Board of Directors New Victory School & 15 others v Ndegwa; Chief Land Registrar (Interested Party) (Environment and Land Case Civil Suit 119 of 2019) [2024] KEELC 6441 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6441 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 119 OF 2019

JO MBOYA, J

SEPTEMBER 30, 2024

BETWEEN

BOARD OF DIRECTORS NEW VICTORY SCHOOL & 15 OTHERS & 15 OTHERS ..... PLAINTIFF

AND

PETER NDIRANGU NDEGWA ..... DEFENDANT

AND

THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY

RULING

1. The subject matter came up for further hearing of the Plaintiffs' case on 30th September 2024; whereupon the advocates for the parties confirmed that same [Advocates] were ready to proceed with the scheduled hearing. In particular, learned counsel for the Defendant intimated to the court that same was ready to proceed with the cross-examination of PW1 and PW2, respectively, who had been recalled by the court.

2. Pursuant to the intimation by the advocates for the respective parties, the court proceeded to and confirmed the matter for hearing. Suffice it to state that indeed the matter proceeded for hearing culminating into the close of the Plaintiffs' case.

3. However, upon the close of the Plaintiffs' case, learned counsel for the Defendant made an application which was four-pronged. Firstly, learned counsel sought for leave to file and serve a witness statement on behalf of the Defendant. For good measure, counsel posited that the Defendant had not filed any witness statement.

4. Secondly, learned counsel sought for liberty for the Defendant to be allowed to adopt and rely on a Replying Affidavit which had been filed in opposition to an interlocutory application and which application had been disposed of by the court.

5. Additionally, and in the alternative, learned counsel for the Defendant sought for liberty to have the Defendant tender and produce the documents which had been filed before the court, albeit in the absence of a witness statement. In this regard, learned counsel contended that the production of the said documents would enable the court to arrive at an informed position irrespective of the fact that the Defendant had not filed a witness statement.

6. Flowing from the foregoing, the court sought to know whether learned counsel for the Plaintiffs was amenable to the application by the Defendant. In this regard, learned counsel for the Plaintiffs contended that the application if allowed would prejudice and occasion grave injustice to the Plaintiffs who had already closed their case.

7. Arising from the foregoing position, the court directed that the application by and on behalf of the Defendant be canvassed and/or ventilated so as to enable the court to render an informed decision. In this regard, the advocates for the respective parties proceeded to and made their respective submissions.

Parties' Submissions :

a. Defendant's Submissions

8. Learned counsel for the Defendant submitted that though the Defendant had duly entered appearance and filed a Statement of Defence, the Defendant herein however failed to file and serve a witness statement in accordance with the provisions of Order 7 Rule 5 of the Civil Procedure Rules 2010.

9. It was the further submissions by the learned counsel for the Defendant that the failure to file and serve the witness statement was as a result of an honest mistake and/or inadvertence on the part of the advocates who were hitherto on record for the Defendant. Nevertheless, learned counsel posited that the mistake of counsel ought not to be visited upon the Defendant.

10. Secondly, learned counsel for the Defendant submitted that if the court was not keen to allow the Defendant to file and serve a witness statement, then the court should grant liberty to the Defendant to rely on a replying affidavit which had previously been filed by the Defendant. In particular, learned counsel for the Defendant contended that the said replying affidavit had been used by the Defendant in opposition to an interlocutory application in the matter.

11. Further and in the alternative, learned counsel for the Defendant submitted that the court could as well allow the Defendant to tender and produce the documents which had been filed even though no witness statement was filed and served. To this end, learned counsel for the Defendant contended that the production of such documents shall enable the court to arrive at a just and an informed decision.

12. Finally, learned counsel for the Defendant submitted that the grant of the application and/or request on behalf of the Defendant shall not prejudice the Plaintiffs and the Interested Party. Consequently, and in this regard, learned counsel for the Defendant implored the court to allow the application beforehand.

b. Plaintiffs' Submissions

13. Learned counsel for the Plaintiffs opposed the application/request by the Defendant and contended that the Defendant's advocate on record had participated in the pre-trial conference and same intimated to the court that the Defendant had duly filed and served all the pleadings, list and bundle

of documents as well as the requisite witness statement. In this regard, it was contended that that the Defendant herein cannot now be heard to turn around and seek leave to file a witness statement.

14. Secondly, learned counsel for the Plaintiffs submitted that the Plaintiffs have already closed their case and if the Defendant was to be allowed to file a witness statement at this juncture, the Plaintiffs would suffer undue prejudice and be exposed to grave injustice. Instructively, learned counsel for the Plaintiffs posited that such an endeavour would impact on the right to fair hearing.

15. Thirdly, learned counsel for the Plaintiffs submitted that the replying affidavit which was adverted to by learned counsel for the Defendant was filed in opposition to an interlocutory application and thus same [replying affidavit] served its purpose. At any rate, it was submitted that the replying affidavit cannot mutate and/or morph into a witness statement.

16. Lastly, learned counsel for the Plaintiffs submitted that though the documents were filed, the said documents cannot be tendered and/or produced in evidence without the witness statement of the witness. In any event, it was contended that the witness statement is the forerunner to the production of the documents and not vice versa.

17. Be that as it may, counsel reiterated that the request by and on behalf on the Defendant has been made too late in the day and thus same constitutes an afterthought. Furthermore, learned counsel for the Plaintiffs contended that the filing of such a witness statement would confer upon the Defendant undue mileage over the Plaintiffs.

18. In the premises, counsel invited the court to find and hold that the application by the Defendant reeks of and/or is wrought with malafides. In this regard, counsel submitted that the application is devoid of merits.

c. Interested Parties' Submissions

19. Learned counsel for the Interested Party, namely, Mr. C.N Menge [Deputy Chief Litigation Counsel] adopted and reiterated the submissions by learned counsel for the Plaintiffs and added that the filing of a witness statement by the Defendant at this juncture shall occasion undue prejudice to the Plaintiffs, who have already closed their case.

20. Secondly, learned counsel for the Interested Party also submitted that the replying affidavit which was adverted to by the Plaintiffs was filed in opposition to an interlocutory application. Furthermore, counsel contended that having been filed in opposition to an interlocutory application, the said replying affidavit served its purpose and thus same cannot be reverted to and constituted as the witness statement.

21. Arising from the foregoing, learned counsel for the Interested Party submitted that the Defendant herein was guilty of dilatoriness and want of diligence. Consequently and in this regard, it was posited that the Defendant was thus not deserving of equitable discretion.

Issues for Determination :

22. Having reviewed the application by and on behalf of the Defendant and upon considering the submissions canvassed by the advocates for the respective parties, the following issues crystalise [emerge] and are thus worthy of determination.

    i. Whether the Defendant has established and/or demonstrated a basis to warrant leave to file a witness statement and whether such leave, if granted, will occasion prejudice to the Plaintiffs.

ii. Whether the replying affidavit which was filed in opposition to an interlocutory application can mutate and/or morph into a witness statement.

iii. Whether the documents which were filed without a witness statement can be produced in the absence of the requisite witness statement.

iv. Whether the Defendant has accounted for the failure to file the witness statement.

Analysis and Determination

i. Whether the Defendant has established and/or demonstrated a basis to warrant leave to file a witness statement and whether such leave, if granted, will occasion prejudice to the Plaintiffs.

23. The Defendant herein was obliged to file and serve, inter alia, the list and bundle of documents and witness statement, if any. At any rate, the details of the documents and items which the Defendant was obligated to file are well delineated vide the provisions of Order 7 Rule 5 of the Civil Procedure Rules 2010.

24. Furthermore, there is no gainsaying that the filing of the various documents/items adverted to at the foot of Order 7 Rule 5 of the Civil Procedure Rules 2010 is time bound. For good measure, it suffices to posit that every defendant, the current Defendant not excepted, is obligated to file the named documents alongside the statement of defence and in any event, within fourteen (14) days from the date of entering appearance.

25. Other than the timelines prescribed by the provisions of Order 7 Rule 5 of the Civil Procedure Rules 2010, any litigant, the Defendant included, who omitted to file any document or witness statement is at liberty to do so at any time before the trial-conference. In this regard, there is no gainsaying that the Defendant could still have filed a witness statement prior to and before the trial-conference. [See Order 11 Rule 3 of the Civil Procedure Rules, 2010].

26. Despite the window and/or latitude provided for under the law, the Defendant herein failed and/or neglected to file the witness statement. At any rate, it is also worthy to recall that the Defendant and his counsel participated in the case conference whereupon same [Defendant] intimated that the he had duly complied with the pre-trial obligations.

27. Be that as it may, the Defendant herein could also have sought for and obtained leave of the court to file and serve a witness statement at any time prior to and before the commencement of the hearing. However, it suffices to point out that the Defendant participated in the proceedings up to and including the close of the Plaintiffs' case without raising any issue as to the filing of a witness statement.

28. At any rate, it is not lost on this court that the first time the Defendant raised the issue of the need to file a witness statement was when the court sought to know whether the Defendant was calling any evidence. For good measure, it was at this juncture that learned counsel for the Defendant sought to be granted leave to file a witness statement.

29. To my mind, the application by and on behalf of the Defendant to be granted leave to file a witness statement long after the close of the Plaintiffs' case, was made with unreasonable and inordinate delay. In any event, the application beforehand appears to be intended to steal a match on the Plaintiffs.

30. Other than the foregoing, there is no gainsaying that the Application by the Defendant is calculated to confer upon the Defendant collateral advantage and undue milage over the Plaintiffs. Instructively, the Defendant herein appears to be keen to utilise the evidence so far obtained from the Plaintiffs in an endeavour to better his [Defendant's] case.

31. Simply put, the application by the Defendant herein appears to be one that is calculated to plug the gaps that may be obtaining in the Defendant's case. Quite clearly, the game plan being deployed by the Defendant amounts to a fishing expedition and litigation by instalment. Such an endeavour must not be countenanced by a court of law.

32. Arising from the foregoing, my answer to issue number one is to the effect that the Defendant herein has neither established nor demonstrated any plausible explanation to warrant liberty being granted to file a witness statement at this late stage.

33. Additionally, there is no gainsaying that the filing of such a witness statement long after the close of the Plaintiffs' case shall occasion undue prejudice and grave injustice to the Plaintiff. In this regard, the right to fair hearing will certainly be negated.

ii. Whether the replying affidavit which was filed in opposition to an interlocutory application can mutate and/or morph into a witness statement.

34. Other than the limb of the application where the Defendant sought leave to file and serve a witness statement, the Defendant made an alternative prayer to be allowed to adopt and rely on a replying affidavit which had been used in opposition to an interlocutory application.

35. Nevertheless, it is worth recalling that the replying affidavit which the Defendant sought liberty to rely on was not one of the documents which had been discovered by the Defendant. Furthermore, it is also important to underscore that the replying affidavit was filed in opposition to an interlocutory application, which was heard and disposed of.

36. In addition, it suffices to point out that insofar as the replying affidavit was filed in opposition to an interlocutory application, which was heard and determined, the replying affidavit served its purpose and was rendered redundant. In this regard, the Defendant who has not filed a witness statement cannot now be heard to seek refuge/asylum in a replying affidavit.

37. In my humble view, to allow the Defendant to revert to and rely upon the replying affidavit would be tantamount to affecting the level playing field. In this respect, the ripple effect would be that the Plaintiffs who were diligent in prosecuting their case would be subjected to prejudice and detriment.

38. In the circumstances, I find it difficult, nay impossible, to accede to the request by the Defendant to be allowed to rely on the replying affidavit as if same [replying affidavit] is a witness statement.

39. In short, I am not prepared to bend or break the rule book merely to serve the interests of a party who was not keen to follow the law. For good measure, this is a proper case where the failure and/or neglect by the Defendant or the Defendant's recognised agents should be allowed to fall on the head of the Defendant.

40. Further and at any rate, it suffices to recall that all litigants are under an obligation to exercise due diligence and assist the court in the realisation of the overriding objectives in terms of Sections 1A and 1B of the *Civil Procedure Act*. To this end, I beg to state and underscore that the Defendant and own Counsel should have complied with their obligations under the law.

41. Before departing from this issue, it suffices to take cognisance of the holding of the Court of Appeal in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR where the Court of Appeal [per Kiage JA] stated and held thus:

> " I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate

> and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

iii. Whether the documents which were filed without a witness statement can be produced in the absence of the requisite witness statement.

42. Additionally, learned counsel for the Defendant also sought the liberty of the court to be allowed to have the documents that were filed tendered and produced before the court despite the absence of a witness statement. In this regard, learned counsel for the Defendant contended that the documents themselves once produced will suffice as evidence on behalf of the Defendant.

43. However, despite the contention by and on behalf of the Defendant, it is common ground that it is the witness statement that makes reference to the documents and thus the witness statement is the forerunner and/or precursor to the documents.

44. Put differently, the witness statement in my humble view is like the horse that pulls the wagon. Consequently, it behoves each and every party to make a witness statement referencing the documents and thereby laying a foundation upon which the documents shall be produced.

45. In the absence of the witness statement which is the foundation upon which the documents are premised, it is inconceivable that a witness who has not filed a witness statement can tender documents in evidence.

46. For good measure, if such an endeavour were to be allowed then same would be tantamount to defeating the rules of procedure and by extension the import and tenor of the overriding objectives of the court. [See the provisions of Sections 1A and 1B of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

vi. Whether the Defendant has accounted for the failure to file the witness statement.

47. The nature of application that was made and mounted on behalf of the Defendant is one which essentially seeks the exercise of equitable discretion. In this regard, it suffices to posit that whosoever wishes to partake of the discretion of the court must account for the delay and offer candid explanation for the default.

48. In this respect, it is the Defendant who is seeking to partake of and benefit from the discretion of the court. To this end, it was therefore incumbent upon the Defendant to justify why the witness statement was never filed since 2019, when the instant suit was lodged.

49. Surely, the Defendant herein cannot wait for five good years before waking up to seek the indulgence of the court. The conduct by and on behalf of the Defendant is one which no doubt was intended to obstruct, delay and/or better still, defeat the expeditious hearing and determination of the suit.

50. In my humble view, the conduct like the one beforehand does not merit being dignified with equitable discretion. At any rate, it suffices to observe that courts are now called upon to ensure that parties/ litigants, the Defendant not excepted, act with due diligence. Certainly, this is the import of the provisions of Article 159 2(b) of *the Constitution*.

51. To amplify the foregoing position, I beg to adopt and reiterate the holding in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR where the court considered the legal implication of the provisions of Article 159 2(b) of *the Constitution*.

52. For coherence, the court stated and observed as hereunder:

> " "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them."

53. The court went further and stated thus:

> " We also reiterate Lord Griffith's words is in Ketterman v Hansel Properties Ltd (1988) 4 All ER 769, that;
>
> > "Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads..."

54. Duly guided by the ratio decidendi espoused in the decision supra, I beg to state and underscore that it is no longer fashionable for parties like the Defendant herein to play hide and seek with the due process of the law and thereafter spring to life at the tail end of the proceedings with application[s], which if allowed, would have a ripple effect. In particular, the application like the one beforehand has the potential effect of upsetting all the proceedings that have so far been taken in the matter.

55. Quite clearly, the court must be prepared to admonish lethargic Litigants and their legal Counsel. In any event, the only way to admonish same is to let the defaulting party face the music composed by themselves. Same ought to be left to bear the consequences of their default.

Final Disposition:

56. Flowing from the discussions [details in terms of the preceding paragraphs] it must have become crystal clear that the multi-pronged application that was made on behalf of the Defendant is clearly an afterthought and reeks of malafides. Furthermore, the Application is also barred by dilatoriness.

57. Consequently, and in the premises, the application beforehand be and is hereby dismissed. However, the costs attendant to and arising from the application shall abide the outcome of the suit.

58. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Dawood Farah for the Plaintiffs.

Mr. Boaz Agutu for the Defendant.

Mr. C. N. Menge [Deputy Chief Litigation Counsel] for the Interested Party.