



**Momanyi & another v Ongwae & 3 others (Environment & Land Case E007 of 2023) [2024] KEELC 6932 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE E007 OF 2023**

**M SILA, J**

**OCTOBER 23, 2024**

**BETWEEN**

**SAMUEL MOKAYA MOMANYI ..... 1<sup>ST</sup> PLAINTIFF**

**STANLEY MEMBA MOKAYA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KEVIN ON'GERA ONGWAE ..... 1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**THE KISII COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. (Application by the plaintiffs to be allowed to reopen their case and adduce additional evidence; plaintiffs having presented their case and matter awaiting defence hearing; plaintiffs stating that they have come across additional documents which they wish to adduce as part of their evidence; application opposed; principles to be considered; application allowed but subject to payment of costs and liberty given to defendants to also file additional documents and witness statements if necessary)
2. The application before me is that dated 31 July 2024 filed by the plaintiffs. What the plaintiffs want is to set aside the order closing their case, and for them to be allowed to file a supplementary list of documents and witness statements and further testify. In a nutshell they want their case reopened so that they can adduce additional evidence. The application is opposed.
3. To put matters into context, the plaintiffs/applicants commenced this suit through a plaint filed on 5 June 2023. The plaintiffs averred to be the rightful proprietors of the land parcel Kisii Municipality/ Block I/185 which is a leasehold title. They filed suit because they came to learn that the 1<sup>st</sup> defendant/respondent also appears to have title to the same land. In the suit, they ask for orders inter alia that



- they be declared the rightful proprietors of the leasehold interest in the suit property and a permanent injunction to restrain the 1<sup>st</sup> defendant from it. In the plaint, they elaborated that they had great difficulty finding out about the second title and they in fact needed to file suit to compel the Land Registrar to supply them with the particulars of registration thereof.
4. Together with the plaint, the plaintiffs filed their list of witnesses, which only specifically listed the 1<sup>st</sup> plaintiff Samuel Mokaya Momanyi, and ‘any other witness with leave of court.’ There was an accompanying witness statement of the said Mr. Momanyi. There was also filed the plaintiffs’ list of documents which had a total of 18 documents copies of which were supplied. These documents were also alluded to and explained in the witness statement of Mr. Momanyi.
  5. The 1<sup>st</sup> defendant filed a defence more or less refuting the claims of the plaintiffs and asserting to be the rightful proprietor of the disputed property, having purchased the suit property for value. Together with the defence, there was filed a list of witnesses having two witnesses, with the accompanying witness statements and also a list of documents together with the documents attached.
  6. Contemporaneously with the plaint, the plaintiffs had filed an application for injunction which was compromised on 26 June 2023 with an order of status quo. I then fixed the matter for pretrial on 28 September 2023 and gave directions for parties to file their statements and documents within 30 days. On 28 September 2023 counsel for the plaintiffs affirmed that they have complied in full and were ready to take a hearing date though she decried that she had not received the documents of the 1<sup>st</sup> defendant. I again fixed the matter for mention on 2 November 2023. On that day counsel for the plaintiffs and counsel for the 1<sup>st</sup> defendant confirmed that they had fully complied and were ready to take a hearing date. I fixed the case for hearing on 19 March 2024.
  7. On 19 March 2024, hearing commenced with the plaintiffs calling Mr. Momanyi as the sole witness. He gave his evidence, produced the documents in the list of documents as his exhibits, and he was cross-examined, and re-examined. After he had completed his evidence, counsel for the plaintiffs pronounced that that was the close of the plaintiffs’ case. I ordered the plaintiffs’ case as closed and adjourned to 5 June 2024 for defence hearing. I did not sit on 5 June 2024 as I was on leave and the matter was adjourned to 16 October 2024 for defence hearing. Before that day, this application was filed. I have already pointed out that it seeks reopening of the plaintiffs’ case. As far as I can see, the main ground upon which the application is based is that the 2<sup>nd</sup> plaintiff had in his custody relevant documents which he never shared with his counsel and which had been mislaid and forgotten altogether, and were located after the hearing of the plaintiffs’ case.
  8. The application is supported by the affidavit of the plaintiffs. In his affidavit sworn on 31 July 2024, the 1<sup>st</sup> plaintiff deposes that the 2<sup>nd</sup> plaintiff requested him to engage counsel and supply him with the documents he had in his possession as he was the one who generally used to keep the documents relating to the suit property. After hearing the suit, the 2<sup>nd</sup> plaintiff, was on 12 May 2024 going through his personal effects, when he came across additional documents. On 13 May 2024, he called his counsel and shared the documents and he was advised that it may be important for an application to reopen the case to be made. He believes that it will be in the interests of justice for the application to be allowed. The second affidavit, that of the 2<sup>nd</sup> plaintiff, more or less repeats that of the 1<sup>st</sup> plaintiff. He deposes that he was going through his personal effects on 12 May 2024 when he found some more documents. There is attached a list of additional witnesses, having the 2<sup>nd</sup> plaintiff as the additional witness, with his statement attached. There is also attached the additional documents which more or less constitute documents related to a charge that they say they had over the suit property and rates payment. In essence the 2<sup>nd</sup> plaintiff now wishes to also testify in the matter and give evidence related to the charge and payment of rates.



9. The 1<sup>st</sup> defendant filed a replying affidavit to oppose the motion. He inter alia deposes that the application is ambiguous as it seeks open ended orders. He questions the drafting of the application which seeks a prayer to adduce additional documents and reopening and rehearing of the case de novo. He believes that the application is made too late in the day which lateness has not been explained. He deposes that there is no good explanation why the additional documents were not filed with the rest of the documents. He does not believe that the applicants stumbled on the documents two years after filing suit. He also does not think that the additional documents will add value to the case. He avers that the 2<sup>nd</sup> plaintiff cannot be a witness to the case as he authorized the 1<sup>st</sup> plaintiff to act, plead and represent him, and he was also in court when the 1<sup>st</sup> plaintiff testified thus disqualified from giving evidence. He is not convinced that the application meets the threshold of adducing additional evidence.
10. I took in the submissions of both Mr. Nyamurongi learned counsel for the applicants, and Mr. Masore Nyangau, learned counsel leading Mr. Bosire Gichana, for the 1<sup>st</sup> respondent. I acknowledge the industry that counsel put in their arguments alongside the authorities that they supplied.
11. This is an application to have the plaintiffs' case reopened so that they can adduce additional evidence. I do not think that there is any ambiguity in what the plaintiffs seek. The 2<sup>nd</sup> plaintiff indeed wishes to now testify as the second witness and intends to produce more documents to support their case. If allowed, I wouldn't think that the 2<sup>nd</sup> plaintiff would be disqualified from testifying for reason that he was in court because he is a substantive party and has every right to be in court to see how his matter progresses.
12. On discovery of documents and witnesses, the standard procedure as set out in the [Civil Procedure Rules](#) is that the plaintiff needs to file his documents and statements at the time that the plaint is filed. This is set out in Order 3 rule 2 which provides as follows :

Documents to accompany suit [Order 3, rule 2.]

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.

13. It will thus be seen from the foregoing that the plaintiff is supposed to file his intended documents and witnesses when filing suit. He could however supply them at least 15 days to the date given for a pretrial conference.
14. We have of course passed this stage, and at the pretrial, the plaintiffs confirmed that whatever they had supplied would suffice at the hearing of the suit. We indeed proceeded on that basis with the plaintiffs closing their case. From the supporting affidavits, they aver that they stumbled across additional evidence on 12 May 2024 when the 2<sup>nd</sup> plaintiff was going through his personal effects. Can the plaintiffs be allowed to reopen their case at this stage ?



15. Authorities reveal that the court has discretion to allow a plaintiff to reopen his case and adduce additional evidence. In fact additional evidence can even be adduced at the appeal stage. I was indeed supplied with the principles that an appellate court would allow additional evidence to be availed at the appellate stage and reference made to the case of *ERI Limited v Equitorial Commercial Bank*, Kisumu Civil Appeal No. 122 of 2017 wherein the case of *Mzee Wanje & 93 Others v A.K Saikwa & Others* (1982-88) 1 KAR 462 was cited with approval. In the latter case, it was held that the following principles will be considered, being :-
- a. It must be shown that the additional evidence could not be obtained with reasonable diligence for use at the trial;
  - b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
  - c. The evidence must be such as it presumably.

In the same case, a cautionary statement was made, that the rule is not intended to enable a party who has discovered fresh evidence to import it and neither is it intended to aid a litigant who has been unsuccessful at trial to patch up his weak points or fill in gaps in evidence.

16. I appreciate why the principles outlined in adducing additional evidence on appeal are brought in an application such as this and I am persuaded that they are principles that can be taken into account when a court assesses an application to adduce additional evidence after a party has testified. However, I would think that the liberty to allow a plaintiff adduce additional evidence, when the defendant is yet to testify, cannot be as stringent as leeway given to adduce additional evidence on appeal, as in this instance the defendant is yet to adduce his evidence and can be allowed liberty to also expand his witnesses or documents to counter whatever new evidence the plaintiff may present. That is not to say, that applications such as the one before court should be allowed as a matter of course. I had, in the case of *Johana Kipkemei Too v Hellen Tum* (2014) eKLR dealt with an application to adduce additional evidence and I held thus :

There is no provision in the rules that permits the Court to accept a list of witnesses or documents filed outside the time lines provided in order 3 rule 7 and order 7 rule 5. The provisions of order 3 and order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the *Constitution* under article 50(1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.

The Court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the Rules. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 others v IEBC & 3 others*, Supreme Court of Kenya, Petitions Nos 3, 4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

This however is not to say, that the Court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under



the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of article 159(2)(d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.

17. In the above case, I did not allow the application as it was an application seeking to adduce new witnesses at the defence stage after the plaintiff had already testified and closed her case.
18. A court should try as much as it can, within the parameters permitted by law, and taking into account any prejudice to the other party, allow each party to present their evidence in full for litigants only have one chance at conducting their case. But parties also have a duty to adhere to the rules as drawn in the *Civil Procedure Rules*, for these rules are aimed at delivering the overriding objective in Section 1A of the *Civil Procedure Act*, which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
19. It is of course stretching the rules to accept an application to adduce additional evidence, and therefore courts should be slow in allowing them, otherwise there is risk of a party waiting to see how the first hearing has progressed, then try and fill in the gaps by applying to adduce additional evidence, when the defendant had already prepared his case based on what the plaintiff affirmed would be the evidence that he will produce. But courts also are the repository for justice and where possible, should allow parties to adduce their evidence in full without shutting them out.
20. Courts will inevitably have to decide such applications on a case by case basis depending on the reasons given and also taking into account any prejudice that the defendant is bound to suffer. Of course, the further the trial has progressed, I believe the more difficult it will be for a party to be allowed to adduce additional evidence. For example, if the defence case has already commenced it will need really special circumstances for the court to be persuaded to allow the reopening of the plaintiff's case in order to adduce additional evidence or be persuaded to allow undiscovered evidence by the defence. Whatever the case, the court must try its best to see to it that parties avail all their evidence and that both contestants are accorded a fair trial. At the end of it all it falls on the discretion of the court weighing the scales of justice and considering the reasons given for failure to adduce the additional evidence.
21. In our case, the reason given is that the 2<sup>nd</sup> plaintiff came across the additional evidence when going through his personal effects on 12 May 2024. I certainly cannot vouch that this is the truth but I will give him benefit of doubt on that. I see that the documents sought to be produced may be material to the case and I will allow the plaintiffs opportunity to present them at trial. I have also taken into account that the defence is yet to open their case and any prejudice to the defence can be counterbalanced by the court allowing the defence opportunity to also file a further list of documents and an additional list of witnesses if they are inclined so to do. That is not to say that there is no prejudice to the defendants at all. There is an element of prejudice as the defendants are more or less being returned back to a bridge they believe they had already crossed but I think this can be compensated by an award of costs. The 1<sup>st</sup> defendant certainly instructed counsel on the basis of what the plaintiffs had presented and must



have incurred costs in instructing counsel to appear at the hearing and also to oppose this application. He will have to reinstruct his counsel to come back to court to continue with the case of the plaintiffs when he would have only limited instructions to proceeding for defence hearing. He may also incur additional expenses and costs in reviewing the new documents and evidence that the plaintiffs now wish to adduce. I think the 1<sup>st</sup> defendant deserves to be compensated by an award of costs.

22. Given the nature of the case and the wealth of documents sought to be adduced, in exercise of my discretion, I will allow the application, but this will be subject to payment of compensatory costs of Kshs. 100,000/= to be settled within the next 30 days. If the applicants cannot make good the costs then I am afraid that this application will stand dismissed. If they abide by the settlement of the award of costs, then they can formally file their additional documents and statements within the similar period of 30 days. If they settle the costs of Kshs. 100,000/= I think this will also suffice as costs of the application but if they do not settle the costs then the application will stand dismissed with costs and we will proceed from where we had reached. If the applicants abide by the orders and file the additional documents and statements as directed above, I will give liberty to the defendants to also file any additional statements and/or additional documents within the next 60 days.
23. Orders accordingly.

**DATED AND DELIVERED THIS 23 DAY OF OCTOBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Ms. Kebungo for the plaintiff instructed by M/s Nyamurongi & Company Advocates;

Mr. Masore Nyangau leading Mr. Bosire Gichana instructed by M/s Bosire Gichana & Company Advocates, for the 1<sup>st</sup> defendant;

Mr. Wabwire, State Counsel, for the 3<sup>rd</sup> & 4<sup>th</sup> defendants

Court Assistant – David Ochieng’.

