



REPUBLIC OF KENYA



Githanji & 17 others (Suing on their own behalf and on behalf 73 others) v Gichugu Laikipia Property Investment Co Ltd & 3 others (Environment and Land Case Civil Suit E008 of 2023) [2024] KEELC 6471 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND CASE CIVIL SUIT E008 OF 2023
AK BOR, J
SEPTEMBER 18, 2024**

BETWEEN

PETER NJOMO GITHANJI 1ST PLAINTIFF
BENSON GATERE MWITHIGA (SUING ON BEHALF OF MITHIGA NYAGA) 2ND PLAINTIFF
DANIEL KAMAU MUNGE 3RD PLAINTIFF
JOSEPH KARIUKI NDUKU 4TH PLAINTIFF
JAMES D. NJUGUNA KARANJA 5TH PLAINTIFF
PHILLIS WANJIRA MBUNGI 6TH PLAINTIFF
PHILISILA MUTITU KATHENDU 7TH PLAINTIFF
JOSEPH KANYUIRO 8TH PLAINTIFF
GACHURAI NDUI 9TH PLAINTIFF
NDAMBIRI KABUTITI 10TH PLAINTIFF
JOSPHAT M. IRUNGU 11TH PLAINTIFF
PATRICK NYAGA 12TH PLAINTIFF
JAMES MBOGO 13TH PLAINTIFF
NISETTAH WAIRIMU GACHOKI 14TH PLAINTIFF
JESITAH MBOGO 15TH PLAINTIFF
JOSPHAT MWANIKI MBOGO 16TH PLAINTIFF
MARY WANJIRA NJUE 17TH PLAINTIFF
DANIEL NJAGI KANGATIA 18TH PLAINTIFF



SUING ON THEIR OWN BEHALF AND ON BEHALF 73 OTHERS

AND

GICHUGU LAIKIPIA PROPERTY INVESTMENT CO LTD 1ST DEFENDANT
FAR OUT FARM LTD 2ND DEFENDANT
SOSIAN RANCH LTD 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

1. The hearing of this suit commenced on 17/10/2023 when the Plaintiffs' witness gave evidence and was cross-examined. The hearing was adjourned to 13/11/2023. The Plaintiffs' advocate applied for witness summons to issue against the Directors of Sosian Ranch Limited and the Land Registrar, Laikipia sued as the 3rd and 4th Defendants respectively. The court directed the Plaintiffs to file a formal application.
2. The Plaintiffs' advocate brought the application dated 7/11/2023 seeking witness summons to issue against the 4th Defendant and Lucy Wangechi Kairu or James Kairu Wanderi, being the directors of the 3rd Defendant and its affiliate, Sosian Limited. They also sought leave to file a supplementary list of documents and extra witness statements and upon the grant of leave, to have the supplementary witness statements already filed deemed to be duly filed and served.
3. The application was made on the grounds that the individuals against whom the witness summons are sought have crucial evidence that would assist the court in determining the issues at stake. Further, that although the company in which they were directors was sued as a party, they had failed, refused or neglected to file any pleadings even though no adverse orders were sought against the company. The other ground was that their evidence was crucial because the 3rd Defendant or its affiliate, Sosian Limited, sold the suit property to the 1st Defendant and was bound to release the completion documents under the sale agreement and to execute the relevant transfer. The Plaintiffs added that no party would suffer prejudice if the orders sought were granted. They urged the court to grant the orders sought in the interest of justice.
4. Peter Njomo Githanje swore the supporting affidavit in which he deponed that since the Plaintiffs were yet to close their case, it was pertinent that they be allowed to put in as much evidence as they could obtain to address their case and that that had necessitated the introduction of additional witness statements of persons who initially they had not managed to secure as witnesses. They added that the supplementary list of documents and the additional documents were not alien in the suit having been annexed to the amended notice dated 5/7/2023. Mr. Githanji reiterated that the 3rd Defendant, Sosian Limited was a crucial player in the dispute and that its evidence was critical in assisting the court determine the real issues and controversy since it was the initial seller of the suit property to the 1st Defendant. Regarding the 4th Defendant, he averred that being the custodian of lands records including the suit property, the Land Registrar had valuable evidence on how the transfers were done and the documents submitted and that that evidence would be crucial to the courts in determining the issues in controversy.
5. Johnson Ndinwa Gachara, the chairman of the 1st Defendant swore the replying affidavit in opposition to the application. He deponed that failure to enter appearance and file a defence leads to the



conclusion that the 3rd Defendant was not interested in the case and that in an adversarial legal system the court could not compel a party to file defence. He deponed that the option was for the Plaintiff to request for judgment in default of defence and then proceed to set down the suit for hearing in the absence of the Defendant. The 1st Defendant added that having set down the suit for hearing and it being partly heard, the inclusion of other witnesses and documents at this point would prejudice the 1st Defendant since the pleadings had closed. He was of the opinion that the Plaintiffs intentionally waited to hear the evidence of the 1st Defendant in order to add more witnesses and documents which was prejudicial to the Defendants.

6. Martin Evans, a director of the 2nd Defendant, swore the 2nd replying affidavit in opposition to the application in which he termed the application as a total abuse of the process of this court. He referred the Plaintiffs to Order 10 Rule 6 of the Civil Procedure Rules on the consequences of the failure to enter appearance and file a defence. He added that the application to file a supplementary list of documents and witness statements was unlawful and offended Order 11 of the Civil Procedure Rules on pretrial directions and closure of pleadings. He too deponed that the Plaintiffs should have applied for judgment to be entered against the 3rd and 4th Defendants while adding that the inclusion of documents and witness at this point would prejudice the 2nd Defendant since the pleadings had closed and the case was partly heard. He averred that the Plaintiffs intentionally waited to hear the cross-examination by his advocate in order to fill the gaps in their case by purporting to add more witnesses and documents which was prejudicial to the 2nd Defendant and an abuse of the court process.
7. The court directed parties to file submissions. The Plaintiff submitted that the matter was part-heard and that the Plaintiffs had not even closed their case and they were only seeking leave to introduce additional witness statements and witness summons against the directors of the 3rd Defendant company and the 4th defendants.
8. The Plaintiffs submitted that Order 16 of the Civil Procedure Rules gave a party the leeway to apply for witness summons and did not bar a party who had been sued from being summoned to give evidence. The Plaintiffs submitted that the Defendant had not shown that they would suffer any prejudice if the Plaintiffs were allowed to admit additional witnesses since the Plaintiffs had not closed their case and the Defendants will have an opportunity to cross examine the intended additional witnesses and that they would also be at liberty to file additional evidence if they wished. They added that the essence of filing a witness statement and a list of documents prior to the hearing was to avoid ambush during the hearing and enable the opposite party appreciate the other party's evidence in advance. They maintained that allowing the application at this stage would not prejudice the Defendants, as they would have had an opportunity to look at the intended witness statement in advance.
9. The Plaintiffs adverted to Article 50 (i) of *the Constitution* which guarantees every person the right to a fair trial while urging that a fair trial entails a party being given the opportunity to present all available evidence in support of their case. They also relied on Article 159 (2) (d) of *the Constitution* which requires the court to ensure that justice was dispensed without undue regard to unprocedural technicalities. They submitted that denying them the opportunity to file additional witness statements and documents would infringe on the constitutional requirement.
10. They cited the decision in *Mary Wamuyu Thuku & Serah Wanjiku & 2 Others [2022] eKLR* where the court observed that it was to be guided by the circumstances of each case in exercising its discretion including the availability of witnesses and the stage which the matter had reached when the additional evidence was to be introduced. The court observed that locking out crucial witnesses would occasion injustice for such evidence would assist the court in arriving at a fair and just determination of the issues between the parties. It reiterated that the 4th Defendant was the custodian of lands records who needed



to attend court and give evidence. The Plaintiffs maintained that the issue of applying for interlocutory judgment did not arise since was a land dispute and not a liquidated claim as envisaged under Order 10 Rule 6 of the Civil Procedure Rules.

11. The 1st Defendant submitted that the 3rd Defendant was sued but they elected not to file a response which was within its rights not to participate in the proceedings meaning the matter would proceed and orders made in the suit. It cited Order 10 Rule 7 on the application for interlocutory judgment as the avenue which the Plaintiff should have pursued once the court was satisfied that proper service was effect with the adverse parties who failed to appear.
12. The 1st Defendant submitted that under our Kenyan legal system which is adversarial, all the parties present their sides of claim to an impartial tribunal and that each party was responsible for conducting its own investigations and presenting its own arguments for the court to render a judgment based on the evidence presented. It added that the Plaintiffs attempt to compel parties suit being the 3rd and the 4th defendants to attend court and produce certain documents or evidence would run contrary to our legal system as it urged the court to decline the application since it was an independent habitant.
13. The 1st Defendant cited Order 11 of the Civil Procedure Rules while urging that upon hearing and cross-examination the Plaintiffs realized that the gaps in their case could only be filled by calling for more documents and witnesses. It urged that the Plaintiffs had not explained why they failed to include the intended additional witnesses and to file the additional witness statements. It added that the application made a mockery of Orders 10 and 11 of the Civil Procedure Rules on pretrial proceedings. It maintained that a party to a suit could not be summoned and compelled to give evidence as that would go against the common law adversarial system. They urged that the application would delay justice yet legal business should be conducted efficiently. The 1st Defendant concluded that no reason had been given why the Plaintiffs did not file the extra documents and witness statement before the pleading were closed and pretrial was done for the filing of trial bundles.
14. The 2nd Defendant submitted that under Order 3 Rule 2 of the Civil Procedure Rules a plaint was supposed to be accompanied by a list of witnesses, their written statements and copies of documents they would rely on at the trial. The 2nd Defendant submitted that this application had been brought too late in the day after the hearing had commenced and the Plaintiffs had given evidence. It added that the Plaintiffs had not demonstrated that the additional documents or witness statements could not have been obtained and filed earlier before the suit was certified as being ready for hearing.
15. Regarding the 4th defendant, the 2nd Defendant submitted that as a public officer, Section 32 of the [Evidence Act](#) provided that public officers were not compellable witnesses in court proceedings. The 2nd Defendant questioned how the court would deal with a party who sued but failed to enter appearance or file a defense and that being adversarial system it was the duty of a litigant to present their case in the best possible way before the court for adjudication. That it was not the business of the court to assist a litigant to procure material which he required for purposes of litigating his case.
16. The 2nd Defendant made the argument that summoning the 4th Defendant and the 3rd Defendant's directors would violate its right to a fair hearing since the intended witnesses are likely to testify on matters and documents which the 2nd Defendant was entitled to raise in its defence and that compelling those intended witnesses to tender evidence was unreasonable and would amount to an unfair hearing of the defense case. The 2nd Defendant argued that by Section 123 of [the Constitution](#), although inanimate, the 3rd Defendant was entitled to the fundamental rights afforded to a natural person. Further, that if the directors of the 3rd Defendant were compelled to testify for the Plaintiffs it would hinder the defense while prejudicing the 2nd defendants case. The 2nd Defendant cited *Peter Agweli Onalo v Eliakim Ludeki & 2 others* (2006) eKLR where the court observed that the petitioner



had no right to summon an officer from the Defendant to give evidence on his behalf since the decision whether or not to call those witnesses depended on that Defendant. The court observed that summoning those witnesses for the petitioner would undermine the 3rd Defendant's legal rights as a party to the petition. The court declined to grant the request. The 2nd Defendant urged the court to dismiss the application

17. The Plaintiff filed supplementary submissions reiterating that interlocutory judgment could not be entered in a land dispute. They added that while it was not in dispute that they should have filed all their witness statements and witness at the trial stage they maintained their omission was not a barrier to the courts exercise of the discretion to allow the instant application. They maintained that the 1st and 2nd Defendants had not shown any prejudice they stood to suffer if the application were allowed while urging that if the court ought to decline to grant the orders sought it would compromise the Plaintiffs right to a fair trial while denying the court the opportunity to be fully ceased of valuable facts and evidence that would assist it arrive at a just determination. The Plaintiffs cited a case in which the court observed that nothing prevented the court from exercising its discretion and allowing parties to call further witnesses or file further documents even after pretrial conference and setting down the case for hearing. They maintained the defendants would have an opportunity to cross examining the additional witnesses and that admitting documents would not make them the gospel truth if there was contrary evidence. The Plaintiffs concluded that the evidence to be adduced by the additional witnesses including those to be summoned was extremely crucial and would assist the court in reaching a fair judgment having had the benefits of all relevant facts, evidence and documents.
18. The issue for determination is whether the court should allow the Plaintiffs to call additional witnesses and file a supplementary list of documents. The other issue for determination is whether witness summons should issue to the 3rd and 4th Defendant as the Plaintiffs seek.
19. It is helpful to look at the legal provisions dealing with witness summons. Sections 22(b) and 23 of the [Civil Procedure Act](#) gives the court discretion either on an application or of its own motion, to issue summonses to persons whose attendance is required either to give evidence or to produce documents or other objects at any time. The penalty for default is given in Section 24 and includes a warrant for arrest being issued against the person summoned or attachment and sale of his property or the imposition of a fine or an order for furnishing security.
20. Order 10 of the Civil Procedure Rules which deals with the consequences of non-appearance and default of defence provides at Rules 9 and 10 that where a party served does not appear or a defendant fails to file his defence, the Plaintiff may set down the suit for hearing in accordance with Rules 4 to 9 with the necessary modifications. Interlocutory judgment may be entered under Rule 7 against a defendant who fails to file a defence where there are several defendants and the claim is to proceed for hearing. This is the route which the Plaintiffs ought to have pursued after the 3rd Defendant failed to file its defence.
21. The 4th Defendant also failed to file defence after being served. Presumably, the 4th Defendant, a public officer, was sued as the custodian of all land records including those touching on the suit land.
22. In the present application, the Plaintiffs seemingly seek to compel the 3rd Defendant to give evidence in the matter through the issuance of witness summons. Were such summons to be issued and the directors of the 3rd Defendant failed to appear in court, Rule 10 of Order 16 would kick in and warrants with or without bail could be issued. The court has the discretion to make an order for the attachment of their property for the sum covering the fine imposed for failure to appear under Order 16 Rule 12. If the court were to issue witness summons against the 3rd Defendant or its directors, it would



be tantamount to compelling it to give evidence in the matter which would not augur well with its Constitutional rights to a fair trial.

23. An application for summons to persons whose attendance is required to give evidence or produce documents should have been made by the Plaintiffs before the pretrial conference based on Order 16 Rule 1 and not after the trial had commenced. If indeed the Plaintiffs desired to call the directors of the 3rd Defendant as their witnesses, then they ought to have recorded their witness statements and filed those alongside the suit papers in line with Order 3 rule 2 of the Civil Procedure Rules but not waited until the trial was underway.
24. The court has considered the application dated 7/11/2023, the responses together with the written submissions and makes the following orders: -
 - a. Witness summons are to issue against the 4th Defendant.
 - b. The Plaintiff is granted leave to file and serve a supplementary list of documents and witness statement of Francis Mathenge Wanderi within three days of today.
 - c. The court declines to issue witness summons in respect of Lucy Wangechi Kairu and James Kairu Wanderi, said to be directors of the 3rd Defendant and its affiliate, Sosian Limited.
 - d. The 1st and 2nd Defendants are awarded the costs of the application dated 7/11/2023.

DELIVERED VIRTUALLY AT NANYUKI THIS 18TH DAY OF SEPTEMBER 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Jeremy Njenga for the Plaintiffs

Mr. Francis Moriasi for the 1st Defendant

Ms. Njeri Magua for the 2nd Defendant

