



Kimundi v Mukaa Trading Co. Ltd & another (Environment & Land Case 50 of 2017) [2024] KEELC 4579 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 50 OF 2017**

TW MURIGI, J

JUNE 5, 2024

BETWEEN

PETER KIMUNDI PLAINTIFF

AND

MUKAA TRADING CO. LTD 1ST DEFENDANT

COUNTY GOVERNMENT OF MAKUENI 2ND DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 2nd October, 2023 brought under Articles 50 and 159 (2) (d) of the *Constitution*, Section 146 (4) of the *Evidence Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 18 Rule 10 of the *Civil Procedure Rules*, 2010 in which the Plaintiff/Applicant seeks the following orders: -
 - a. That this Honourable Court be pleased to grant leave to the Applicant/Plaintiff to adduce new additional evidence listed in the Applicant's/Plaintiff's annexed further list of documents.
 - b. That this Honourable Court be pleased to grant leave to the Applicant/Plaintiff to recall the 2nd Respondent's/Defendant's 1st witness one Mr. Julius Landu Ndile for further cross-examination.
 - c. That the Applicant's/Plaintiff's annexed further list of documents be deemed as duly filed upon payment of the requisite court fees.
 - d. That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the affidavit of Pius Kimundi sworn on even date.



The Applicant's Case

3. The Applicant averred that he has discovered new and important evidence which was not available during the pre-trial conference. He further averred that he discovered the new documents in August, 2023 when the Court was on recess and after the 2nd Defendant's first witness, Julius Landu Ndile, had been heard and cross-examined.
4. He further averred that the new documents consist of the new Sultan Hamud Map and the proceedings of the County Assembly of Makueni debating the report dated 17/5/2023 of the Sectoral Committee on Lands, Urban Planning and Development on revised Local and Land Use Development Plan for Sultan Hamud Township (2021 – 2026).
5. According to the Applicant, the new documents will assist the Court to determine the matter in contention on the merits. He argued that it will be necessary to recall Julius Landu Ndile for further cross-examination on the new documents in accordance with Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of the *Civil Procedure Rules*. He contended that the Plaintiff will suffer prejudice if the new documents are not admitted. He further averred that the 2nd Respondent will not suffer any prejudice if the orders sought are granted as the 2nd Defendant's counterclaim is yet to be heard. In addition, the Applicant averred that the 2nd Defendant will have an opportunity to cross-examine or adduce evidence in rebuttal.
6. He further averred that the application has been made timeously and that the 2nd Defendant's case is yet to be closed.

The Respondent's Case

7. The 2nd Defendant opposed the application through the replying affidavit of its Director, Joseph Musyoki Kanyote sworn on 16th October, 2023. He averred that the 2nd Defendant's witness, Julius Landu Ndile has since retired as a director and cannot be traced. He further averred that no new evidence has been discovered and that allowing strange documents at this stage will amount to re-opening the case.
8. The deponent further averred that the 2nd Defendant's witness is not a surveyor and as such he is not competent to answer questions related to the map or documents which he has not prepared. He contended that the application is an abuse of the court process and wholly intended to delay the finalization of this matter. He urged the court to dismiss the application with costs.
9. The application was canvassed by way of written submissions.

The 2nd Defendant's Submissions

10. The 2nd Defendant's submissions were filed on 17/10/2023.
11. On his behalf, Counsel reiterated the contents of the replying affidavit in support of his submissions. Counsel submitted that the 2nd Defendant will be greatly prejudiced if the application is granted. Counsel contended that the application is a waste of the court's time and urged the court to dismiss it with costs.
12. As at the time of writing this ruling, the Applicant had not filed his submissions as directed



Analysis And Determination

13. Having considered the application, the respective affidavits and the 2nd Defendant's submissions, the only issue that arises for determination is whether the Applicant is entitled to the orders sought in the application.
14. The Applicant is seeking leave to adduce additional evidence on the grounds that the new documents were not available during the pre-trial stage.
15. In *Attorney General vs Zinj Limited* [2021] eKLR, the Supreme Court reasserted some of the considerations to be made when granting an application for leave to adduce additional evidence as follows: -
 - i. Direct relevance of the additional evidence must be shown to the matter before the court and the interest of justice;
 - ii. If given, the additional evidence would influence or impact upon the result of the verdict, although it need not be decisive;
 - iii. The additional evidence could not have been obtained with reasonable diligence for use at the trial or it was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
 - iv. The additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
 - v. The evidence must be credible in the sense that it is capable of belief;
 - vi. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively; ...
16. The Applicant contended that the map will show the location of the suit property and the bordering properties belonging to the 2nd Respondent and whether there is a conflict in the suit property as per the new approved Sultan Hamud map.
17. The documents intended to be produced are dated 17th May, 2023 which is approximately three months after the 2nd Defendant's case was adjourned. The Applicant averred that he discovered the documents in August, 2023. The application herein was filed in October, 2023. A delay of about two months is not inordinate. The 2nd Defendant will not suffer any prejudice since it will be accorded an opportunity to cross-examine on the new evidence. Since the documents which the Applicant intends to introduce relate to this case, I am of the view that the same may assist the court in arriving at a just determination.
18. The Applicant also sought leave to recall the 2nd Defendant's witness for further cross examination on the new documents. Section 146 (4) of the *Evidence Act* generally grants the court power to recall a witness. It provides as follows: -

‘The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.’
19. The 2nd Defendant averred that Mr. Julius Landu Ndile has since retired as a director of the 2nd Defendant and cannot be traced. Being a limited company, the 2nd Defendant is hereby granted leave to substitute their witness with any other competent witness to proceed with their case.



20. The upshot of the foregoing is that the application dated 2nd October 2023 is merited and the same is hereby allowed as prayed.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF JUNE, 2024.

IN THE PRESENCE OF:

Kamolo for the 2nd Defendant

Kiluva for the Plaintiff

Court assistant Alfred.

