Mutwol v Mutwol & 4 others (Environment & Land Case 37 of 2020)
[2024] KEELC 14133 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14133 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 37 OF 2020

FO NYAGAKA, J

DECEMBER 18, 2024

BETWEEN

PHYLIS JEROTICH MUTWOL ..... PLAINTIFF

AND

EMMY JEPKEMOI MUTWOL ..... 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORTATION ..... 2ND DEFENDANT

COUNTY LAND REGISTRAR TRANS NZOIA COUNTY ..... 3RD DEFENDANT

SARAH CHEPTENGENY BUSIENEI ..... 4TH DEFENDANT

MESHACK KIMUTAI KETER ..... 5TH DEFENDANT

RULING

1. This Court could have dismissed the instant Application summarily, without giving any reasons thereof, but for reasons that the Plaintiff/Applicant has on recent previous occasions made baseless allegations against the Judge handling the matter, and anybody else not privy to such allegations may not understand the basis of any 'noise' that may arise if the Court were to proceed in that manner, it is in the interest of both the Plaintiff herself and all the parties herein to understand the reasons for the determination. That said, the Court ends this introduction by noting that the instant application is a non-starter which any basic mind looking at it, even casually, will not hesitate to so conclude. The main reason is, and this Court has stated in so many other decisions not related to this matter, that parties will always lose otherwise good cases because of poor pleadings or lackadaisical drafting of pleadings. It is now left for everyone to have a look at the application and move with the Court towards its dismissal.

2. By an application dated 19/11/2024 the Plaintiff moved this court under a Certificate of Urgency dated the same date. She brought the Application and Articles 48, 50(1) and 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, 3B and 63(e) of the Civil Procedure Act, Chapter 21, Laws of Kenya,

Order 42, Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. She sought the following orders:-

1. **...spent**

2. There be stay of the ruling delivered on 6th November 2020 (wrongfully dated 10th July 2024) and any further proceedings in the matter pending interparty (sic) hearing and determination of this application.

3. There be stay of the ruling delivered on 6th November 2020 (wrongfully dated 10th July 2024) and any further proceedings in the matter pending interparty (sic) hearing and determination of this application.

4. **Cost of their application is awarded to the plaintiff applicant.**

2. The application was based on fifteen (15) grounds. The first one was that the matter was set down for further defence hearing on 30/10/2024. The first defendant took to the witness box on the material date for the purpose of giving her testimony. While being led by learned counsel in examination-in-chief she sought to produce a bundle of documents as listed in her List of Documents. The Applicant, through her counsel raised an objection to the production of contentious documents not authored or made by the 1st defendant. These were a Consent to transfer from Sarah Busienei to Emmy Mutwol; Sale agreement between Sarah Busienei to Emmy Mutwol; Consent to transfer from Emmy Mutwol to Meshack Keter; and Sale agreement between Emmy Mutwol and Meshack Keter.

3. The Court rendered a ruling on 06/11/2024 dismissing the objection. The ruling was cunningly and mischievously backdated to 10/07/2024 with a view to defeating the applicant's rights of appeal by foreclosing the period for filing a notice of appeal. Nonetheless, the applicant was dissatisfied with the ruling for being out of sync with the attendant law and on production of documents. She lodged a Notice of Appeal dated the 11/11/2024 within the 14 days envisaged under the Court of Appeal Rules, 2022. She requested a Certified Copy of the court proceedings through a letter dated 11/11/2024. The Notice of Appeal and the Letter for Proceedings were served on the defendants on 13/11/2024 at 5:54 PM as envisaged under the Court of Appeal, Rules, 2022. The suit was fixed for further hearing on 20/11/2024, barely a day from the date of the Application.

4. There was an imminent risk that the contested documents would be admitted in evidence if the matter proceeded to hearing on the material date, thereby rendering the intended appeal nugatory, noting that the judgment of the Court of Appeal would serve no utilitarian purpose after admission of the documents. The irregular admission of the contested documents would accord the defendants an unjustified opportunity to steal a match from the plaintiff, noting that the resolution of the dispute between the parties herein would turn on the authenticity. Of the imprisoned documents, there was an imminent risk that the applicant would lose her parcel of land worth Kshs. 75,000,000/= at the time, if the unpinned documents were admitted without an effective opportunity to interrogate their authenticity. The Applicant would be deprived of her right to a fair hearing if the matter proceeded for determination before the intended to appeal, which would constitute irreparable harm.

5. The Application was opposed through a Replying Affidavit sworn by the 1st defendant on 20/11/2024 and Grounds of Opposition dated 25/11/2024 which were filed by the third defendant.

6. In the Affidavit in Reply the first Defendant deposed that the application was an abuse of the process of the Court; it did not meet the threshold for the grant of the orders sought; staying of proceedings was a drastic measure which usually be granted in rare cases; the interest of justice militated against the grant of the orders sought; the Plaintiff would be free to pursue the Intended Appeal while the suit

was being heard; the matter would not in any way have a bearing on the Intended Appeal hence the application ought to be dismissed.

7. On its part of the 3rd Defendant stated in the Grounds of Opposition that the application was frivolous, mischievous and an abuse of the process of the court, devoid of merits and ought to be struck out or dismissed in limine. The applicant had not disclosed the substantial loss she stood to suffer if stay of the proceedings was not granted under Order 42 Rule 6 of the Civil Procedure Rules. The Notice of Motion had been overtaken by events as the documents objected to had already been produced in evidence on 20/11/2024 as the 1D.Exhibit 3, 1D.Exhibit 4, 1D.Exhibit 5 and 1D.Exhibit 8. There were no exceptional circumstances disclosed in the Application to warrant the grant of stay of proceedings pending an interlocutory appeal. The Intended Appeal was not arguable as the applicant not only failed to annex the draft Memorandum of Appeal to outline the grounds forming the intended appeal but also did not show that he contested production of the alleged documents during Pretrial Conference or that she issued Notices to Produce to the makers thereof. The scales of justice and the appropriate utilization of precious limited judicial time militated against the grant of stay of proceedings. In any event a stay of proceedings pending appeal was likely to lead to delays in the resolution of the dispute contrary to Articles 47, 48, 50 and 159 of the Constitution. The Notice of Motion was a grope in the dark and meant to frustrate the resolution of the dispute. The applicant stood to suffer no prejudice as she had the right to cross-examine the witness on the documents and may also file an appeal against the resultant judgment.

8. The 4th defendant elected not to participate in the application.

9. The application was disposed of by way of written submissions. The plaintiff filed her submissions dated 13/12/2024. The first defendant filed his dated 19/11/2024. And the third Defendant filed its dated 12/12/2024.

Issue, Analysis And Determination

10 This Court has considered the application, the law and the rival submissions of the parties who elected to participate in the application. I am of the view that the only issues that commend themselves to me for determination are three, and an analysis of the last two will depend on the success or failure of the first one. Therefore, the court will determine the issues in the sequence hereunder. Further, the determination of the 1st issue will form a further basis for the Court to consider whether to analyze the parties' submissions as explain the law and facts or not. The first issue is whether the prayers sought pass the threshold of being worth for consideration on merit. The second is whether the application is merited. The third is who bears the costs of the application.

11. Before I begin the analysis, it is important to point out two vital facts herein. One is that the impugned Ruling delivered on 06/11/2024 followed an oral objection made on 30/10/2024. Whereas the "Footer" of all the pages bore the correct date of delivery, a typographical error at the end indicated the date of delivery as 10/07/2024. As soon as that error was brought to the attention of the Court the Court invited all parties to mention the matter for correction of the error in their presence, and it was done. Secondly, and as certainly as the 3rd Defendant indicated in the Grounds of Opposition, the Further Defence hearing proceeded on 20/11/2024 when the Plaintiff's learned counsel literary 'abandoned' (as the record and even Teams Platform recording show) the Court while in session in the process of handing the instant application at the first instance but in presence of counsel for the parties. Thus, the impugned documents were produced as per the directions of the Ruling.

12. As stated above, the first issue is whether the prayers sought pass the threshold of being worthy of further consideration.

13. I begin this analysis by restating the law regarding the importance of pleadings. It is trite that pleadings form the backbone of any case. Often courts have emphasized the point that many parties lose cases for reasons of poorly drafted pleadings. This is because a court is not permitted to redraft parties' pleadings to salvage either a case or claim that has not been put forth well or a defense not articulated properly. To do so would invite the court to descend into the arena of parties and take the parties' sides in the adversarial system as ours where it is supposed to be an impartial arbiter. What should always be left clear to all is that justice must not only be done but be seen to be done. One of the ways of doing so is to steer on course and listen to parties' cases while comparing the law and facts presented, however painful it may be for a party who has not followed the law. This includes failure to draft pleadings properly to capture a party's case. Why? Because drafting of pleadings is not a triviality. It also is not a defect that can be cured by or through the application of Article 159 of the Constitution of Kenya because it is not just a procedural defect but a substantive one.

14. What is a pleading? Section 2 of the Civil Procedure Act defines pleading as follows:-

> " pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;"

15. 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 the court held: -

> " Pleading in law means, written presentation by a litigant in a lawsuit 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.

16. That said, the importance of pleadings cannot be gainsaid. In Joshua Mungai Mulango & Another -vs- Jeremiah Kiarie Mukoma [2015] eKLR the Court of Appeal held as follows:

> " Parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs."

17. In Independent Electoral And Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 Others [2014] eKLR the Court of Appeal held:

> " ....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any one 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."

18. Additionally, in Hellen Wangari Wangechi -vs- Carumera Muthoni GathuA [2015] eKLR it was held:-

> " As parties are adversaries it is left to each 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 knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties themselves..."

19. Having laid the basis for the determination herein by giving the issue and the law, I now turn to the application of the law the applicant prayed. In Prayers 2 and 3 of the application the Applicant prayed that this court be pleased to order "...stay of the ruling delivered on 6th November 2020 (wrongfully dated 10th July 2024) and any further proceedings in the matter pending interparty (sic) hearing and determination of this application."

20. Granted that the merits of the application could be considered, what is the end result thereof? The prayers, if they were successful, would mean that from the date of filing of the application to when it was placed before the court to the time when the instant ruling is being made and the conclusion thereof, if the court were to find merit in the application then the Orders will automatically lapse at the penning down of the at the signing and delivery of this ruling. That being the case, basically the entire application has been spent by the time of the determination of the same. Since that is the case, then there is nothing for the Court to determine further. The best it can do is to mark the application as spent. But since parties have opposed their application the court will grant the parties who oppose it the costs of opposing the same. Essentially the application is lost. Therefore, the Court need not consider the merits of the second issue, and basically the application.

21. It also needs not consider the parties' submissions that were spiritedly put forth by the parties to support their positions as it would be a waste of judicial time. Therefore, the stay cannot be granted. I therefore direct that the parties file their submissions within the next 30 days, with the plaintiff being directed to file and serve his not later than the 22/01/2025 and the defendants not later than 22/01/2025. If any party will default in filing their submissions on time, the court will proceed to deliver the judgment, absence of the parties' submissions notwithstanding. This is based on the understanding of the law regarding the filing and consideration of submissions. As was stated by the Court of Appeal decision of Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & AnotheR [2014] EKLR, their Lordships had this to say:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

22. Each party's submissions should not exceed six (6) pages of New Times Roman Font 12, 1.5 spacing. The matter shall be mentioned 23/01/2025 for purposes of giving a judgement date.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 18TH DAY OF DECEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Ms. Chelogoi Advocate----------for the Plaintiff

Wainaina Advocate-----for the 1st and 5th Defendants

M. W. Odongo SSc----------for the 3rd Defendant

Keter N. K. Advocate----------for the 4th Defendant