



**Okwara v Ouma (Environment & Land Case 175 of 2017)
[2024] KEELC 13392 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 175 OF 2017
BN OLAO, J
NOVEMBER 13, 2024**

BETWEEN

WILLEX AGENYA OKWARA PLAINTIFF

AND

PETER OUMA DEFENDANT

RULING

1. In the case of Charles Wakhu Otokoma -v- Joyce Malala & 6 Others 2020 eKLR, I stated the following with regard to the need for the parties to file their witness statements and documents in time as required by the rules of procedure:

“In order to ensure an orderly way of conducting the trial process, parties are required to disclose their cases at an early stage. This ensures that there are no delays or ambush of a party and also promotes the expeditious disposal of cases while minimizing costs. That is why under Order 3 Rule 2 of the Civil Procedure Rules, the plaintiff is required to file a verifying affidavit, list of witnesses and their statements and copies of the documents to be relied upon during the trial. Similarly, the defendant is obliged under Order 7 Rule 5 of the Civil Procedure Rules to file the same documents together with his defence and Counter – Claim, if any. Before the pre – trial conference, statements may be filed with leave of the Court. Thereafter, all the parties will have disclosed their respective cases so that the trial can proceed in a seamless manner. All this is geared towards ensuring a fair trial as guaranteed under Article 50(1) of *the Constitution*. However, these are pre – trial directions and in ensuring that justice is administered without undue regard to technicalities as provided under Article 159(2) (d) of *the Constitution*, the Court can exercise its discretion in allowing a party to file fresh statements and documents but in so doing, no prejudice should be occasioned to either party. Each case must therefore be decided on its own peculiar circumstances”.



Similarly, in the case of Marcus Kibuku Nimrod & Another -v- Nussy Kuthii Justus 2017 eKLR, I expressed myself as follows:

“It is instructive to note that neither Order 3 nor Order 7 of the Civil Procedure Rules prohibits the trial Court, upon application, from accepting late filing of statements or documents sought to be relied upon. In my view, and in keeping with Article 50 of *the Constitution* which provides for a fair hearing of any dispute, a trial Court is not barred from allowing a party, with leave, to introduce new statements and documents that were not previously filed and served as mandated by the provisions of Order 3 and Order 7 of the Civil Procedure Rules because the primary duty of the Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective claims. Each case will however be decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party.”

I am again faced with the same spectre in these proceedings.

2. When this case came up for hearing on 9th October 2024, Mr Were counsel for the plaintiff drew the court’s attention to the fact that the Defendant had filed and served him with another affidavit and annexures thereto yet appearances had been filed on 15th February 2016 and on 3rd July 2018, the parties had been allowed to file further documents. That this case has come up for hearing several times and when it came up for hearing on 5th November 2020, Mr Wanyama counsel for the Defendant had also served him with another list of the Defendant’s witness statement dated 3rd November 2020.
3. That on 22nd June 2022, the Defendant sought leave to file further documents which the plaintiff did not oppose and the suit was set for hearing on 15th February 2023. Then the defendant sought leave to amend the defence which was granted and no indication was given that the defendant would be filing further documents.
4. Mr. Were saw this as a calculated move to delay this case by filing documents some of which are infact already filed and there is no reason why they are being filed at this late stage. Counsel urged the Court to strike them off from the record.
5. In response, Mr Wanyama counsel for the defendant while conceding that the documents had been filed late, he added that this was done in good faith and following the amendment of the defence, it was necessary to file further documents.
6. Counsel added that this court must also consider the hardship of the defendant because some of the documents filed relate to agreements dated way back in 1978 and the defendant has been sickly since 2023 and it was therefore difficult to coordinate his case. Assistance had to be sought from the Lands Department and it was only on 4th October 2024 when the Department availed a letter to the defendant which is crucial evidence. The plaintiff will not be prejudiced since he has admitted that most of the documents are not new having been filed earlier.
7. In his rejoinder Mr Were stated that the defendant has already been indulged 4 times previously and equity aids the vigilant. That every time the defendant is granted leave to file further documents, he does so late. Even the Land Registrar’s letter dated 4th October 2024 was only obtained following a request made on 3rd October 2024. The plaintiff will therefore be prejudiced.



8. Order 7 Rule 1 of the Civil Procedure Rules provides that:

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

Rule 5 goes on to add that:

“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.”

The law is therefore clear as to what the defendant needs to file and when in support of his defence and counter-claim. The same duty applies to the plaintiff under Order 3 Rule 2 of the Civil Procedure Rules. However, Section 95 of the [Civil Procedure Act](#) allows the Court to extend time. It reads:

95: “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

I shall also be guided by Article 159 (2) (d) of [the Constitution](#) which states that:

“Justice shall be administered without undue regard to procedural technicalities.”

And also Article 50 (1) which provides that:

50(1) “Every person has the rights to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

In my rulings delivered in the case of Marcus Kiranga Nimrod -v- Nussy Kuthia Justus (supra) on 28th July 2017 and also in the case of Joseph Mumero Wanyama -v- Jared Wanjala Lyani (supra) delivered on 27th May 2020, I took the view that a party can be allowed to file documents and statements late in the trial but that will depend on the circumstances of each case including the stage at which the trial has reached and the prejudice, if any, that will be caused to the other party.

9. In this case, it is common ground that notwithstanding the fact that this suit was filed in 2017, it has not commenced hearing due to various reasons. The plaintiff has therefore not testified or called his witnesses. The defendant has also not commenced his defence. The court has been informed that some



of the documents which the defendant wants to introduce are in fact already part of the documents filed herein. It is true that the defendant has previously been indulged in this case by being allowed to amend his defence and file other documents. Since the plaintiff is yet to commence or even close his case, no prejudice will be caused to him by allowing the filing and serving of fresh statements and documents because he can be granted leave to file any additional documents to rebut any documents filed by the defendant. The defendant and his witnesses will of course also be subject to cross-examination on those documents. The court should always strive towards giving the parties an opportunity to present before it all available and relevant documents and other evidence so that justice is seen to have been served. That is the primary duty of any court or Tribunal called upon to determine disputes between parties. Therefore, unless there is evidence of fraud or any intention to overreach or steal a march over the other party, the cause of justice will best be served by allowing all the parties to play their cards by placing before the court or Tribunal all available evidence. In any event, in the course of rendering its decision, the court or Tribunal will have the last say as to what is or is not relevant evidence in the dispute.

10. In the case of *Dhl Worldwide Express Kenya Ltd -v- Andrew Mutuma C.a. Civil Appeal No E526 of 2022* [2024 KECA 938 KLR], the trial judge has declined to accept the filing of a supplementary list of documents by the Appellant yet leave had previously been granted to the Respondent to file documents on the eve of the hearing of the case. In allowing the appeal, the court had this to say at paragraph 29 of its judgment.

29: “Looking at the totality of the of the foregoing, we find that the learned judge injudiciously exercised her discretion in refusing to admit the appellants’ supplementary documents. We find that the application complies with the guiding principles set out by our apex court in *Mohammed Abdi Mohamud -v- Ahmed Abdulahi Mohamed & 3 Others* [2018] (supra).”

In the said case of *Mohammed Abdi Mohamud -v- Ahmed Abdulahi Mohamed & 3 Others*, Supreme Court Petition No 7 Of 2018 As Consolidated With No 9 of 2018 [2018 eKLR], the Supreme Court while considering the interpretation of Rule 26 of its rules, laid down the following principles in considering the filing of additional evidence:

- 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 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 addressed 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 cause of trial is an essential consideration to ensure fairness and due process;”
- h. “where the additional evidence disclose 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, full 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.”

The Supreme Court was of course considering an application for additional evidence at the appeal stage which is not the case in the matter now before me. Also, the Supreme Court appreciated that it has very limited mandate to allow parties before them to re-open their cases for admission of fresh evidence.

11. The available jurisprudence suggests, however, that in order to do substantive justice to the parties in the matter before it, the court should lean towards allowing additional evidence especially in a case such as this one where the trial has not even commenced and where the other party will have adequate opportunity to rebut such additional evidence. In the circumstances of this case, that would be the most pragmatic route to take as no prejudice will be caused to the defendant.
12. In the circumstances, having heard counsel on the oral application to admit the defendant’s affidavit dated 7th October and the annexures thereto, I issue the following orders:
 1. The defendant’s affidavit dated 7th October 2024 together with the annexures thereto be deemed as duly filed and served.
 2. The defendant shall have 14 days from the date of this ruling to file and serve any further statements or documents.
 3. The plaintiff shall have costs of this application agreed or taxed.
 4. Hearing shall proceed on 25th February 2025 as earlier fixed.

RULING DATED, SIGNED AND DELIVERED ON THIS 13TH DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

13TH NOVEMBER 2024

