



REPUBLIC OF KENYA



**Ayado v Oliech & another (Land Case E002 of 2023)
[2024] KEELC 14081 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
LAND CASE E002 OF 2023
GMA ONGONDO, J
DECEMBER 17, 2024**

BETWEEN

GRACE ACHIENG AYADO PLAINTIFF

AND

LAWRENCE OCHICH OLIECH 1ST DEFENDANT

BENARD WAFULA WANGWE 2ND DEFENDANT

RULING

1. This ruling is in respect of two applications namely;
 - a. The 2nd defendant's application by way of a notice of motion dated 17th October 2023 through Otieno Ochich and Company Advocates, the first application herein.
 - b. The plaintiff's application by a Notice of motion dated 24th July 2024 through O.P Ngoge and Company Advocates, the second application herein.
2. In the first application originated under, inter alia, sections 1A, 1B and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya, Order 2 Rule 15 (1) (d) and Order 8 Rules 1, 2 and 3 of the Civil Procedure Rules 2010, the orders sought are;
 - a. The amended plaint therein stated as having been amended on 4th October 2023 be struck out and/or be expunged from the court record.
 - b. The reply to the 2nd defendant's statement of defence herein dated 3rd October 2023 be struck out and/or be expunged from the court record.
 - c. The Plaintiff's List and bundle of documents herein dated 3rd October 2023 be struck out and / or be expunged from the court record.



- d. The 2nd defendant be accorded an opportunity to prosecute his preliminary objection in respect of which the notice was duly given vide paragraph 19 of the 2nd defendant's statement on Defence herein dated 4th October 2023.
 - e. The 2nd defendant's preliminary objection in respect of which the notice was duly given vide paragraph 19 of the 2nd defendant's statement of defence herein dated 4th September 2023 be prosecuted on the basis of the suit as originally filed.
 - f. The 2nd defendant be awarded the costs of this application.
 - g. Further or other order that this Honourable court may deem just in the circumstances.
3. The said application is founded upon an affidavit of 27 paragraphs sworn on even date by the 2nd defendant's counsel together with the documents marked as 'GOO-1 to GOO-5' annexed thereto as well as grounds (a) to (y) stated on it's face. The grounds include;
- a. The plaintiff filed the mended plaint herein on 5th October 2023, which Amended plaint is stated as having been amended on 4th October 2023.
 - b. In the light of paragraph (c) hereinabove, pleadings closed on or about 28th September 2023, the said date being the fourteenth (14th) day following the service of the 2nd defendant's statement of defence as aforesaid.
 - c. The plaintiff filed her said amended plaint after the close of pleadings aforesaid without the requisite leave of the court. Indeed, it is expressly stated on the face of the said Amended Plaint that it is amended under "ORDER 8 RULE 1"
 - d. The plaintiff's said reply to the 2nd defendant's statement of defence was also filed after the close of pleadings aforesaid without the requisite leave of the court.
 - e. The said Plaintiff's List and bundle of documents was filed in court in contravention of the law, an Order 3 Rule (2) (d) of the Civil Procedure Rules, 2010 requires that a party must file his list and bundle of documents at the same tie with the suit.
4. In the replying affidavit sworn on 29th May 2024, the plaintiff averred, inter alia, that the first application was served belatedly via email on 29th May 2024 at 1.44 PM by use of incorrect email. That the delay thereof was deliberate aimed at subverting justice. That the 2nd defendant did not reply to the plaintiff's letter dated 5th October 2023 regarding service via email ngogeop@yahoo.com. That therefore, the first application be dismissed as it is an abuse of the process of the court.
5. The second application is commenced under sections 1A, 1B and 3A (supra), Rule 9 of the Advocates Practising Rules, Articles 10, 25, 48 and 50 of [the Constitution](#) of Kenya 2010, among other provisions of the law, for the following orders;
- a. Spent
 - b. Spent
 - c. The 2nd defendant herein and his son-Mr. George Otieno Ochich- who is also acting for his father in this matter as an Advocate in this proceeding contrary to Rule 9 of the Advocates Practising Rules be convicted and sentenced to civil jail for a term not exceeding 6 months without the option of a fine for flagrantly disobeying the orders granted by the Hon. Mr. Justice Ong'ondo herein on the 3rd June 2024 which orders had obligated them to produced



the documents being mentioned in the plaintiffs Notice to produce documents dated 27th May 2024 within 21 days.

- d. That the 2nd defendants' statement of defence as filed herein be struck-out and/or dismissed due to deliberate refusal to comply with the orders given by this Honourable court on the 3rd June 2024.
6. The anchorage of the second application is an affidavit of ten paragraphs sworn on even date by Peter O. Ngoge learned counsel for the plaintiff/applicant together with the annexed documents marked as PON 1 and PON 2 and the grounds which include;
 - a. That the plaintiff contends that by deliberate refusing to comply with the orders granted by the Hon. Mr. Justice Ong'ondo herein on the 3rd June 2024 the 2nd defendant herein and his son (Mr. George Otieno Ochich) are denying the Plaintiff/Applicant the Legal Right to be accorded fair hearing in this matter in contravention of Articles 10,25,27,48 and 50 of the Constitution of Kenya 2010.
 - b. That the Plaintiff contends that the documents being requested by the plaintiff vide the plaintiffs Notice to produce documents dated 27th May 2024 are not only meant to accord the plaintiff herein fair hearing but also meant to guide the Honourable Court understand the 2nd defendants case as pleaded on the backdrop of title documents attached to the 2nd defendants list of documents on record clearly showing that the 2nd defendant herein is the 1st Registered owner of the Parcel of land known as West-Kasipul/Kotieno-Kochich/727.
 7. In the replying affidavit sworn on 31st July 2024, the 2nd defendant opposed the second application and urged the court to dismiss it with costs. He averred, inter alai, that the application is false, contrary to Rule 9 of the Advocates Practice Rules as well as Articles 10, 25, 27 and 50 (supra) and not established or at all. That it is unnecessary, a waste of court's scarce and valuable time.
 8. Further, the 2nd respondent opposed the second application by grounds of opposition dated 31st July 2024 and stated that the orders of 3rd June 2024, were complied with. That the said application is misconceived, baseless, unfounded, ambiguous, confused, incapable of being granted, incompetent and not established a case of contempt thus, the same be dismissed with costs.
 9. The first and second applications were heard by way of written submissions pursuant to the orders of this court.
 10. By the submissions dated 17th June 2024, learned counsel for the 2nd defendant implored the court to allow the first application and disallow the second application which contravenes the law. That the plaintiff's pleadings and documents be expunged from the record as the amended plaint alters the position to the detriment of the 2nd defendant. That the reply to the defence was filed out of time without leave of the court. That the second application is prejudicial, incompetent, hopeless, lodged in bad faith and geared towards pre-empting, clogging and compromising the 2nd defendant's preliminary objection in the defence. Reliance was made on Order 2 Rule 13, Order 3 Rule 2, Order 7 Rule 18 and Order 8 of the Civil Procedure Rules to reinforce the submissions.
 11. Also, the 2nd defendant's counsel filed submissions dated 5th November 2024 referring to the second application, replying affidavit and grounds of opposition as well as the orders of 3rd June 2024. Counsel termed the second application baseless and unfounded in law, ambiguous and confused as to the orders sought. That paragraph 3 of the plaintiff's supporting affidavit sworn on 24th July 2024 shows the plaintiff aware of the 2nd defendant's response to the notice to produce documents. That the allegations relating to violation of court order and potential witness allegation is remote, far-fetched



- and unreasonable. Reliance was made on Tom Kusienya & others-vs-Kenya Railways Corporation & others (2013) KLR, termed the second application personal attacks, sideshow, diversionary tactic and abuse of court process hence, urged the court to uphold the first application and dismiss the second application with costs to the 2nd defendant.
12. Learned counsel for the plaintiff filed submissions dated 4th July 2024. It was submitted, inter alia, that the 2nd defendant's act is a mischievous act in contravention of the plaintiff's rights under Articles 10, 25, 27, 48 and 50 of *the Constitution* of Kenya 2010. That thus, the first application be dismissed with costs to the plaintiff.
 13. Further, the plaintiff's counsel filed submissions dated 25th October 2024 and made reference to the orders of 3rd June 2024. Counsel submitted that there was deliberate refusal by the 2nd defendant to comply with the said orders which forced the plaintiff to withdraw the 1st defendant from the case as per the notice of withdrawal dated 25th July 2024. He implored the court to allow the second application as the 2nd defendant is has an overriding legal and equitable right over the disputed parcel of land which is registered in the name of the 2nd defendant and the said counsel is a potential witness in this suit thus, in breach of Rule 9 of the Advocates Practising Rules. To buttress the submissions, counsel relied on the case of Francis Mugo & 22 others-vs-James Bress Muthee & 3 others (2005) eKLR on choice of counsel.
 14. Moreover, the plaintiff's counsel orally submitted on 6th November 2024 opposing the first application and termed it frivolous. He submitted that the amended plaint was filed without leave of the court and that by that time, pleadings closed. Counsel cited Order 8 of the Civil Procedure Rules 2010, among others, to fortify the submissions.
 15. Having considered the parties' respective applications, responses, pleadings and submissions, have the 2nd defendant and the plaintiff established that they are deserving of the orders sought in the first and second applications?
 16. By the first application, the 2nd defendant's lamented, inter alia, that the amended plaint herein was filed without leave of the court. That the same was lodged after closure of pleadings in this case.
 17. Close of pleadings is stipulated in Order 2 Rule 13 of the Civil Procedure Rules 2010 which reads;

The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counter claim, or, if neither served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.
 18. Further, Order 17 Rule 7 of the said Rules 2010 relates for subsequent pleadings including filing of reply within fourteen days after the defence.
 19. Notably, the plaint dated 25th July 2023 was lodged on 20th August 2023. The 2nd defendant's defence was filed on 4th September 2023 while the plaintiff's Reply to defence was filed on 3rd October 2023 at 15.36.08 hrs.
 20. The first application questions the plaintiff's amended plaint dated 5th October 2023. It was generated within fourteen days after the service of the amended plaint and aims to disallow the amendment as required under Order 8 Rule 2 (1) of the Civil Procedure Rules 2010.
 21. Order 8 (supra) governs amendment of pleadings. Rule 5 thereof provides for general power to amend pleadings for determination of the real matters in controversy in cases.



22. In paragraph 19 of the statement of defence, the 2nd defendant averred that the suit herein is statutory time-barred, incompetent, fatally defective, bad in law and an abuse of the court process. That the 2nd defendant thereby gave notice that he shall raise a preliminary to move this court to strike out the suit in its entirety on the basis of the aforesaid grounds.
23. It is pretty clear from the statement of defence that the 2nd defendant raised a preliminary to the suit on points of law for the court's attention in consonant with the case of Mukisa Biscuit Manufacturing Company Ltd-vs-West End Distributors (1969) EA 696, where the Court of Appeal held;

‘.....a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings.....Examples are an objection to jurisdiction of the court, a plea of limitation.....’
24. Order 2 Rule 5 of the Rules sets out instances of striking out of pleadings. In the present suit, the 2nd defendant's pleadings may be amended in view of the amended plaint filed timeously as noted in paragraphs 17, 18, 19 and 21 hereinabove in the interest of justice.
25. Regarding the second application, on 3rd June 2024, the court directed the 2nd defendant's counsel to produce the documents mentioned in the plaintiff's Notice of Motion dated 27th May 2024 within 21 days from that date. The court did so in the presence of the 2nd defendant's counsel. The plaintiff laments that the 2nd defendant deliberately refused to produce the requisite documents hence, he is in contempt of court. That the 2nd defendant's counsel is a potential witness in his father/the 2nd defendant, has equitable and legal interest in the subject matter of litigation hence, precluded from acting for him pursuant to Rule 9 of the Advocates Practising Rules.
26. The Reply to the Notice to produce documents dated 27th May 2024 was made within fourteen days from the date of the Notice. Paragraph 3 of the plaintiff's supporting affidavit sworn on 24th July 2024, shows that the plaintiff was aware of the 2nd defendant's response to the Notice to produce documents.
27. I note all the provisions of the law including Rule 9 of the Advocates Practising Rules pursuant to which the second application is originated alongside Kusienya and Francis Mugo cases (supra) herein. However, the plaintiff's counsel failed to demonstrate the allegedly violated court order with penal notice in the second application hence, the same application is inept and bad in law.
28. It is noteworthy that the right to be heard is fundamental and permeates our entire justice system; see Onyango Oloo-vs-Attorney General (1986-89) EA 456 applied in the case of James Kanyiita Nderitu and another-vs-Marios Philotas Ghikas and another (2016) eKLR.
29. This court underscores the importance of Articles 10, 25, 27 and 50 (supra) inclusive of the unlimited right to fair trial. So, the parties in this suit must be accorded fair opportunity to be heard which is a fundamental principle of justice as noted in Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639.
30. It is trite that it would be wrong and unjust to preclude any party from appearing including filing of pleadings and hearing of this suit in the obtaining circumstances; see Philip Chemwolo and another-vs-Augustine Kubende (1986) eKLR.
31. To that end, the first and second applications are devoid of merit and are hereby disallowed with no orders as to costs.
32. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 17TH DAY OF DECEMBER 2024.



G. M. A ONG'ONDO

JUDGE

Present;

1. Mr Otieno Ochich learned counsel for the 2nd defendant
2. F. Mutiva, court assistant

