Kinyanzui & 4 others v Kivondo & 20 others; Government of Makueni County (Third party) (Environment & Land Case 242 of 2017) [2024] KEELC 7333 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7333 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND CASE 242 OF 2017

TW MURIGI, J

OCTOBER 29, 2024

BETWEEN

PETER STANNIE N KINYANZUI & 4 OTHERS & 4 OTHERS & 4 OTHERS ..... PLAINTIFF

AND

MICHAEL KIVONDO & 20 OTHERS & 20 OTHERS & 20 OTHERS ..... DEFENDANT

AND

GOVERNMENT OF MAKUENI COUNTY ..... THIRD PARTY

RULING

1. This ruling is in respect of the Notice of Motion dated 3rd June, 2024 brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Orders 11 and 44 of the Civil Procedure Rules in which the Applicants seek the following orders:

    1. That this Honourable Court do review its orders on case conference with a view to varying and/or setting the same aside and enlarge time for the Plaintiffs to file and serve additional list of documents on such terms as it shall deem fit and expedient.

    2. That PW2 be allowed to be recalled with a view to giving further evidence.

    3. That the costs of this application be provided.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Capt. Peter Stannie Kinyanzui sworn on his own behalf and on behalf of his Co-Plaintiffs on even date..

The Applicant's Case

3. The deponent averred that on 28th October, 2023 he filed a paginated trial bundle containing 207 pages marked as Exhibits 1 – 102. That after he had given his testimony, he realized that some of the documents that he had submitted to his Advocate for preparation of the trial documents were inadvertently omitted.

4. He contended that the said documents are crucial towards the fair determination of this suit and added that the omission was not out of malice or intended to steal a march against the other litigants. He further contended that the omitted documents were issued by the Ministry of Lands, extended the period stipulated in the allotment letters as an acknowledgement of the validity of the offers by the time they were effecting acceptance and payment.

5. He averred that neither the Defendants nor the 3rd Party will suffer any prejudice as they will have an opportunity to interrogate the said documents in cross-examination or file any documents to counter the same in the alternative.

6. He argued that the mistake of his Advocate should not be visited upon him and if at all any loss will be suffered by the Defendants and the 3rd Party, the same can be compensated by an award of costs. He contended that neither the Defendant nor the Third Party have commenced their cases and hence the introduction of the said documents will not prejudice their respective positions because they will have an opportunity to call witnesses to rebut any issue. In conclusion, he urged the court to allow the application as prayed.

The 3rd, 5th, 6th, 14th, 16th, 17th 21st and 22nd Defendants and The Interested Party's Case

7. The 3rd, 5th, 6th, 14th, 16th, 17th, 21st and 22nd Defendants and the Interested Party filed a replying affidavit of Francis Mutuku in opposition to the application. The deponent contended that the application is an afterthought which will occasion prejudice to the Defendants. He further contended that out of the four witnesses including three Plaintiffs who have already testified, none of them indicated in their testimonies that any document had been left out from their list of documents.

8. He argued that the documents sought to be produced are overtaken by events since the Plaintiffs have been cross-examined and re-examined on their existence. According to him, the application is aimed at patching up the Plaintiffs' case whose net effect will be to re-open the entire case. He further contended that the Defendants have incurred a lot of expenses in the case which has taken over fourteen years and whose re-opening will not only be expensive but will also prejudice the Defendants and the Interested Party. He urged the court to dismiss the application with costs.

The 3rd Party's Case

9. The 3rd Party filed grounds of opposition dated 10th June, 2024, raising the following grounds:-

    1. The Plaintiffs' application is an abuse of the court process as the Plaintiff has after the commencement of the hearing of this matter repeatedly introduced documents outside the trial bundle effectively ambushing the 3rd party. The 3rd Party can only concede to the two previous applications to introduce new documents in the interest of time and expense considering that all parties counsel on record and witnesses had travelled from far.

    2. The introduction of further additional documents in the middle of the trial will prejudice the 3rd party as four witnesses have already testified.

3. The application is belated and the introduction of new documents will necessitate a reopening of the Plaintiffs' entire case as the Plaintiffs' witnesses PW3 and PW4 adopted the evidence of PW2 Peter Stannie Ngui Kinyanzui and recalling PW2 would by extension necessitate a recall of PW3 and PW4 thus rendering wasted the numerous judicial hours already employed in this matter.

4. The Plaintiff's application is an attempt to patch up gaps identified through cross-examination which amounts to an afterthought. It is an abuse of the process of the court and unfair to the 3rd Party for the plaintiff to introduce documents in piece meal.

5. The proposed additional documents were not part of the Plaintiff's original trial bundle.

6. By their conduct, the Plaintiffs are not entitled to this court's discretion to extend time and the 3rd Party shall seek to rely on the court record as evidence of its assertion and to demonstrate a consistent disregard of the rules of procedure by the Plaintiffs including but not limited to introduction of witness statements at trial not supplied to the 3rd party in advance.

10. The 3rd Party urged the court to dismiss the application with costs.

The Response

11. The Applicant filed two supplementary affidavits in response to the Defendants and 3rd Party replying affidavits. In his affidavit sworn on 13th June, 2023, the Applicant reiterated that the circumstances which necessitated the instant application was the omission by his Advocates to include the additional documents in the trial bundle. He argued that the 3rd Party will not suffer any prejudice since the Plaintiffs were yet to close their case, hence the veracity of the additional documents would be put to test. He further argued that the 3rd Party has not explained how the introduction of the additional documents will prejudice its case.

12. The Applicant averred that 3rd Party did not raise any objection when the Defendants filed their paginated trial bundle on 24th May, 2024 after he had given his evidence on two different occasions. He contended that the selective objection to the application would not assist the court in making an informed decision.

13. In the supplementary affidavit sworn on 31st July, 2024, the Applicant reiterated that the omission to include the proposed additional documents was inadvertent and not deliberate. He explained that he had indicated severally during his testimony that they had been authorized by the relevant government officials to pay for their allotment letters out of time after time had been extended for payment. He added that the documents sought to be introduced are not new documents since they were authored by the Advocate representing the Defendants while the other documents were authored by the precursor to the Interested Party.

14. He further averred that the additional documents are public documents which the Defendants as well as the Interested Parties have used to acquire benefits vide monies paid by the Plaintiffs as rates and rent. He opined that it would be against justice and morality for the Defendants and the Interested Parties to allege that the said documents do not exist since they are the authors of the same and benefits have accrued to them through the usage of the said documents. The Applicant insisted that neither the Defendants nor the Interested Party have explained what prejudice they stand to suffer if the orders sought are granted. He argued that the Defendants reserve the right to cross-examine and interrogate the veracity of the documents since the Plaintiffs have not closed their case.

15. He deposed that the issue of re-opening of their case does not arise since the Plaintiff are yet to call two witnesses in support of their case.

16. The application was canvassed by way of written submissions.

The Plaintiffs Submissions

17. The Plaintiffs' submissions filed their submissions dated 14th August, 2023. In their submissions, Counsel reiterated the contents of the Applicant's affidavit in support of the application together with the supplementary affidavits. On their behalf, Counsel submitted that it is not enough to simply allege prejudice without demonstrating the same. Counsel submitted that the Defendants have not stated the manner in which the proposed documents will alter their case. Counsel further submitted that the mere fact that there was a partial hearing of the Plaintiffs' case is not a basis to deny the court an opportunity to receive more evidence which will assist the court in making an informed decision.

18. Counsel submitted that the Plaintiffs' Advocate explained in his affidavit that the omission of the documents was inadvertent and hence the said omission cannot be equated to an intention by the Plaintiff's to steal a march on the Defendants and the Third Party. Counsel further contended that the documents sought to be produced are public documents which emanate from the Interested Party. Counsel went on to submit that some of the documents were even authored by the Advocate on record for the Defendants and added that the documents will not require scrutiny as they have been in their custody.

19. Counsel argued that Article 50 (1) of *the Constitution* guarantees every person the right to a fair hearing and therefore procedural requirements should be disregarded in favour of substantive justice. Counsel further argued that when the omission was discovered, the Applicant immediately notified the court and the Respondents which clearly demonstrates a litigant who wants justice to be served fairly and objectively.

20. Counsel went on to submit that the enactment of the overriding objective was to embolden the court to be guided by the broad sense of justice and fairness in the determination of cases. Counsel submitted that the parallel claims of ownership by both the Plaintiffs and the Defendants underscores the importance of according all the parties an opportunity to ventilate their respective cases so that a lasting solution will be found. Counsel argued that the production of the additional documents will put the parties on an equal footing and thereby assist the court to determine the dispute with the full benefit of the evidence available.

21. To buttress his submission, Counsel relied on the following authorities: -

    i. Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel [2022] eKLR

    ii. Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd [2001] eKLR

The 3rd, 5th, 6th, 14th, 16th, 17th, 21st and 22nd Defendants And The Interested Party Submissions

22. The Defendants/Interested Parties filed their submissions dated 13th September, 2024. On their behalf, Counsel submitted that the only issue for determination is whether the Plaintiff's should be granted leave to file additional documents and whether PW2 can be recalled to give evidence. Counsel submitted that the Defendants' were opposed to the application because the Plaintiffs had virtually finalized their case and that the documents they intend to introduce were the subject of the cross-examination during the hearing of the Plaintiffs' case.

23. Counsel submitted that the Applicants admitted that the additional documents were in their possession hence they have not discovered any new material that was not within their knowledge at the time of filing the suit and/or during the close of pleadings.

24. Counsel further submitted that the Defendants' defence was premised on the documents supplied by the Plaintiffs before, during and at the time of the hearing. Counsel argued that granting the orders will not only send the Respondents back to the drawing board but will also delay the disposal of this suit. Concluding his submissions, Counsel argued that the application is an afterthought and ought to be dismissed with costs. To buttress his submissions, Counsel relied on the case of Moboko Shembekho Ltd v Kiptalam & 2 others; Agricultural Development Corporation (Third Party) [2023] KEELC 19982 (KLR).

The 3rd Party's Submissions

25. The 3rd Party filed its submissions dated 20th September, 2024. On its behalf, Counsel submitted that the application has not met the conditions set out in Section 80 of the *Civil Procedure Act* and in Order 45 of the Civil Procedure Rules. Counsel submitted that there was no error apparent on the record or new and important matter which could not have been discovered with the exercise of due diligence. Concluding his submissions, Counsel urged the court to dismiss the application with costs

26. To buttress his submissions Counsel relied on the following authorities: -

    i. Francis Njoroge v Stephen Maina Kamore [2018] eKLR

    ii. Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] Eklr

Analysis and Determination

27. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the following issues fall for determination;

    a. Whether the Applicant has satisfied the conditions for the grant of review.

    b. Whether the Applicants should be granted leave to file additional documents and;

    c. Whether PW2 should be recalled to give further evidence.

28. The Applicant is seeking a review of the case conference orders with a view to setting aside the same in order to enlarge time for the Plaintiff to file and serve an additional list of documents. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules.

29. Section 80 of the *Civil Procedure Act* provides as follows;

    Any person who considers himself aggrieved -

    a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

    b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

30. Order 45 Rule 1 of the Civil Procedure Rules provides that: -

    Any person considering himself aggrieved -

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

b. By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

31. The provisions of Order 45 were restated by the Court of Appeal in the case of Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR where the Court held that: -

> " In the High Court both the *Civil Procedure Act* in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review."

32. Similarly, in Republic Vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR the court held that: -

> " Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review."

33. In the matter at hand, the Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not discovered even after exercising due diligence.

34. As regards the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of Nyamogo & Nyamogo Vs Kogo (2001) EA 170 the court held that;

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal."

35. Similarly, in the case of Timber Manufacturers and Dealers Vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992, Emukule J held that;

> " For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established."

36. The grounds laid by the Applicant do not disclose an error apparent on the face of the record. The Applicant has not pin pointed the errors that are apparent on the face of the record.

37. The Court is also mandated to consider if there are sufficient reasons to review the Court's judgment. In the case of Wachira Karani v Bildad Wachira (2016) eKLR the court held that:-

> " Sufficient cause is thus the cause for which the Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending court by a sufficient cause...".

38. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR stated that;

> " These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record."

39. The Applicant is seeking for leave to file and serve additional list of documents.

In the case of Mohamed Abdi Mahamud v Ahmed Abdulahi Mohamad & 3 others {2018} eKLR, the Supreme Court reasserted some of the considerations to be made when granting an application for leave to adduce additional evidence as follows: -

> " We conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:
>
> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
>
> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
>
> c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
>
> d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
>
> e. the evidence must be credible in the sense that it is capable of belief;
>
> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
>
> g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

40. The Applicant attributed the omission of the additional documents to an inadvertent mistake on the part of his Advocate. He argued that mistakes of his Advocate should not be visited upon him.

41. In the case of Belinda Murai & 9 others v Amos Wainaina [1978] eKLR, Madan JJA (as he then was) appreciated that mistakes will inevitably occur during litigation and that a party should not be penalized at the expense of justice. The court held as follows: -

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The Court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

42. Similarly in the case of Gideon Mose Onchwati v Kenya Oil Co Ltd & Another (2017) eKLR cited in the case of Shah v Mbogo the court held that :-

> " Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate is bound by the acts and omissions of the Advocates in the course of representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure on the part of the litigant, to give the Advocate due instructions".

43. The Applicant annexed the affidavit of Francis M Kalwa Advocate(annexure CPSK/2) to his affidavit in support of the application. The Applicant's Advocate acknowledged the said mistake was on his part. He further stated that he had alerted his colleagues of the evidence which had been omitted. The Plaintiffs have demonstrated that the omission to include the documents in the trial bundle was on the part of their Advocate. In the circumstances, I find that the mistakes of their Advocate cannot be visited upon them.

44. The record shows that three witnesses have testified in support of the Plaintiffs case. The Plaintiff have not closed their case.

45. The defence case is yet to commence. I have perused the documents sought to be produced by the Plaintiff and I note that the emanate from the 3rd party and relate to the suit property and are therefore relevant to this case. From a keen perusal of the said documents (annexure CPSK/3), it is apparent that the documents pertain to the suit property and touch on the Plaintiffs' claim of ownership. The Applicant has exhaustively explained the relevance of the additional documents which is sought to be produced highlighting the fact that the said evidence originates from the predecessor of the 3rd Party and that it also relates to the suit property.

46. The Defendants and the 3rd Party have not demonstrated the prejudice they will suffer in the event the application is allowed. Besides stating that there will be a delay in the proceedings and that the application is an afterthought, the Defendants and Third Party have not advanced any compelling reasons to show how their respective cases will be prejudiced. In any case, should the orders sought be granted, the Defendants and the 3rd Party will be at liberty to cross-examine the witnesses on the evidence or even apply to amend their pleadings or call witnesses to rebut the evidence.

47. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay. It is clear that the application herein was made immediately after the Applicant discovered the omission. I find that the application was made without delay.

48. In the end, I find that the Applicant has demonstrated sufficient reasons to warrant a review of the orders.

49. The Applicant sought to recall PW2 to give further evidence.

50. Section 146 of the *Evidence act* provides as follows:-

> " The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination and if it does so the parties have the right of further cross examination and re-examination respectively."

51. The Defendants/Interested Parties/Third party will not be prejudiced as they will have an opportunity to cross examine PW2 on the additional documents.

52. In the end I find that the Application dated 3rd June 2024 is merited and the same is hereby allowed in the following terms:-

    1. The Plaintiff is hereby granted 7 days leave to file and serve the additional list of documents
    2. The Defendants/Interested Party as well as the Third Party are granted corresponding leave to file and serve additional list of documents and witness statements if need be.
    3. Costs in the cause

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HON. T. MURIGI

JUDGE

RULING DATED, SIGND AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF OCTOBER, 2024.

IN THE PRESENCE OF:

Kalwa for the Plaintiff.

Muthuri holding brief for Denis Mungáta for the Third Party and Muia for the 3rd, 5th, 6th, 16th, 17th, 21st, 22nd Defendants and the Interested Parties.