



Fadhil (Suing as the Legal Administrator to the Estate of the Late Amina Mwatumbo Kongo - Deceased) v Bayah & 2 others (Environment & Land Case 29 of 2018) [2024] KEELC 5925 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5925 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 29 OF 2018
FM NJOROGE, J
SEPTEMBER 18, 2024**

BETWEEN

SALIM OMAR FADHIL (SUING AS THE LEGAL ADMINISTRATOR TO THE ESTATE OF THE LATE AMINA MWATUMBO KONGO - DECEASED) PLAINTIFF

AND

**FRANCIS S.K BAYAH 1ST DEFENDANT
ABDIQANI IBRAHIM ALI 2ND DEFENDANT
THE DISTRICT LAND REGISTRAR, KILIFI 3RD DEFENDANT**

RULING

1. For determination is the 1st Defendant’s Notice of Motion dated 19th January 2024 seeking the following orders:
 1.Spent,
 2. That this honourable court be pleased to grant leave to the 1st Defendant to file his List of Witnesses and witness statements;
 3. That the annexed 1st Defendant’s List of witnesses and witness statements be deemed as filed with leave of court upon payment of fees;
 4. That costs of this application be in the cause.
2. The application is founded on the grounds on its face and the supporting affidavit of Francis K. Bayah the Applicant who deponed that the Plaintiff instituted this matter and the same was set down for hearing without confirmation as to whether he had witness statements on record. Further, that his



former advocates failed to contact him or inform him or prepare to comply with Order 11 of the Civil Procedure Rules which has denied him the opportunity to testify before court. He stated that he has witnesses and the introduction of statements at this stage does not prejudice any party in the proceedings.

3. In response, the Plaintiff filed grounds of opposition opposing the application on the following grounds:
 1. That the Application by the Applicant is brought too late in the day and no sufficient reasons have been given to the said omission by the Applicant taking note that the Plaintiff had already closed his case and the matter was coming up for hearing of the 1st Defendant's case;
 2. That the Applicant is aware that the Pre-trial directions were closed on 9th December 2021 and the Applicant's Advocate were present in court to confirm compliance with Order 11 of the Civil Procedure Rules;
 3. That the Application is prejudicial to the Plaintiff/Respondent given that the Plaintiff/Respondent had already testified and closed his case on 17th January 2023.

Disposition

4. The application was canvassed by way of written submissions. I have considered the application, the grounds it is premised upon, the grounds of opposition, submissions by the parties as well as the authorities relied upon.
5. It is not disputed that the instant application was instituted after the Plaintiff had closed his case. This was long after the matter had undergone pretrial stage and parties confirmed that they were ready to proceed in compliance with Order 11 of the Civil Procedure Rules.
6. Among the prerequisites of compliance of Order 11 is the filing of the documents parties to a suit intend to rely on. That means that the Plaintiff ought to have complied with Order 3 Rule 2 regarding the filing of lists of documents and lists of witnesses, and both copies of documents and witness statements while the Defendants ought to have complied with Order 7 Rule 5 of the Civil Procedure Rules. Relevant for the instant application then is the application of Order 7 Rule 5. It provides that:

“The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-

 - (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
 - (b) a list of witnesses to be called at the trial;
 - (c) written statements signed by the witnesses except expert witnesses; and
 - (d) copies of documents to be relied on at the trial, Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”
7. From the above provision, both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7 of the Civil Procedure Rules.
8. There is no provision in the rules that permits the court to accept or reject a list of witnesses or documents filed outside the time lines provided for under Order 3 Rule 7 and Order 7 Rule 5 of the



Civil Procedure Rules. However it is noteworthy that the provisions of Order 3 and Order 7 are meant to avert trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court.

9. Much as this court has a constitutional mandate to ensure that a trial will be fair and therefore it retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules, the framing of the rules have also left the court with a wide discretion to allow the filing of further documents and calling of further witnesses where in the court's consideration that course of action would meet the ends of justice in any matter. It is clear that the Supreme Court in the case of Raila Odinga & 5 Others v IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR, where the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules, the court was dealing with a dispute whose resolution has been squeezed by Constitutional provisions into a very narrow timeline. There are numerous cases in which the court has allowed the filing of documents out of time where it has been shown that default was merely inadvertent or otherwise excusable.
10. This matter was first fixed for pre-trial hearing on 12th November 2018. When it came up for pre-trial directions, it was noted that the 1st Defendant had not filed any document and in the absence of proof of service the matter was adjourned. On 29th April 2019 the matter came up again for pre-trial. The Deputy Registrar noted that there was no evidence of service of summons on the 1st Defendant and directed that the Plaintiff puts his house in order before pretrial directions. On 1st July 2019, all parties were present before the Deputy Registrar. They requested for time to file all their documents. This was granted and parties were made aware that the final pretrial directions would be taken on 12th August 2019. On 25th October 2021, the 1st Defendant sought for time to file his written statement and the same was granted for a timeline of 14 days and on 9th December 2021, the matter was confirmed ready for hearing. From the proceedings, I do note that the matter was adjourned twice when it came up for hearing. The plaintiff then testified on 1st November 2022.
11. The reason advanced by the 1st Defendant for non-compliance was indolence attributed to his then counsel on record. The question therefore is, is it a *bona fide* mistake of the advocate in this case reasonable that occasioned the applicant's misfortune and has it been explained to the satisfaction of the Court?
12. In my view, the Applicant has merely cited a failure to comply by his erstwhile counsel. The applicant had a duty to follow up with his advocate and find out the status of his case. No evidence of any tangible steps taken to follow up the matter with his Advocate or at the Court's registry.
13. Merely claiming inaction on the part of its advocate is not sufficient reason and this is a position that was also taken by the Honourable Justice Odunga in Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR where he stated that:

“ 33.This seems to be a case of mere inaction and as was held in Berber Alibhai Mawji v. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.”



30. Further, the Court of Appeal in *Rajesh Rugbani v Fifty Investments Limited & Another* [2016] eKLR declined to simply blame inaction on the mistake of counsel instead stating:

"Our re -evaluation of record lead us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay."

14. However, a court of law is not given to mechanical adoption of prior precedent given the existence of different sets of facts prevailing in the case before it. Extenuating circumstances are of great relevance if true justice is to be achieved in any case. In that regard, there are also instances in which courts have allowed relief to applicants following mistakes on the part of their counsel see for example the case of *Philip Chemwolo and Another -v- Augustine Kubende* [1986] eKLR. Though the applicant has not demonstrated the usual manner in which he used to communicate with his advocate, it may be deduced that communication between them was as is in many a case in this country, informal. I have stated in other cases before this that the earlier advocates and their clients adopt formal and recorded means of communication in their cases the better, for there is less risk of mishap as such that has befallen the applicant herein.
15. I have also considered that the applicant has attached witness statements that seem not recent at all. They were apparently made in 2018 before the police who appear to have been investigating some claim in connection with the suit land. The witness statements made to the police in the inquiry are the only documents that the applicant wishes to be admitted into the record by this court. Some copies of documents in the plaintiff's bundle appear to confirm there was such an inquiry. Indeed, one letter dated 26/12/2014 included in his bundle is his formal complaint regarding the way the police were handling the issue before them. In the circumstances the risk of total ambush that may arise from allowing the application is thus extenuated. Therefore, in this court's consideration, the applicant ought to be excused on the basis of mistake on the part of his erstwhile advocate. In stating this I am alive to the fact that though the applicant's erstwhile advocate is said to have erred, he had filed a robust defence to the claim on 20/4/2021 and a list of documents as well as copies of documents to be relied on. This is therefore not a case of absolute neglect, if any, by counsel, and as the applicant desires to have his record become complete, I find it proper to allow the present application so that the suit may be heard to completion on the merits with all documents parties rely on being considered.
16. From the foregoing, I find that the 1st Defendant ought to be allowed to file his witness statements. Consequently, I find that the application is merited and the same is hereby allowed in terms of prayers nos 2, 3 and 4 thereof. Consequently, the applicant shall file those statements, duly signed by their makers, and serve them on the other parties within 14 days from the date hereof. To be fair to the plaintiff I also hereby issue an order allowing the plaintiff, if such need be, to reopen his case and call any such evidence, if any, as he may deem necessary in view of the statements filed by the 1st defendant. To facilitate this the plaintiff shall file any relevant document within 7 days of being served by the 1st defendant. This matter shall be mentioned on 29/10/2024 for directions as to hearing and issuance of a hearing date on priority basis.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 18TH DAY OF SEPTEMBER 2024.

MWANGI NJOROGE



JUDGE, ELC, MALINDI.

