



REPUBLIC OF KENYA



KENYA LAW
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**Chumba & another v Lelei & another (Environment & Land Case
E005 of 2022) [2024] KEELC 7019 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7019 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E005 OF 2022**

**MN MWANYALE, J
OCTOBER 23, 2024**

BETWEEN

ALFRED MALAKWEN CHUMBA 1ST APPLICANT

**DINAH CHEVOTIN BARKAR ALIAS DINAH JEBOTIP (SUING AS
THE LEGAL REPRESENTATIVE OF THE ESTATE OF EDWIN OSCAR
KIPRUTO 2ND APPLICANT**

AND

BENJAMIN KIPKOECH LELEI 1ST RESPONDENT

KIPSREREM ARAP NGETICH 2ND RESPONDENT

RULING

1. Vide an oral application made today, the 1st Defendant/Applicant sought leave of the Court to file his witness statement on the grounds that the suit was commenced by an originating summons and he had filed a Replying Affidavit thereto which affidavit was converted to a defence, and whereas he had filed his documents which he confirmed during pretrial, he had not filed his witness statement, which essentially is a replica of the Replying Affidavit that he had previously filed. He submits that no prejudice will be suffered by the Plaintiffs as there is no new evidence that he is introducing and the Plaintiff will have a change to cross – examine in any event.
2. In response to the application Mrs. Koech Lelei for the 1st Plaintiff submitted that non-compliance with pretrial directions meant that the Defendant could not introduce new evidence this late in trial, and placed reliance on the decision in the case of Sedy Kenya Freight Limited vs Multiple Solutions Limited (2021) eKLR and urged the Court to dismiss the application.
3. On his part Mr. Korir Bundotich for the 2nd Plaintiff submitted that under Order 7 Rule 5 of the Civil Procedure Rules, the defence and counterclaim ought to be filed accompanied by the list of witnesses as well their statements and their documents. Failure to do so would not empower the Court to exercise



- discretion in allowing the same and if allowed to testify the same would be an affront to the principles of fair hearing under Article 50 of *the constitution*. He urged the Court to disallow the application.
4. On her part Ms. Jepchumba Tanui for the 2nd Defendant/Respondent while associating herself with the submissions of Mr. Bundotich Korir Learned Counsel and Mrs. Koech Lelei Learned Counsel urged the Court not allow the application as that would be tantamount to allowing new evidence mid trial, and she placed reliance on the decision in the case of Raila Odinga and 3 others vs IEBC & 3 others, on the need for strict compliance with timelines.
 5. In a brief rejoinder, Mr. Melly Counsel for the 1st Defendant/Applicant submitted that the application was made in good faith and that the suit having commenced under Originating Summons Order 37, was silent on filing of witness statements. He argued that interest of justice will be served with allowing for a fair trial under Article 50.
 6. I have considered the application and the law and the Court is being asked to exercise its discretion.
 7. The application herein is made for testimony of the party himself and not additional witnesses.
 8. In the Sendy decision as well as the Raila Decision, the same related introduction of additional evidence and witnesses, whereas herein the evidence to be adduced is already in the form of affidavits within the party's knowledge.
 9. It is true that the directions for conversion of Replying Affidavit are issued under Order 37, hence the submission that under Order 7 Rule 5 the witness statements ought to be filled together with the Defence is true but applicable to a suit filed by way of a plaint.
 10. Whereas the Defendant ought to have filed the statement well in advance so as to give the opponent a chance to know the defence case, the submission that replying affidavits on record now defence had already been filed and that the witness statement to be filed mirror the said Replying Affidavits on record, shall form the basis for the issue for determination.
 11. The issue for determination is whether or not allowing filing of the witness statement shall cause prejudice and to whom?
 12. On prejudice, as claimed by the Respondent I find that the statement to be introduced as submitted by the Applicant mirrors the affidavits, already on record hence the Respondent have at least knowledge of what the Defendant shall testify which in any event shall be subjected to cross – examination, however if the Defendant/Applicant shall not testify in his case, yet he filed his documents and replying affidavits/ defence, he will be prejudiced as he will not be able to defend his case.
 13. Article 50 of *the Constitution* grants parties to matters the right to fair hearing and a Defendant who has filed a Defence and documents has a legitimate expectation to be heard on the same.
 14. I allow the application for the Defendant to file a witness statement on the conditions that;
 - i. The witness statement shall contain only the issues raised in the previous affidavits filed by the Defendant and the Plaintiffs' Counsel shall be at liberty to object to any new issues introduced in the statement.
 - ii. The statement shall be served to the parties forthwith so as to prepare for the witness to be heard at a later date.
 - iii. The Plaintiff shall be at liberty to call a rebuttal witness and/or evidence should they consider the same necessary at the next hearing.



RULING DATED AND DELIVERED AT KAPSABET THIS 23RD DAY OF OCTOBER, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of; -

Mrs. Koech Lelei for the 1st Applicant

Mr. Korir for the 2nd Applicant

Mr. Melly for the 1st Respondent

Ms. Tanui for the 2nd Respondent

