



Mureithi & another v Mwangi & 3 others (Environment & Land Case 298 of 2019) [2024] KEELC 6230 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 298 OF 2019**

**JO MBOYA, J
SEPTEMBER 24, 2024**

BETWEEN

LEOPOLOD PRUDENSIO MUREITHI 1ST PLAINTIFF

CONSOLATA NYAMBURA MWANGI 2ND PLAINTIFF

AND

HAWA NYAMBURA MWANGI 1ST DEFENDANT

EDWARD NJUGUNA KANGE'THE 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The instant matter came up for further hearing of the defence case on the 20th of September 2024, whereupon the case for the 3rd and 4th Defendants was duly closed. Following the close of the case for the 3rd and 4th Defendants, learned counsel for the Plaintiffs made an application to have the Chief Land Registrar summoned to attend court and to give evidence in respect of the instant matter.
2. Suffice to point out that by the time the application to summon the Chief Land Registrar to attend court and give evidence was being made, the Plaintiffs herein had long closed their case. Furthermore, no application was made to have the Plaintiffs' case re-opened for whatever purpose.
3. Owing to the nature of the application beforehand, the court directed that the advocates for the parties do proceed to address the court on pertinent issues, including whether the court was seized of the jurisdiction to order the Chief Land Registrar to attend court and give evidence, long after all the parties had closed their respective cases.



4. On the other hand, the court also sought to be addressed on the question as to whether the court could order and direct the Chief Land Registrar or any other witness, for that matter, to appear in court and testify as a witness for and on behalf of the court, bearing in mind the Common Law system that applies in Kenya.

Parties Submissions:

a. Plaintiffs' Submissions:

5. Learned counsel for the Plaintiffs' submitted that the Plaintiffs herein had hitherto sought for and obtained witness summons against the Chief Land Registrar, prior to and before the close of the Plaintiffs' case. Furthermore, learned counsel for the Plaintiffs added that despite obtaining the witness summons, the Chief Land Registrar failed to attend court and/or to give evidence.
6. It was the further submission by learned counsel for the Plaintiffs that even though the Chief Land Registrar failed to attend court and give evidence, the witness summons that was issued by the court remains in existence and thus the court has the requisite jurisdiction to order the Chief Land Registrar to attend court and give evidence.
7. Secondly, learned counsel for the Plaintiffs has submitted that despite the fact that the Chief Land Registrar failed to attend court, the Plaintiffs proceeded to and testified before the court and thereafter closed their case. In any event, it was contended that the Plaintiffs' proceeded to and closed their case because the Chief Land Registrar had failed to attend court.
8. Thirdly, learned counsel for the Plaintiffs submitted that despite the fact that the Plaintiffs had closed their case, the court is still seized of the requisite jurisdiction to summon the Chief Land Registrar to attend court and give evidence. At any rate it was contended that the evidence of the Chief Land Registrar would be crucial to enable the court to reach a just and informed decision.
9. Fourthly, learned counsel for the Plaintiffs submitted that the fact that the Plaintiffs' case has since been closed, does not deprive the court of the jurisdiction to summon the witness. For good measure, it was posited that the Chief Land Registrar can be summoned to attend court and testify as a witness for the court.
10. Lastly, learned counsel for the Plaintiffs' contended that if the court were to decline the application to order the Chief Land Registrar to honor the witness summons and to attend court, then the court will be setting a dangerous precedent of government officers disregarding lawful court orders/ Summons to Witnesses.
11. In short, learned counsel for the Plaintiffs implored the court to order the Chief Land Registrar to attend court and to give evidence pertaining to the true status of the ownership of the suit property.

b. 1st Defendant's Submissions:

12. Learned counsel for the 1st Defendant opposed the application and submitted that the Plaintiffs ought to have made the application to compel the Chief Land Registrar to attend court and give evidence prior to and before same [Plaintiffs] closed their case. Furthermore, learned counsel posited that it was incumbent upon the Plaintiffs to move the court to obtain warrants of arrest against the Chief Land Registrar.
13. Secondly, learned counsel for the 1st Defendant submitted that because the Plaintiffs did not follow up to have the Chief Land Registrar attend court and coupled with the fact that the Plaintiffs proceeded to close their case, the application beforehand has been made too late in the day.



14. Thirdly, learned counsel for the 1st Defendant submitted that having closed their case and there being no application to re-open the Plaintiffs' case, the application to have the Chief Land Registrar attend court and give evidence, is not only misconceived but legally untenable.
15. Finally, learned counsel for the 1st Defendant submitted that the court has no jurisdiction to summon any witness, the Chief Land Registrar not exempted, to attend court and give evidence as a witness for the court. For good measure learned counsel posited that our legal system is adversarial in nature and thus the court cannot be called upon to enter into the arena of controversy or otherwise.
16. Premised on the foregoing, learned counsel for the 1st Defendant therefore submitted that the application by the Plaintiffs herein is not only misconceived but constitutes an afterthought which is intended to enable the Plaintiffs to plug the gaps that may have appeared in their case during cross-examination and thereafter.

c. 2nd Defendant's Submissions:

17. Learned counsel for the 2nd Defendant submitted that the Plaintiffs herein had the opportunity to apply to have the Chief Land Registrar attend court and give evidence pertaining to and concerning to the dispute. However, learned counsel contended that the opportunity only availed during the duration before the Plaintiffs' case was closed and not otherwise.
18. Secondly, learned counsel for the 2nd Defendant submitted that following the close of cases for the respective parties, the Plaintiffs herein cannot now be heard to seek to bring on board a further witness. In any event, it was contended that such a witness will occasion prejudice to the parties and thus prejudice the right to fair hearing in terms of the Provisions of Article 50 of *the Constitution*, 2010.
19. In view of the foregoing, learned counsel for the 2nd Defendant has submitted that the application to summon the Chief Land Registrar to attend court and give evidence on behalf of the Plaintiffs, is misconceived and otherwise an abuse of the due process of the court.

d. 3rd & 4th Defendants' Submissions:

20. The 3rd and 4th Defendants did not make any submissions as pertains to the subject application. Nevertheless, it suffices to point out that the 3rd Defendant was/is the Chief Land Registrar and same closed her case without attending court.

Issues For Determination:

21. Having considered the submissions rendered by and on behalf of the advocates for the parties and taking into account the fact that the hearing in respect of the matter has since been concluded, the following issues crystallize and are thus worthy of determination:-
 - i. Whether the court can order and/or compel the Chief Land Registrar to attend court and testify on behalf of the Plaintiffs long after the close of the Plaintiffs' case.
 - ii. Whether the court is seized of jurisdiction to summon a witness to attend court and testify [sic] as a witness for the court.
 - iii. Whether the court can compel a party, namely the 3rd Defendant to attend court and testify contrary to its wishes.

Analysis And Determination

Issue Number 1



Whether the court can order and/or compel the Chief Land Registrar to attend court and testify on behalf of the Plaintiffs long after the close of the Plaintiffs' case

22. The Plaintiff herein filed the instant suit seeking various reliefs pertaining to and in respect of the suit property. Furthermore, the Plaintiffs thereafter proceeded to and filed a list of witnesses, witness statements and bundle of documents, which same [Plaintiffs] sought to rely on in proof of their case.
23. Subsequently, the matter beforehand was listed for hearing, whereupon the Plaintiffs testified and were thereafter cross-examined. Besides, it suffices to point out that the Plaintiffs also tendered and produced all the documents that same had filed before the court.
24. On the other hand, it is no lost on this court that the Plaintiffs herein also sought for and obtained witness summons against the Chief Land Registrar. For coherence, the witness summons was issued pursuant to and in line with the provisions of Order 16, Rule 1 of the Civil Procedure rules 2010.
25. Even though the Plaintiffs sought for and obtained witness summons, the Plaintiffs thereafter proceeded to and closed their case, without pursuing the question of the attendance by the Chief Land Registrar. For good measure, there is no gainsaying that the Plaintiffs had various avenues for procuring the attendance of the Chief Land Registrar, including application for warrants of arrests.
26. Be that as it may, the Plaintiffs' proceeded to and closed their case. Despite, having closed their case, the Plaintiffs are now before the court seeking to have the court compel the Chief Land Registrar to attend court and testify.
27. The question that does arise and which the court needs to grapple with is whether the court can compel any witness, the Chief Land Registrar not exempted, to attend court and testify on behalf of a party who has since closed its case.
28. To my mind, any party, the Plaintiffs not exempted, have the liberty to call/summon any witness to attend court and testify on its behalf. However, such application can only suffice during any stage of the parties' case, but not after the concerned party has closed its case.
29. In addition, it is important to underscore that the moment a party closes his/her case, no further evidence can be called for and/or tendered by and on behalf of such a party. However, if such a party discovers the need to call/summon an additional witness, it behooves such a party to seek for and/or obtain leave of the court to re-open its case.
30. It is only after the party's case has been re-opened that the party can be allowed to call and/or tender further evidence, whether oral or documentary. However, without re-opening the case, the court is prohibited from taking and/or admitting any further evidence.
31. Nevertheless, there is no gainsaying that the Plaintiffs herein have not sought for any order to re-open the Plaintiffs' case. However, the Plaintiffs are here seeking to have the Chief Land Registrar attend court and give evidence on their behalf.
32. Consequently and in my humble view, the application by and on behalf of the Plaintiffs herein, is tantamount to placing the wagon before the horse. Certainly, if the Plaintiffs were well advised, then same ought to have addressed the question of the order closing the Plaintiffs' case before moving forward to summon additional evidence.
33. On the other hand, it is also important to underscore that by proceeding to close their case prior to and before procuring the attendance of the Chief Land Registrar, the Plaintiffs impliedly signaled that same [Plaintiffs] had waived the desire to call the Chief Land Registrar. In this regard, it suffices to invoke and adopt the doctrine of waiver and estoppel.



34. Arising from the foregoing, my answer to issue number (1) is to the effect that no witness or further evidence can be called and/or tendered by the Plaintiffs, for as long as the order closing the Plaintiffs' case has neither been reviewed nor vacated.

Issue Number 2

Whether the court is seized of jurisdiction to summon a witness to attend court and testify [sic] as a witness for the court.

35. The Plaintiffs' counsel contended that the court has the jurisdiction to call and/or compel the Chief Land Registrar to attend court and testify as a witness for the court. In this regard, learned counsel for the Plaintiffs contended that the testimony of the Chief Land Registrar will enable the court to arrive at an informed judgement and/or decision.
36. It was the further submission by learned counsel for the Plaintiffs that it is the duty of the court to ensure that disputes before same [court] is determined on the basis of the substance and without undue regard to procedural technicalities.
37. What I hear the Plaintiffs' counsel to be saying is that the court can call and/or summon a witness to attend court and give evidence and thereafter the court can proceed to use such evidence in its endeavor to determine the dispute beforehand.
38. Furthermore, I hear learned counsel for the Plaintiffs to be suggesting that the court can call a witness and such a witness shall thus be a witness for the court. To my mind, the contention by and on behalf of learned counsel for the Plaintiffs is erroneous and misleading.
39. To start with, the court is an impartial and independent arbiter in respect of the matter. To the extent that the court is an impartial and independent arbiter, the court is divested of the right to descend or wade into the arena of controversy and to endeavor to help either party to prove its case. For good measure, the provisions of Sections 107, 108 and 109 of the *Evidence Act* Chapter 80, Laws of Kenya places the burden on the parties to prove their respective cases and not to rely on the goodwill, if any, of the Court towards proving their respective cases.
40. Secondly, Kenya's legal system is the common law system, wherein the parties are called upon to place before the court their respective cases and furthermore the parties are the drivers of their own cases. In this regard, parties are the ones who set the agenda for the court in terms of the pleadings and the witnesses that the parties call.
41. For good measure, the adversarial legal system which Kenya subscribes to, does not leave room for any other business, where the court can intervene to help either party to supplement its own case. Instructively, even where the court holds the opinion that an important witness has not been called, the court is divested of jurisdiction to descend into the arena of controversy.
42. Put differently, the Court in an adversarial system is an adjudicator and same [Court] cannot abandon such position and instead became a forum for investigation. Simply put, the Court does not exist to help/ assist either party to better own case.
43. To this end, it suffices to cite and reference the decision of the Court of appeal in the case of *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] 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. 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."

44. Flowing from the ratio decidendi in the decision supra, there is no gainsaying that the court plays an impartial role and same has no business in descending into the arena of disputes. For good measure, the court is prohibited from aiding and/or assisting either party to supplement its case.
45. Further and at any rate, if the court were to enter into the arena of controversy including summoning a witness to be named as the witness of the court, there is a likelihood that the court will abdicate its role as an adjudicator and thus become an investigator, the latter which is antithetical to the rule of law.
46. Arising from the foregoing, my answer to issue number (2) is to the effect that the court is divested of the mandate and/or jurisdiction to summon the Chief Land Registrar to come and testify as a witness for the court.
47. Quite clearly, the court has no case to warrant summoning of any witnesses.

Issue Number 3

Whether the court can compel a party, namely the 3rd Defendant to attend court and testify contrary to its wishes.

48. The application by and on behalf of the Plaintiffs herein is intended to compel the Chief Land Registrar to attend court and to give evidence, namely for and on behalf of the Plaintiffs.
49. Nevertheless there is no gainsaying that the Chief Land Registrar who is the subject of the current application was actually impleaded as the 3rd Defendant. Thereafter, the said Chief Land Registrar entered appearance and filed a statement of defence through the Honorable Attorney General.
50. Suffice to point out that having duly entered appearance and filed a statement of defence, the Chief Land Registrar was at liberty to attend court and give evidence, if same deemed it appropriate and expedient.
51. Be that as it may, it is not lost on the court that the learned counsel for the 3rd and 4th Defendants, including the Chief Land Registrar closed their case without calling any witness. In this regard, the 3rd and 4th Defendants took the position that same had no evidence to tender.



52. Pursuant to the provisions of Article 50 (1) of *the Constitution*, the 3rd and 4th Defendants had the liberty to either tender evidence or otherwise. In this case, the 3rd and 4th Defendants, exercised their constitutional right to tender no evidence.
53. Notwithstanding the foregoing, the Plaintiffs are now seeking to have the court compel the 3rd Defendant [Chief Land Registrar] to attend court and tender evidence. For good measure, it is the said Chief Land Registrar, who had the opportunity to attend court and give evidence by virtue of being a party. However same spurned the opportunity to do so.
54. The question that does arise and which merits deliberation concerns whether the court can direct the Defendants and in particular the 3rd Defendant, as to how the 3rd Defendant should conduct her case. Furthermore, the incidental question that also flows from the main question is whether the court can compel a party, in this case the 3rd Defendant to attend court and give evidence.
55. In my humble view, the manner in which the 3rd and 4th Defendants seek to conduct their case, depends wholly on their learned counsel. In this case, the manner in which the case for the 3rd and 4th Defendants was to be conducted, depended wholly on the Attorney General.
56. To my mind, this court is not bestowed with the mandate to compel a particular party to tender evidence contrary to its wish. Nevertheless the only option that the court has is to consider the evidence tendered and where appropriate to make adverse inference against a party who, for no good reason, withholds or declines to tender evidence.
57. Without belaboring the point, it suffices to reference the decision of the Court of Appeal 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.
84. We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See J. Wigmore, *Evidence* § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.
85. Comparatively, in *Bukenya and Others -v- Uganda* [1972] EA 549, it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse. In *Mann Holdings Pte Ltd and another -v- Ung Yoke Hong* [2018] SGHC 69, the Singapore High



Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial. In *Elgin Fineways Ltd -v- Webb* 1947 AD 744, it is stated at 745:

“... it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears such evidence will expose facts unfavorable to him ...”.

58. In view of the foregoing, it is my finding and holding that this court is divested of jurisdiction to compel the 3rd Defendant [Chief Land Registrar] to attend court and give evidence contrary to his/her desire. Nevertheless, there is no gainsaying that the court has the latitude to invoke the doctrine of adverse inference, where appropriate.

Final Disposition:

59. Flowing from the discussion [details enumerated in the body of the ruling], it must have become crystal clear that the application by and on behalf of the Plaintiffs is not only defeated by dilatoriness, but also same was rendered moot by the closing of the Plaintiffs' case.

60. Other than the foregoing, there is no gainsaying that the application by the Plaintiffs is also intended to invite the court to descend into the arena of controversy. Such an endeavor would be contrary to the established ingredients that underpin the common law system, which is adversarial in nature and where the Judge plays a passive role.

61. In the premises, the application beforehand, is not only misconceived but devoid of merits. Same be and is hereby dismissed.

62. As pertains to costs, it suffices to state that costs shall abide the outcome of the suit.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court Assistant.

Mr. Ngugi for the Plaintiffs.

Mr. Moses N. Siagi for the 1st Defendant.

Ms. Rachael Njoroge for the 2nd Defendant.

Mr. Mwambonu for the 3rd and 4th Defendants

