Malakwen (Suing as legal representative of the Estate of the Late Raphael Kiptoo Biebei) v Engairo & 3 others (Environment & Land Case 102 of 2018) [2024] KEELC 13587 (KLR) (28 October 2024) (Ruling)

Neutral citation: [2024] KEELC 13587 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 102 OF 2018

FO NYAGAKA, J

OCTOBER 28, 2024

BETWEEN

CHRISTINA BARABARA MALAKWEN (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE RAPHAEL KIPTOO BIEBEI) ..... PLAINTIFF

AND

BENJAMIN MWALE ENGAIRO ..... 1ST DEFENDANT

TITUS KIPYAB ..... 2ND DEFENDANT

LAND ADJUDICATION & SETTLEMENT OFFICER TRANS-NZOIA ..... 3RD DEFENDANT

IBRAHIM WAFULA ..... 4TH DEFENDANT

RULING

1. The 1st defendant brought the instant Application dated 01/07/2024, under Sections 3, 3A and 63(e) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and Sections 19 (2) and (3) of the *Environment and Land Court Act*. He sought the following orders:

    1. ...spent

    2. That this Honorable Court do grant the Applicant/1st Defendant leave to file and serve a witness statement of David Mwale Engairo and further list of witnesses and documents to be relied on during the hearing.

    3. That this Honorable Court be pleased to reopen the plaintiff's case for hearing de novo or as the Court may order to enable David Mwale Engairo who was brought into the matter to participate fully in the hearing of the same and cross-examined the plaintiff's witnesses.

4. That the cost of this application be in the course.

2. The application was based on eight grounds. The first one was that the Court had allowed David Mwale Engairo to appear on behalf of the 1st defendant who had become old and sickly and unable to proceed with the case in person. Due to the health status of the first defendant his witness statement had not been recorded. The first defendant did not give full information to enable the previous advocate who acted for him to file his statement and all documents to defend him well. Upon allowing David Mwale Engairo into the matter the pleadings were amended and there was a need to file a new witnesses list and witness statements and documents. The delay in filing the new witness statements and documents was caused by the fact that there was an attempt to negotiate the matter, which made the applicant lose track of the matter. The matter was fixed for defense hearing without verifying that the first defendant had filed their statement and complied with Order 11 of the Civil Procedure Rules. The application was brought in good faith and expeditiously. It was in the interest of justice that the orders sought be granted.

3. The application was supported by the Affidavit of the 1st Defendant, David Mwale Engairo which he swore on 01/07/2023 (sic). He repeated the contents of the grounds but in deposition form. He annexed to the affidavit an Amended Amended Defence dated 01/02/2024. He stated that he would like to participate in this matter from the start because his father was sickly and could not participate in the matter in light of his sickness. He prayed that the suit be reopened, and it starts de novo and he be granted leave to file witness statements and documents to be relied on at the hearing. He annexed to the Affidavit a copy of the father's identity card and the Amended Amended Defence.

4. The Application was opposed through two documents. The first one was Grounds of Opposition dated 25/07/2024 and the other, the Plaintiff's Relying Affidavit sworn on 12/09/2024. The first ground was that the plaintiff's case was closed on 19/06/2023. Therefore, introducing new witnesses at this stage would be prejudicial to the plaintiff. Further, the Application to have David Mwale Engairo added as a next friend of the first defendant was made on 25/07/2023 and allowed on 03/10/2023 and there was no reason for the matter to start de novo. Three, the Application was brought late and aimed at delaying the defense hearing of the case.

5. The plaintiff's Affidavit was that she was the representative of the estate of Raphael Kiptoo Biebei. Her case was closed on 19/06/2023 and has been pending for reference hearing.

6. She deposed that she was not opposed to the Applicant being granted leave to file a witness statement although the prayer was made very late in the day. But for the filing of further documents, even not specified, she was supposed to the granting of the orders given that she had already closed her case hence introducing the same would be prejudiced. Having closed her case, she would be prejudiced by the inclusion of the intended new undisclosed documents and unnamed witnesses as she has already closed her case. Further, the prayer to reopen her case for it to start de novo was not merited. The Applicant was ably represented by learned counsel M/S Kidiavai and Company Advocates who cross-examined her and her witnesses.

7. Further, the amendment to the Plaint towards was done on 28/05/2019, before the commencement of the hearing. And the 1st Defendant amended his Statement of Defence on 31/10/2019. The further Amended Plaint filed on the 30/10/2023 only introduced the Applicant as the next friend of his father and no other issue was introduced. The litigation of the matter was now eight years old, and she (Respondent) was sickly and aged 81 years old. She deposed that she was born in 1943. Thus, to her, the grant of the order for the matter to start de novo would delay it yet there was no reason for the matter to start de novo.

8. The application was canvassed by way of written submissions, with the Applicant filing his dated 11/09/2024, and the Respondent his dated 07/10/2024. This Court will consider the parties' written submissions alongside the merits of the Application.

9. To start with, this Court notes that the Plaintiff did not oppose the grant only of the prayer by the 1st Defendant to file his written Witness Statement. However, she opposed the prayer for other witnesses to file written statements, and also for the Defendant to file a List of Documents and copies thereof. That being the case, prayer (b) of the Application is allowed only in part, at this stage, to the extent that the plaintiff is granted leave to file his written Witness Statement and serve it within the next 7 days. In any event the proviso to Rule 3(2) and Rule 7(5) of the Civil Procedure Rules envisions a situation where written witness statement is filed, with leave of the Court, at least fifteen days prior to the taking of Pre-trial Directions under Order 11 of the Civil Procedure Rules.

10. This Court now considers the rest of the prayers. The first one is whether the court should allow the 1st defendant to file a further list of witnesses and written witness statements. The second one is whether he should be allowed to file a further List of Documents. Whereas the Applicant moved the Court under Sections 3, 3A and 63(e) of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Act*, and Section 19(2) and (3) of the Environment and *Land Act*, this Court is of the view that the provisions cited were a misapprehension of the law regarding the procedure on the filing of documents and written witness statements. In any event Section 19(3) of the *Environment and Land Court Act* does not exist in the laws of this country since it was deleted in 2012. Each of the remaining provisions cited has their own province of application regarding various sets of facts in each case and situation apart from the instant one. For instance, Section 19(2) of the Act is a general provision to the effect that this Court is to apply the procedure laid down by the *Civil Procedure Act*. Therefore, whereas it refers this Court to the *Civil Procedure Act* for application, it (Section 19(2) of the Act) is not the substantive procedural law to apply. But since it does so, it means that this Court is to apply the provisions of Order 3 Rule 2 of the Civil Procedure Rules as made under the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. I will come to the provisions after I have given the summary of the record for it will lay the basis for considering the merits of the instant application.

11. It is worth noting that this matter is now at the defence hearing stage. The suit was filed on 04/06/2018. And after a number of mentions, on 18/01/2021 the Court fixed it for hearing on the 16/02/2021. Prior to that, the Court had on 11/11/2019 fixed it for hearing on 02/04/2020. Worth noting also is that on the 18/06/2021 the Court gave directions on compliance with Order 11 of the Civil Procedure Rules. Thus, contrary to the Applicant's contention that directions were not given by the Court, it is not true.

12. Further on 15/02/2021, the Court gave further directions still on compliance with Order 11. But by 09/02/2022 the parties had not complied, and they were given up to 16/03/2023 to comply. After many adjournments on account of the parties failure to fulfil one condition or other or failure to proceed on a schedule hearing, the suit ultimately proceeded to hearing on 20/09/2022. On that date the Plaintiff testified and called her first witness (PW2) who testified. The 1st Defendant's learned counsel was present and cross-examined the witnesses. The Plaintiff again called her second witness (PW3) on 19/06/2023. He testified and was cross-examined by learned counsel for the 1st Defendant. She then closed her case.

13. That remained the position until 25/10/2023 when the learned counsel for the Applicant/1st Defendant ceased to act for him. The issue of attempted negotiations was introduced by learned counsel now on the record for the Applicant on 01/02/2024 and the court gave them up

to 05/03/2024. Nothing was forthcoming. Then 1st Defendant filed the instant application on 01/07/2024.

14. The court record shows further that the 1st defendant filed an Amended Defense dated 31/01/2024 on 01/02/2024. The Amendment only introduced David Mwale Engairo as the Guardian ad Litem. The said Amendment sought to mislead the Court, by way of underlining the name of a party, the 4th Defendant, one Ibrahim Wafula, that it introduced him as one, yet the party had been in the suit all along. What is plain in the circumstances of the amendment is that the 1st Defendant was replaced by a Guardian Ad Litem.

15. From the background summarized above this Court turns to the merits of the instant application. The issue herein is that the 1st Defendant did not file a witness statement and documents for reason that he was old and sickly. Thus, he wants that to be granted and the Plaintiff's suit which was already closed to be reopened and the matter starts de novo.

16. The law regarding the filing of documents and statements together with pleadings is, for plaintiffs or claimants, Order 3 Rule 2 of the Civil Procedure Rules, provides for the procedure to be followed by the Plaintiff, Petitioner or Claimant when filing his suit, petition or claim. It provides that:

> " All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by-
>
> (a) the affidavit referred to under Order 4 rule1(2);
>
> (b) a list of witnesses to be called at the trial;
>
> c) written statements signed by the witnesses excluding expert witnesses; and
>
> (d) copies of documents to be relied on at the trial including a demand letter before action:
>
> Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11."

17. These contents are replicated in Order 7 Rule 5 regarding a Defendant or Respondent respectively when he/she responds to the Plaint, Petition or Claim, and if he/she has a Counterclaim to raise in the matter against him. It provides:-

> " 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."

18. I have carefully considered the application. The first defendant prayed that be given leave to file a Further List of Documents and copies thereof. In supporting his request, he stated that the father whom he replaced as the Guardian ad Litem did not file the List of Documents or copies thereof because he was old and sickly hence could not give the Advocate then on record for him full

information as to write his statement on the issues before court. From both his grounds in support of the Application and the Supporting Affidavit the Applicant has not given any reason why the father had not given any set of documents to the Advocate. In any event the averment that his father was so old and sickly that he could not write a statement or do anything else in support of the case is not supported by any medical evidence. The only time the issue of the father's age and illness came up was only recently when the Applicant was appointed as Guardian ad Litem.

19. Furthermore, to demonstrate that the Applicant's prayer is not merited, he has not annexed any copy of such documents in order for the other parties to appreciate their two important aspects of the same: their content and secondly that they were not within the 1st Defendant's reach as at the time he filed his Defence or the Amended Amended Defence. Additionally, he has not given any reasons why, if at all, the documents would have to be introduced in the case at such late hour as after the plaintiff had closed her case and seven (7) years into the institution of the suit and service of the summons and three into the prosecution of thereof. In my view to grant such an order would be greatly prejudicial to the Plaintiff who has closed her case and has been waiting to conclude her case for almost seven (7) years. Other than delaying the matter further and therefore defeating the ends of justice and the overriding objective of this Court, I see no other reason for the prayers made by the applicant.

20. Needless to say, the 1st Defendant was duly and ably represented always by learned counsel and at no point in time did counsel indicate to the court that he had difficulty in obtaining any documents in support of his defence or that he had difficulty in conducting the Defence on behalf of his client. As a matter of fact, learned counsel even cross-examined the Plaintiff and her two witnesses. It has been submitted that this alleged error was a mistake of an advocate which should not be visited on the client. This Court is of the contrary view because at no point in time has the former Advocate owned by way of a deposition or Affidavit to having made a mistake in the process of representing his client. The habit of parties maligning, in the absence of, learned counsel previously representing them should not be condoned by courts: it should be greatly discouraged. It is a barbaric habit of condemning someone unheard if it were to be held to continue. For the court to agree to such a weak and 'frail' contention it paints the learned counsel wrongly and leaves a permanent mark of incompetence and malpractice attached to the learned counsel, which record can be used against him or her at any future whether domestically or internationally. Courts should not participate in destroying learned counsel's or indeed any other professional's careers without giving them an opportunity to be heard. This Court shall not be the first to throw such a stone at such a 'sinner'. The standard of proof that learned counsel committed a mistake should be higher than ordinary balance of probabilities because such an allegation puts one's lifelong careers at stake.

21. Therefore, this Court rejects the prayer for the 1st Defendant to file a Further List of Documents. It does not in any way comport with the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010.

22. Lastly, the Applicant contends that the Plaintiff's case be re-opened and the suit starts de novo. First, the prayer is framed in a manner that the same cannot be granted if taken literary or as it is. Times without number in other matters previously handled, this Court has reiterated the importance of proper drafting of the pleadings. Many a time parties have lost cases because of poor drafting, and it appears they will continue to do so, not necessarily through the instant law firm's errors in drafting but numerous others. I have had occasion to share my frustrations with many judges and judicial officers regarding the paucity of poor drafting in the legal practice today. The situation is nearing a catastrophe.

23. In the instant matter the Applicant prays that the plaintiff's case be re-opened and the suit be heard de novo. What I understand the Applicant to say is that since the Plaintiff had closed his case, to give her a chance to respond to the new evidence the 1st Defendant shall introduce upon grant of the orders sought, her case should be re-opened. Granted that the prayer of re-opening the Plaintiff's case

is granted, has the evidence given by the Plaintiff so far been touched or set aside? No. It remains intact. How then and why should be matter start de novo. This Court shall have given to Caesar what belongs to Caesar and that would end the matter there. The Court cannot craft orders to suit a party's imagination. Parties should be and are bound by their pleadings as was stated in the Tanzanian case of Salim Said Mtomekela Versus Mohamed Abdallah Mohamed, Dar-Es-Salaam Court of Appeal Civil Appeal No. 149 of 2019 (Mugasha. J.A. Kihwelq. J.A. Rumanyika. J.A p where it was held by the Court of Appeal thus:-

> " Pleading in law means, written presentation by a litigant in a law suit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case ... That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. See Barclays Bank (T) Vs Jacob Muro, Civil Appeal No. 357 of 2018 [where] the Court cited with approval a passage in an article by Sir Jack I.H. Jacob bearing the title,"The Present Importance of Pleadings", first published in Current Legal Problems (1960) at p. 174 whereby the author among other things said: "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 as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not 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..."

24. Also, in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima J. stated as follows: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as

this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

26. Further, the Supreme Court of Kenya discussed the importance of pleadings in Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR, as follows:-

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

27. Thus, if in the instant case the prayer is granted, the matter cannot start de novo. It can only proceed from the point that the Plaintiff is allowed to adduce further evidence. Is that the other prayer the Applicant has made? No. Therefore, to grant the prayer would be self-defeating. It would lead to nowhere than mixing the proceedings herein.

28. At any rate, David Mwale Engairo only came into the matter as a Guardian ad Litem. He and his father whom he replaced were duly represented by learned counsel. As I have discussed above, there was no lapse, procedural or substantive, on the part of learned counsel who represented them previously in conducting the Plaintiff's case. Furthermore, the amendment introduced did not prejudice any parties as to require additional evidence by either or both. The 1st Defendant having participated in cross-examining the Plaintiff up to the close of her case, wants to have a second bite at the cherry. In any event this is the Applicant's father's case. I see no merit in the prayer for reopening the plaintiff's case. I dismiss it.

29. The upshot is that apart from the limb of filing only a witness statement by the David Mwale Engairo, the application is not merited. I dismiss all the other prayers, with costs to the Plaintiff/Respondent but grant the part of the prayer (b) on filing of a witness statement and serving the same, as stated at paragraph *9* above.

30. Mention on 16/01/2025 for further orders regarding the Defence hearing herein.

31. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 28TH DAY OF NOVEMBER, 2024

HON. DR. *IUR* F. NYAGAKA

JUDGE, ELC KITALE.

In the presence of:

Teti for----------1st Defendant

Kiarie----------for Plaintiff