Kebande v Arasa (Enviromental and Land Originating Summons E004 of 2022) [2024] KEELC 7103 (KLR) (29 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7103 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2022

M SILA, J

OCTOBER 29, 2024

BETWEEN

ZACHARIA OGARO KEBANDE ..... APPLICANT

AND

PAULINE MORAA ARASA ..... RESPONDENT

RULING

(Application by the plaintiff seeking to reopen his case to adduce additional evidence being a surveyor's report; the report having been listed in the list of documents but plaintiff closing his case without producing it; respondent availing her defence evidence and closing her case; plaintiff now seeking to reopen his case; court not persuaded that the application should be allowed; the applicant made a conscious choice not to produce the report as his exhibit; respondent entitled to proceed on the basis of no report by the applicant; not prudent in the circumstances to reopen the case of the applicant after the respondent has testified and closed her case; application dismissed)

1. The application before me is that dated 25 July 2024 filed by the applicant in this Originating Summons. More or less, what the applicant wants is to have the proceedings re-opened so that he can produce a survey report that was not earlier produced when he conducted his case, and also the defence case to be reopened so that the respondent can also produce her own survey report. The application is opposed.

2. To put matters into perspective, this suit was commenced through an Originating Summons which was filed on 22 June 2022. In it the applicant seeks orders that it be declared that he has obtained title, by way of adverse possession, to the land parcel Central Kitutu/Daraja Mbili/462. On 16 August 2022, the respondent filed a replying affidavit to oppose the suit. She deposed that she purchased the suit land and constructed a permanent house on it which has had different tenants and it would be a lie for the applicant to allege that he has been in occupation of it.

3. On 9 December 2022, the applicant filed a list of witnesses and a list of documents. The list of witnesses has 6 persons, with five being named and the sixth being identified only as 'a surveyor.' In the list of documents were listed three documents, that is the copy of Green Card of the suit land, pictures showing the land and developments, and a survey report. That survey report is one prepared by a Mr. Alex Mecha.

4. The respondent on her part filed a list of 5 witnesses and seven documents. The witnesses included a surveyor and the documents included a survey report.

5. Directions were taken on 17 October 2022 for the matter to proceed by way of viva voce evidence and hearing commenced on 16 November 2023. The applicant testified on that day and called two other witnesses. Counsel for the applicant then applied to adjourn to call two other witnesses and a surveyor. I adjourned to 25 February 2024. On that day counsel for the applicant mentioned that she had three witnesses. Regarding the surveyor, she stated that she had contacted him but he was not willing to attend court. I directed that we proceed with the witness who was available and we deal with the issue of adjournment later. The plaintiff thereafter called his fourth witness who testified. After he had testified no application for adjournment was made and it was never recorded that the applicant wished to call a surveyor, or indeed any other witness, or have produced the survey report. What happened is that counsel applied to close the applicant's case which I duly obliged. We then adjourned to 8 May 2024 as the respondent was said to be ill. On 8 May 2024, the respondent again applied for adjournment on account of illness and I adjourned on that account to 23 July 2024.

6. On 23 July 2024, both counsel for the applicant and respondent were present and the respondent testified. She also called one other witness, who testified that he was her caretaker on the suit property. After this witness had testified, the respondent closed her case. There was no mention of any intention to call a surveyor or produce the survey report.

7. I closed the hearing of the matter and directed counsel to file submissions within 14 days. No submissions were filed by counsel for the applicant within the 14 days, though counsel for the respondent did file his submissions. Instead, the applicant filed this application. I have already mentioned that it seeks to reopen the case so that the applicant can bring a surveyor as a witness and produce the survey report that was never produced when he was conducting his case.

8. The application is supported by the affidavit of the applicant. He deposes that his case was closed and subsequently the respondent also closed her case. He deposes that he is informed by his counsel that it is imperative to have the survey reports produced so that the court can understand the occupation of the land since the court did not visit it. He believes that there will be no prejudice to the respondent.

9. The respondent filed grounds of opposition. Inter alia, it is averred that the application is overtaken by events since the respondent has already presented and closed her case.

10. I invited both counsel for the applicant and respondent to file submissions, which they did, and I have taken the same into account.

11. Hearing of civil suits, such as this one, is governed by the *Civil Procedure Act* and Civil Procedure Rules. Order 18 rule 1 provides that the plaintiff shall have the right to begin unless the court otherwise orders. Under Order 18 Rule 2, the party beginning presents his evidence, after which the other party states his case and produces his evidence. There is thereafter given liberty for parties to address court which is ordinarily done through submissions of counsel. That, generally, is the way hearings are conducted. One is at liberty to present whatever evidence he/she deems appropriate then closes his/her case before the court retires to make a decision.

12. There are however instances when the court can exercise its discretion to allow a party reopen his/her case. There of course must be good reason given why the court should exercise its discretion to allow such party to reopen his/her case, for if such discretion is exercised too liberally, then the court process can be subjected to abuse and there can be risk of a trial being one conducted by indefinite instalments. A party can sit pretty, assess how the matter has proceeded, then apply to reopen, for no other reason other than to fill in gaps created during the hearing. It cannot be the intention that such discretion should be exercised in order to allow a party fill in gaps created at the hearing of the suit. I would particularly think that such discretion is intended to allow a party adduce evidence which he could not be able to procure and avail when the matter was heard despite exercise of reasonable diligence. If however, such evidence was readily available and capable of production by the applicant, then the court ought really to be slow in allowing such application.

13. In our case, the survey reports were readily available and capable of production when the applicant was conducting his case. The applicant was indeed at liberty to produce his survey report or call a witness to adduce it. It had been mentioned earlier on 25 February 2024, when the applicant closed his case, that the surveyor was difficult and was not keen to attend court. However, counsel did not press the issue further and opted to close the case of the applicant. Of course, it is presumed that counsel had instructions to close the applicant's case and that the applicant was comfortable to rest his case based on the evidence that had been presented. If really the applicant was intent to have the surveyor testify, the applicant could have applied for summons to witness, or pursue the arrest of the witness for his presentation to court for declining to attend court despite being served. But no such application was made by the applicant. It would mean that the applicant was happy with the evidence presented and was ready to face the respondent's case on the basis of that evidence.

14. A party to a suit is entitled to abandon any evidence that he/she had earlier disclosed. It is not a must for a party to produce all the evidence that he had listed. The purpose of discovery is only to allow the other party be aware of the potential evidence that can be adduced. At the hearing, the party has discretion to either rely on the whole of the discovered evidence or only part of it. It is apparent to me that in exercise of this discretion, the applicant made a choice not to pursue the production of the survey report or call a surveyor to support his case. This is clear because after he closed his case on 28 February 2024, the matter was adjourned several times without any indication being given that he would wish to reopen his case to adduce evidence that was left out when his case was being conducted. It will be recalled that after 28 February 2024, we adjourned the case to 5 May 2024. On 5 May 2024, counsel for the applicant stated that she was ready to proceed with hearing of the respondent's case. We adjourned since the respondent was said to be ill. We were again in court on 23 July 2024. On that day, counsel for the applicant stated that she was ready to take the respondent's case and we indeed proceeded on that day. If at all the applicant thought that he needed to present the evidence that he now wishes to adduce, there was opportunity on those two occasions to apply to reopen his case before the respondent presented her evidence.

15. It will need quite a compelling case to allow a plaintiff reopen his case after a defendant has already testified, presented his evidence and witnesses, and has closed his case. The hurdle at this stage of the case is much higher that in an instance where the plaintiff is applying to reopen his case before the defendant has testified. It should be appreciated that a defendant or respondent responds to the case of the plaintiff/applicant as presented. A defendant may even opt not to call evidence based on what the plaintiff has presented, or can decide to not call other witnesses depending on the evidence that the applicant has tabled. There can be great prejudice to a defendant if a plaintiff is allowed to reopen his case after the defendant has already closed his. It would appear in our case that the respondent did

not see it necessary to call her surveyor witness or present a survey report given that the applicant had presented none.

16. What displays itself in the application at hand is that maybe the applicant feels that there were some gaps left in his evidence which he was hoping the defendant would fill, but now that the defendant has not taken that path, he wishes to reopen his case so as to fill them. That, as I have said, is not the intention of the exercise of the court's discretion in allowing a party to reopen his case. The applicant made a conscious decision to close his case and I do not see why the respondent should be prejudiced by the change of mind of the applicant midstream. If we liberally indulge parties when they continuously change their minds in conducting proceedings then no case will ever end. Parties must live by the conscious choices that they make at the hearing of their cases. In our instance the applicant made a choice to close his case without calling a surveyor. He will need to live with that choice.

17. The long and short of it is that I am not persuaded to allow this application and it is hereby dismissed with costs.

DATED AND DELIVERED THIS 29 DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Ms. Gogi for the applicant

N/A on part of Mr. Ochwangi for the respondent

Court Assistant – David Ochieng'