Mwanzi & another (Both Trading as Kayole Hekima Academy Educational Centre) v Mwangi & 4 others (Environment & Land Case 126 of 2011) [2024] KEELC 5579 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5579 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 126 OF 2011

LN MBUGUA, J

JULY 18, 2024

BETWEEN

AGGREY ASTIAVULA MWANZI ..... 1ST PLAINTIFF

SOFIA NABANGALA NDOLO ..... 2ND PLAINTIFF

BOTH TRADING AS KAYOLE HEKIMA ACADEMY EDUCATIONAL CENTRE

AND

BEN JOSEPH MWANGI ..... 1ST DEFENDANT

BISHOP JUSTUS WANJALA SUED AS A REPRESENTATIVE OF LIGHTHOUSE CHURCH ..... 2ND DEFENDANT

CITY COUNCIL OF NAIROBI ..... 3RD DEFENDANT

SAMUEL NDUMBE NJOROGE ..... 4TH DEFENDANT

STEPHEN ODOYO T/A BROOKFIELD ACADEMY ..... 5TH DEFENDANT

RULING

1. The hearing of this matter is at an advanced stage, where by the pending case is that of the 4th and 5th defendants. On 15.5.2024, DW5 a witness for the 4th and 5th defendants was in the motion of giving evidence when an objection was raised by counsel for the plaintiff relating to the production of some of the documents, hence this ruling.

2. The documents in question are 1) a formalization card and 2) a receipt relating to the said card, which documents the 4th and 5th defendants desired to produce as exhibits through DW5. The objection raised by counsel for the plaintiff is that the witness does not have the original documents, that he is not the maker of the said documents and that the documents are highly contentious.

3. Counsel for the 3rd defendant supported the objection averring that he has never seen the originals, adding that the documents emanated from the 3rd defendant and when an official from the 3rd defendant came to court, no reference was made to the said documents.

4. Counsel for the 1st and 2nd defendants did not object to the production of the two documents.

5. In rejoinder, counsel for the 4th and 5th defendants stated that pretrial exercise was conducted way back on 6.12.2016 and the matter was certified as ready for hearing. That if there were any issues to be raised regarding any document, they ought to have been raised at that time. It was argued that the witness was simply a recipient of the documents in question and he was not claiming to be the author. It was further argued that the counsel objecting to the production of the copies had themselves produced copies in court without calling the makers.

6. In the final rejoinder by counsel for the plaintiff, it was argued that they never received the documents in question, adding that a party is entitled to challenge production of copies of documents. Similar sentiments were expressed by counsel for the 3rd defendant.

7. The provisions of Order 11 of the Civil Procedure Rules, 2010 provides for pre-trial conferences which are meant to inter-alia aid in expeditious disposal of suits. To this end, courts are mandated to uphold the objectives set out under Article 159 (2) (b) and (d) of *the Constitution* as well as Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* by exploring expeditious ways of introducing evidence upfront hence the Trial Bundle is usually availed well in advance of the date of the trial.

8. This means that courts are called upon to actively manage cases so as to shepherd the trial in a harmonious and speedy manner. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes with a view to ensuring that the overriding objective is achieved. This in turn enhances processing efficiency, promotes court control of cases, and provides judicial officers with the tools that may be used to dispose off a case efficiently. These techniques reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources - all of which encourage generally better services from courts.

9. The first witness in this matter (PW1) gave his testimony over 6 years ago on 18.12.2017. Before then, several pre trial conferences had been held. A perusal of the record also indicates that the documents in question were filed in this court way back on 1.7.2015. Since then the issue of service of the same has never been raised. Indeed the issue of service did not form a basis of the objection, it was only raised in rejoinder.

10. In the case of *Moschion v Mwangi (Environment & Land Case 350 of 2018)* [2023] KEELC 17144 (KLR) (27 April 2023) (Ruling), the court, Mbugua J had this to say on matters Pre-trial;

> " The legal regime governing the conduct of Pretrial processes swaddles various laws and rules including Article 159 (2) (b) of *the Constitution* of Kenya on expeditious trial, Article 50 (1) of the said Constitution on legitimate expectation of fairness as well as Section 1A and 1B of the *Civil Procedure Act* on the overriding objective of the said statute and Order 3 as well as Order 11 of the Civil Procedure Rules on Case Management.
>
> The overaching principle in the above mentioned law is the "Expeditious delivery of justice" as Justice delayed is justice denied. The principle emphasizes minimal delays, while promoting timely concluding of cases. Further, the principle encompasses the doctrine of

predictability and reliability, such that there is no trial by ambush, that there is improved quality of litigation and that the workload is quantified".

11. While in Virginia KathambiMaingi v Nicholas Mwatika & 2 Others [2021] eKLR it was held that;

> " While a party is entirely within their rights to demand that any documents be produced by its maker, that demand must be made at the pretrial stage and not during the main hearing of the suit. Direction 28(g) of the Practice Direction acts as a reflux valve to facilitate progress and avoid stagnation in resolution of disputes. Judicial resources and more specifically judicial time is finite, in view of the enormous demand for access to justice. Hence every party and or advocate who appears before court is obligated to assist the court to further the overriding objective by complying with what needs to be done at the appropriate time."

12. In the case of Ntarangwi M'Ikiara v Jackson Munyua Mutuera [2018] eKLR, I cited the case of Evangeline Nyegera (suing as the legal representative of Felix M'Ikiugu alias M'*Ikiugu Jeremiah M'Raibuni (deceased) vs Godwin Gachagua Githui, where the Court of Appeal Civil Appeal No. 28 of 2016* held that;

> " The test for admission of evidence is relevancy..... There is need for fair determination of the dispute in the suit which may not be possible if a party is denied the opportunity to adduce relevant evidence. We hold the view that the appellant should not be barred from adducing secondary evidence through copies of the original documents. It is imperative that the nature of the documents, their number and relevance is shown. The other party will have an opportunity to cross examine on veracity and legitimacy if it be necessary".

13. From the foregoing analysis, this court in determining whether expunging the documents in question would be in the interest of justice finds that the said documents are important for the just determination of the dispute and that no evidence has been adduced to indicate that the said documents have been obtained in a manner which violates the rule of law or any right or fundamental freedom in the Bill of Rights. Further, the defence will have a chance to cross examine the witness on their veracity and legitimacy noting that the documents were filed almost 10 years ago!.

14. In the end, I find that the objection is not merited, the same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mungai for Plaintiff

Mwangi for 4th and 5th Defendants

M/s Miswati holding brief for Ojienda S.C for 3rd Defendant

Munene holding brief for Ayecko for 1st Defendant

Court assistant: Eddel