to add the situation immediately. This Survey Report is not only necessary for the plaintiffs case, but essential for the Honorable Court to determine the dispute hearing with finality and justly. The dispute before the court revolves around the ownership of the suit property, particularly the boundaries of the 1st defendant's property and the Survey Report demonstrates the position advanced by the plaintiffs, 3rd defendant and Interested Party. It is in the interest of justice and fairness that the report is filed to allow the court to examine all the necessary evidence before making a final determination. The defendants will not suffer any prejudice since they will have opportunity to cross examine the author of the document. It is through their production of the said documents that the court will have a chance to interrogate them and arrive at a correct decision. This Honorable Court should not be denied the opportunity to determine the suit justly and fairly in substantively on account of default of Counsel which is a mere procedural technicality which can be cured under Article 159(d) of *the Constitution* which implored the court to administer justice without undue regard to procedural technicalities. Court should intervene since if it does not do so the Applicants stand prejudiced and the court denied opportunity to determine the suit on merits. The application was supported by the affidavit of Rogers Samanya, which he swore on 02/05/2024.

3. His Affidavit repeated the contents of the grounds in deposition form. Therefore, the Court needs not repeat the contents. However, the deponent continued to state that he had authority of the 1st, 3rd, 4th, 5th and 6th plaintiffs to swear on their behalf. The dispute between the plaintiffs and the 1st defendant was on ownership of the suit land, which the 1st defendant had unprocedurally and unlawfully acquired. The dispute was in regard to the part of the property fronting the main Kitale-Lodwar highway which is approximately 11.46 Hectares which the plaintiffs claim ownership on account of allotment letters by the defunct Municipal Council. Well on the other hand, the 1st defendant claims ownership of the property on account of documents as purchasers from the Interested Party.

4. The Plaintiffs were desirous of meeting the burden of their case and in 2022 they commissioned a licensed surveyor by name Geomatics Services to conduct a survey of all the entire property and provide the ground status. He made a report dated 11/09/2022, a copy of which they are next as RSI. The Co-plaintiffs received their report in March, 2023 after settling the full survey fees. The report was handed over to the Advocates who did not file it and all along the plaintiffs knew that he had filed it. The failure to file the report was due to an oversight on the part of the Advocate. He annexed and marked as RS2 a copy of an Affidavit sworn by Kennedy Mogire Advocate. The report was expunged on 15/02/2024. The instant application was made without undue delay hence should be allowed.

5. The annexure marked as RS2 was an affidavit sworn by one Kennedy O. Mogire on 02/05/2024 which he titled "Supporting Affidavit". He stated in it that he was conversant with the facts herein and he wished to confirm that in 2023 he received a Survey Report from the 2nd plaintiff with instructions to file the same. Inadvertently, he did not file and he became aware of the same that it was not filed when he prepared for the hearing in the month of February. Immediately he sought to remedy the situation by filing and serving the Survey Report before the scheduled date. It was his fault, and not in any way to steal a match or ambush the defendants. It was always the intention of the plaintiffs or applicants to use the report. It would be unfair and unjust if they were denied opportunity to produce the same. That the defendants would not suffer any prejudice if they got allowed the Survey Report and it was in the interest of justice and fairness that they be allowed to rely on the report as prayed.

6. The 1st and 2nd defendants opposed the Application through an Affidavit sworn by Prof. George Chemining'wa on 14/05/2024. As the record of 20/05/2024 shows, the Replying Affidavit though filed out of time was accepted by the Court and deemed properly filed and served since the Respondent gave a satisfactory explanation that the delay was due to "Mapping" of the Advocates onto the E-Fling Platform, which took time as to be completed after the times fixed by the Court.

7. He stated that on 12/02/2024 the Plaintiffs filed a Survey Report dated 11/09/2022 out of time and without leave of the Court. On 15/02/2024 through the 1st Defendant's oral Application the document was expunged from the Court record since it was irregularly and unlawfully filed and placed on the record hence it was illegal, unlawful and a nullity. The Court was justified in expunging the same.

8. He deponed further that by asking the Court to set aside the orders of 15/02/2024 the Applicants were asking the Court to extend time and recognize said report, an act tantamount to moving the Court to remedy an illegality. The failure to file the Report on the part of the Applicants and seeking leave of the Court was not an oversight but an inaction and such an action should be visited on the Applicants.

9. After that, from paragraphs *12* to *18* he deposed to facts on how the parcel of land was acquired and the Plaintiff's pleadings over the ownership of the suit land. Then he summed it that the issue was not a boundary dispute but of ownership and it was incumbent on the Plaintiffs to demonstrate that the parcels were properly surveyed and existed based on survey documents at the time of suit and not future documents. The Plaintiffs were on a fishing expedition which they did before in an Application dated 10/05/2022 which was finally dismissed on 3/05/2023. He annexed a copy of the Application and Ruling and marked it as GC4(a) and GC4(b) respectively.

10. He deposed that if the Court granted the prayers, it would prejudice the Defendants. Further, that on 29/05/2020 the Applicants filed an application dated 11/05/2020 seeking orders that a survey be conducted on plot Nos. LR. 14691/425 Kanamkemer Lodwar, Plot No. 931, 932, 829, 976A, 790, 920 and 888. It was dismissed on 26/01/2021 because the issue between the parties was ownership, not a boundary. He annexed and marked as GC5 and GC6 a copy of the Application and Ruling. The Applicants want to introduce the same issues through backdoor, having not appealed the Ruling of 26/01/2021. Further, on 13/02/2020, the Court found that the Plaintiffs had no prima facie case and

they now have resorted to a fishing expedition for evidence. The Application had no basis and should be dismissed.

11. Although on 17/05/2024 at 12:57 PM the 1st and 2nd Defendants filed an undated document titled "Submissions on the Application dated 02/05/2024", it was not signed. The validity and status of an unsigned pleading in a court record is now settled: such a document is a nullity. It does not have any validity as it is not 'owned' by anyone whatever its description or purport. In Vipin Maganlal Shah & Another v Investment & Mortgages Bank Limited & 2 Others [2001] eKLR the Court of Appeal held as follows: -

> " ...If a plaint is not signed either by the plaintiff in person or his recognized agent or his advocate, what is the use of requiring that it contains an averment by the plaintiff that there is no other suit pending and so on? If the plaint is not signed as required by Order VI rule 14, these other requirements clearly become meaningless. Whatever may be the position in India or even in England, the position in Kenya seems to us to be that a party who files an unsigned plaint runs a very grave risk of having that plaint struck out as not complying with the law..."

12. Similarly in the case of Regina Kavenya Mutuku & 3 others v United Insurance Co Ltd [2002] eKLR the court held as follows on unsigned pleadings:

> " ... I am in agreement ... that an unsigned pleading cannot be valid in law. To my mind, it is the signature of the appropriate person on a pleading which authenticates the same... An unauthenticated document is not a pleading of anybody. It is a nullity. In my opinion where a pleading has been amended and the same has been struck out for whatever reason, the party affected has simply no valid pleading left on record... I find that the defendant has no valid defence on record."

13. Therefore, in terms of the two decisions above, and many more, this Court does not regard the unsigned submissions as a proper document it can consider, and it proceeds to disregard it.

14. Turning now to the Plaintiffs submissions dated 21/05/2024 on 24/05/2024 at 11:38 AM, they summed up the application and relied on Section 95 of the *Civil Procedure Act* to argue that the Court has unfettered discretion to extend time. They relied on the case of Neraj Jayatilaiya Kalaiya v. Chruiyot & 5 Others [2022] eKLR. They argued that mistakes will continue to be made by advocates and they ought to be excused rather than driving away a litigant from the seat of justice. Further, that the matter was yet to proceed to hearing hence the parties would have a chance to cross examine the author of the report. Also, the Defendants had not shown any prejudice they would suffer if the orders were granted. Lastly, that the Court did not bar the parties from a further survey.

15. The Interested Party filed a Replying Affidavit sworn by one Prof. Evans Kerosi Somoni on 06/06/2024 on 07/06/2024 at 13:14 PM. Additionally, the Interested Party filed written submissions dated 06/06/2024 through their learned counsel M/S Adera Kenyatta & Advocates on 07/06/2024 at 13:13 PM. They also filed at 13:16 PM a List of Authorities dated the same date.

16. The Plaintiffs signed the Application as the Defendants' but in reality, it was for the Plaintiffs'. The court should have struck out the document on that account but thought it was an error it was prepared and decided to excuse under Article 159(2)(d) of *the Constitution* as a curable defect. Further, the Applicants did not submit or elaborate, apart from repeating citing Article 159(d) (sic) of *the Constitution*, any of the provisions they cited in the body of the application. The Court repeats the advice that it is not in order for learned counsel or a party to simply cite provisions of the law. It is

imperative to argue how any provision cited is relevant to the application they bring before court. Again, it is meaningless to have a clause as "all the enabling provisions of the law" without highlighting what the provisions that fall in the cluster or phrase might be. Otherwise the phrase is meaningless.

17. At this point, it is important to consider whether some of the documents filed in this matter are properly on record. I have noted above that on 06/05/2024 when the instant application came up for hearing, this Court gave the following directions.

> " By consent the hearing of this suit is fixed for 18/06/2024 and 19/062024 in Lodwar. The file is thus transferred to Lodwar sub-Registry. Further, the application dated 02/05/2024 is fixed for hearing on 20/05/2024. The applicant to serve it today. Any party wishing to oppose it to reply strictly within 5 days and parties to submit on the same within four days of service of the same."

18. On 20/05/2024, only the 1st and 2nd Defendants had replied to the Application as indicated above. All other parties had neither complied with the orders made on 06/05/2024 nor did they seek leave of the Court for extension of time to file documents late or afterwards. It goes without saying the Replying Affidavit of Prof. Kerosi Somoni sworn on 06/06/2024, the written submissions and authorities filed by leaned counsel for the Interested Party were all filed without leave of the Court. It should not be lost sight of the fact that the instant application follows the expunging, on 15/02/2024, of a Further List of Documents and documents filed out of time and without leave of the Court on 12/02/2024. This Court found then, and as always it will, that documents filed by a party outside of timelines either statutory or fixed by an order of Court without leave of the Court are a nullity and should be struck or expunged from the record. Therefore, by the same token the documents filed by the Interested Party as noted in this paragraph are a nullity. They are hereby struck out of the record. This Court ought not to take time to consider them at all.

19. On the above view, this Court is guided by the Supreme Court decision of Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR held as follows:

> " What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court."

20. Having considered the Application, the facts thereto through the supporting Affidavit and the Relying Affidavit, the law and the submissions by the Applicants, this Court now proceeds to determine the same. The Applicants seek to set aside the orders made on 15/02/2024 and thereafter pray for the court

to grant leave to file a further List of Documents consisting of a Survey Report dated 11/09/2022. It is therefore imperative to consider the content and import of the impugned orders.

21. On 15/02/2024, when the Plaintiffs were confronted with the oral application that the document filed on 12/02/2024 be expunged from the record they argued that the reason for the failure to file the Report in time was due to inadvertence on the part of their advocate. They then sought leave of the Court orally to have the document deemed to be part of the Court record. They argued that the same were "critical" and necessary to help the Court to determine the issue in dispute and that no prejudice would be suffered by the parties if the application was granted. It was based on those arguments that the Court made a finding by which it expunged the documents from the record.

22. The Applicants have made the same argument and advanced nothing but the same reasons as they did on 15/02/2024. Thy contend that this is the basis for setting aside the orders impugned. On their part the thrust of the 1st and 2nd Defendants is that by seeking to set aside the orders of 15/02/2024 the Applicants are moving the Court to extend time and recognize said report, an act tantamount to moving the Court to remedy an illegality.

23. I have carefully considered the Application, the facts, and the arguments which were placed before the Court on 15/02/2024 which the Court determined. I have taken into account the argument by the Applicants that the error in failure to file the documents in time was an inadvertent error by learned counsel. I have also reflected on the import of the decision of Neeraj (supra). First, it is clear that this suit was filed on 27/06/2019. It is clear, as was even found by this Court on 15/02/2024, that by that time the document sought to be introduced into the record was not in existence. Order 3 Rule 2 of the Civil Procedure Rules provides clearly the documents to accompany a Plaint. These include the List of Documents and copies of documents. There is no provision or exception in the said Rule that documents be filed later. Be that as it may court may in exceptional cases permit such to be done when it is clear that even with due diligence such a document could not have been in the hands or within reach of the Applicant at the time of filing the Plaint or Claim. It is not the case herein. Instead the Plaintiffs filed the suit and three years later they, suo moto, commissioned the preparation of the Survey Report sought to be produced. This differs a bit from the import of the provisions this Court has cited regarding the filing of documents with the Plaint.

24. As to whether there was inadvertence or not, I am convinced that there was none. If the Plaintiffs' argument is anything to go by, the document sought to be introduced by way of the orders sought herein was prepared in September, handed to the lawyers in March and sought to be introduced to the record a year later. There is no evidence of the audit trail on such an argument or fact. The Surveyor did not swear an affidavit to that effect or provide any evidence that he did as deponed by both the Plaintiffs and their advocate in order to firm the contention of inadvertence.

25. Be that as it may, it is not every mistake of learned counsel that may be excused and the effect passed over to an innocent party. Mistakes of learned counsel may not necessarily be visited on the client. However, this must always be balanced with the rights of the innocent party who took all steps to do the right thing only to be confronted with a prayer by the adverse party that whatever he did was in vain because learned counsel made a mistake. It should be in rare and clearest cases that this error should be shifted to the innocent party. In this era of enlightenment in the legal practice, it should be open to the client whose work was not done by learned counsel to through in the towel and by way of a suit for malpractice, go for the learned counsel. Learned counsel are professionals who should discharge their duties professionally and not carelessly or capriciously: they are not sacred cows then that cannot be sued for errors of their commission or omission.

26. In Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR The Court of Appeal in examining the duty of advocates to the court held:

> " From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:
>
> > '... I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned..."

27. About whether an error or blunder of an advocate should be visited upon the client the case of Philip Chemwolo & another vs Augustine Kubede (1982-1988) KAR 103, ins instructive. Apaloo J posited:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

28. However, in Belinda Murai & 9 others vs Amos Wainaina (1979) eKLR, the court stated as follows:

> " The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

29. In the instant case the alleged advocate mistake, if true, was committed not once but twice, and deliberately the second time, even when the learned counsel was fully aware of the failure to file the document at first. First, as alleged, he delayed in filing the Further List of Documents from March, 2023 to 12/02/2024. Then when the Court expunged the Further List of Documents, the learned counsel, or his client for that matter, sat pretty from the 15/02/2024 to 02/05/2024, on the eve of the intended further hearing of the suit (on 18th and 19/06/2024, to move the Court once more about the document. Was this indolence or deliberate and inexcusable inaction? They all fit the possible answer. Delay however short should be explained to the satisfaction of the Court. Herein, no attempt whatsoever has been given by the Applicants. It tells a lot of their character of delaying this matter since they filed the suit in 2019.

30. In any event all the arguments on the reason for the failure to file the document was duly considered and ruled on. This Court is not being moved to review the orders of 15/02/2024. Besides, this is not an appellate court as to be justified to sit on the decision of 15/02/2024. The Court became functus officio on the same issue when it considered the arguments as posed now in the instant application. The

issue was determined on merit when the Applicants moved the Court to deem the document properly filed and served. Thus, to call on the court to set aside the orders and grant leave for the applicants to file the further List of documents out of time would be to relitigate the same issue before me. I would have no jurisdiction to determine the same issue. I would have no basis in law to give the Plaintiffs a second bite at the cherry.

31. Lastly, is defeats logic and reason why the Applicants delayed since they allegedly received the Survey Report from the said maker to February, 2024 to move the Court. Even then, it also does not make sense and there is no reason whatsoever why from 15/02/2024 when the List of Documents was expunged the Applicants waited, for three months, to move the Court for the grant of orders of extension of time.

32. Again, going by the prayers in the instant application, if this Court were to grant the prayers as made, they would cause confusion and even if there could have been merits this Court doubts as to whether prayer 2 and 3 would be granted in tandem or simultaneously. It is important that in pleadings parties are careful on what they wish the court to grant and they 'listen' to themselves as they present the pleadings. In the instant case, if prayer 2 could have been granted, the original position then which was that the List of Documents filed on 12/02/2024 was duly on record could have been restored. Then there could be no purpose of prayer 3. Perhaps prayer 3 could have stood alone.

33. The upshot is the application dated 02/05/2024 (2nd May, 2024) is without merit and is hereby dismissed with costs to the Respondents.

34. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY ON THIS 11TH DAY OF JUNE, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

Delivered virtually from 15:10 PM onwards in the Presence of

Mogire-------------for the Plaintiffs

Omondi ----------for the Interested Party

Jepkemei----------for Odongo for 4th, 5th and 6th Defendants

Chemutai for Kitiwa -----for the 1st and Defendants

N/A ----------------for the 3rd Defendant