



Gitata & others v Nairobi County Government & 4 others (Environment & Land Case 311 of 2010) [2023] KEELC 299 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 311 OF 2010**

**JO MBOYA, J
JANUARY 26, 2023**

BETWEEN

SIMON MWANGI GITATA & OTHERS PLAINTIFF

AND

NAIROBI COUNTY GOVERNMENT 1ST DEFENDANT

**BILACHA GALWE YAKARE, BONAYA BAKATA ARGAMO &
HASSAN LOLO LOCHE (BEING TRUSTEES OF HURUMA ISLAMIC
ASSOCIATION) 2ND DEFENDANT**

CABINET SECRETARY FOR LAND 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

Introduction and Background

1. Vide notice of motion application dated the September 23, 2022, the 2nd defendant/applicant has sought for the following reliefs;
 - i. The honourable court be pleased to set aside and expunge from the record the evidence and documents of the plaintiffs' witness, John Koyier Barreh.
 - ii. The costs of this application be provided for.
2. The instant application is premised and anchored on the various grounds which have been enumerated at the foot thereof. Besides, the application is supported by the affidavit of one Absalom Osodo, Advocate, sworn on the September 23, 2022.



3. Suffice it to point out that upon being served with the instant application, the plaintiff/respondent responded thereto *vide* the replying affidavit sworn on the November 7, 2022; and to which the deponent has annexed a bundle of documents, marked and serialized as annexure Smg 1.
4. Other than the foregoing, the rest of the defendants neither filed any replying affidavit nor grounds of opposition to the named application or at all.
5. Be that as it may, the application came up for hearing on the October 31, 2022, when the advocate for the respective parties agreed to canvass and dispose of the application *vide* written submissions.
6. Premised on the agreement by the advocates for the respective parties, the honourable court thereafter proceeded to and circumscribed timelines for the filing and exchange of the written submissions.
7. Nevertheless, despite various adjournments and indulgence being given to the plaintiffs and the rest of the defendants, same failed to file and serve their respective submissions.
8. However, the 2nd defendant/applicant duly filed her written submissions dated the November 21, 2022. For clarity, the written submissions herein form part and parcel of the record of the court.

Submissions By The Parties

a. Applicant's submissions

9. Learned counsel for the applicant has raised, highlighted and amplified two salient issues for due consideration and determination by the court. Firstly, learned counsel has submitted that the plaintiffs herein summoned and called one, namely, John Koyier Barreh as a witness and thereafter the named witness proceeded to and testified in the matter herein as PW2.
10. In addition, learned counsel has also submitted that the named witness also proceeded to and produced various documents, which were ultimately admitted in evidence on behalf of the plaintiffs herein.
11. Be that as it may, counsel has contended that the named documents which were produced before the court and in particular exhibit P5 at page 36 of the plaintiffs bundle constitutes an internal memo relating to the affairs of the 1st defendant herein.
12. To the extent that the impugned exhibits, touched and or concerned the affairs of the 1st defendant herein, counsel has added that the said document ought not to have been produced or admitted as an exhibit before the court, unless the witness could justify that same was lawfully and legally obtained.
13. Additionally, learned counsel has contended that the impugned document, which was admitted as exhibit P5, was procured and obtained by PW2, during the time when same was an employee of the 1st defendant.
14. Premised on the forgoing, learned counsel for the Applicant has thus contended that the named exhibits was therefore illegally obtained, or otherwise stolen by PW2. Consequently, counsel has added that given the manner in which the named document was obtained, same was therefore in admissible in evidence.
15. Secondly, learned counsel has further submitted that the impugned document, which has been admitted as exhibit P5, was/is a public document and hence its admission as an exhibit before the court was contrary to and in contravention of the provision of sections 35(3) and 80 of the [Evidence Act](#), chapter 80 laws of Kenya.



16. In respect of the contention that the impugned exhibits ought not to have been admitted, learned counsel has invited the attention of the honourable court to the decision in the case of *Okiya Omutatab Okoiti & 2 others v the Attorney General & 4 others* (2020)eKLR.
17. Finally, counsel has submitted that given the fact that the named document which is produced as exhibit P5 was procured and obtained illegally, both the evidence of PW2 and the named document, therefore ought to be expunged from the record of the court.

b. Plaintiffs'/respondents' Submissions

18. Though the plaintiffs/respondents had hitherto sought for and obtained indulgence from the honourable court to file and serve their written submissions, none was ever filed or lodged before court.
19. Nevertheless, when the matter came up for mention on the January 24, 2023, learned counsel for the plaintiff/respondent intimated to the court that same was keen to rely on the replying affidavit sworn on the November 7, 2022.
20. In a nutshell, counsel signaled that same would not be filing any written submissions.

Issues For Determination:

21. Having reviewed the application dated the September 23, 2022, the supporting affidavit thereto and having taken into account the replying affidavit sworn on the November 7, 2022; and upon considering the submissions filed on behalf of the 2nd defendant/applicant, the following issues do arise and are worthy of determination;
 - i. Whether the honourable court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the instant application.
 - ii. In the alternative, whether the applicant has indeed laid or established any sufficient basis or at all to warrant the reliefs sought at the foot of the application.

Analysis And Determination

Issue number 1

Whether the honourable court is seized and possessed of the requisite jurisdiction to entertain and adjudicate upon the instant application.

22. The 2nd defendant/applicant has mounted the current application and same has invited the court to (sic) set aside and expunge from the record of the court, the evidence and documents of PW2, who testified for and on behalf of the plaintiffs/respondents.
23. For coherence, the basis and foundation upon which the 2nd defendant/applicant has mounted the current application is that the named exhibit, which was admitted in evidence on behalf of the plaintiffs, was either obtained illegally or otherwise stolen by PW2.
24. Premised on the foregoing, counsel has therefore invited the court that on the basis of the impugned allegations/averments, it is in the interests of justice that the evidence of the named witness and exhibit P5, produced by same be expunged from the record of the court.
25. Despite the foregoing contentions by and on behalf of the 2nd defendant/applicant, what the counsel for the 2nd defendant/applicant is not disclosing, is that the named witness indeed testified in the presence of counsel for the 2nd defendant/applicant.



26. Secondly, it is also common ground that in the course of the testimony of PW2, albeit in the presence of counsel for the 2nd defendant/applicant, the document which was ultimately produced as exhibit P5 was duly identified by the witness, who thereafter sought to have same admitted as an exhibit.
27. Suffice it to point out, that the named exhibit was never objected to by counsel for the 2nd defendant/applicant. In this regard, there is no gainsaying that counsel for the 2nd defendant/applicant conceded to the production and admission of the named exhibits.
28. In my humble view, having participated in the proceedings and particularly during the testimony of PW2 and when exhibit P5 was produced, the 2nd defendant/applicant and their counsel, was privy to and is therefore, bound by said proceedings and consequential orders.
29. In the premises and in my humble view, it does not lie in the mouth of the 2nd defendant/applicant and by extension their advocate on record, to now come back to court and seek to tell court to expunge the proceedings in respect of which same were party to.
30. In addition, it also does not lie in the mouth of counsel for the 2nd defendant/applicant to seek and impress upon the court to expunge an exhibit which was not objected to by himself, despite opportunity being availed to take or mount any objection, if any.
31. Suffice it to point out that learned counsel for the 2nd defendant/applicant seems to suggest that same was not conversant with the applicable law and hence the failure to take or mount an objection to the testimony of the witness and by extension, the production of the named exhibit.
32. Unfortunately, it is common knowledge and elementary learning that ignorance of the law is no defense. In any event, the conduct of the said defendant/ applicant of not raising (sic) the objection at the appropriate instance, brings into operation the doctrine of estoppel.
33. Be that as it may, to the extent that the proceedings and the named exhibit were taken in the presence of counsel for the 2nd defendant, the bigger question that does arise; is whether this honourable court can seek to expunge the testimony of the witness and the named exhibit, either in the manner sought or otherwise.
34. In my humble view, to accede to the request by and at the instance of the 2nd defendant/applicant shall be tantamount to sitting on appeal on my decision/order, which were made consciously and in accordance with the obtaining provisions of the law.
35. In the premises, I am afraid that the invite by the 2nd defendant/applicant is contrary to the established hackneyed position of the law.
36. In this regard, I am of the considered view and I so hold; that I am neither seized nor possessed of the requisite jurisdiction to undertake the activities, which color and inform the impugned application.
37. Suffice it to point out that without the requisite jurisdiction, this honourable court is devoid and divested of the competence to make any order that will evidently inimical and contrary to law.
38. In this regard, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of *Phoenix of E.A Assurance Company Limited v Simeon Muruchi Thiga t/a Newspaper Service* [2019] eKLR where the court stated as hereunder;
 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?



2. In common English parlance, ‘jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.

Issue Number 2

In the alternative, whether the applicant has indeed laid and established any sufficient basis or at all to warrant the reliefs sought at the foot of the application.

39. Other than the question of jurisdiction, which has been analyzed and considered in terms of the preceding paragraphs, there is also the issue pertaining to whether or not the impugned allegations which color the instant application have been established and proved.
40. Firstly, it is worth remembering that the 2nd defendant/applicant has contended that the document which was produced and admitted as exhibit P5 was either illegally obtained or otherwise stolen.
41. Suffice it to point out that imputation of illegality and theft are very serious allegations. For clarity, the impugned allegations have charged PW2 with commission of a cognizable criminal offense.
42. To the extent that the imputation of illegality and theft are serious in nature, it was incumbent upon the deponent of the affidavit in support of current application, to place and lay before the court credible and cogent evidence upon which the impugned allegations are premised.
43. In any event, it is not lost on the court that the serious allegations of illegality and theft, (which inform the current application) have been made and deponed to by an advocate retained by the 2nd defendant/applicant.
44. In my humble view, allegations/averments of illegality and theft are contentious issues of facts and evidence, to which an advocate cannot deponed to either in the manner adverted to by counsel for the 2nd defendant/applicant or at all.
45. In this respect, I am reminded of the age long decision in the case of *Kisya Investment Limited & others v Kenya Finance Corporation Ltd* HCCC No 3504 of 1993 (unreported), per Ringera J, (as he then was), where the court held as hereunder;

“.....The applicants’s counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge information and belief. It is not competent for a party’s advocate to deponed to evidentiary facts at any stage of the suit.”

46. Further, the learned Judge proceed and stated as hereunder;

“By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his deposition.

It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. he cannot be both counsel and witness in the same case.”



47. Recently, the competence of an advocate to depone to contentious issues of facts and evidence was re-visited in the case of *Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd* (2018) EKLR.
48. For coherence, the honourable court made useful remarks;

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters depone to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”

49. In my humble view, the position of the law remains explicit and clear cut. In this regard, it is not acceptable for an advocate, who occupies the privileged position and enjoys the protection of the law, to make averments which impute commission of cognizable offense, on parties, albeit without any credible basis having been placed before the court.
50. To my mind, it is the height of hypocrisy for the deponent of the supporting affidavit to charge PW2, with commission of an illegality and theft of exhibit P5, yet even the 1st defendant, whose documents is (sic) alleged to have been stolen, has not mounted any such allegation.
51. In the circumstances, it is my finding and holding that the averments of illegality and theft, upon which the current application is mounted, are not only scandalous but alarmist in nature, albeit without any credible basis having been laid.
52. To my mind, a court of law cannot act on allegations, which have not been proven and in respect of which, no legal basis has been established. For clarity, to do so would be tantamount to throwing out of the window the established position of the law. See section 107, 108 and 109 of the *Evidence Act*, chapter 80 Laws of Kenya.

Final Disposition

53. Before venturing to make the final and dispositive orders, it is appropriate to state that counsel for the 2nd defendant/applicant had cited and quoted the decision in the case of *Okia Omutata Okoiti & 2 others v The Attorney General & 4 others* (2020)eKLR, wherein the court of appeal dealt with the import and tenor of the provisions of article 50(4) of the *Constitution* 2010.
54. However, it is imperative to note that the cited decision dealt with admissibility of illegally obtained evidence. Quite clearly, the said decision cannot apply ex-post admission of the evidence, which is the case beforehand.
55. Furthermore, the court of appeal made the following remarks

“As submitted by learned counsel for the respondent, illegally obtained evidence was for a long time admissible in criminal law as long as it was relevant (see *Kuruma Son of Kaniu vs R*[1955] 1 All ER 236. However, the *Constitution* of Kenya 2010 has now shifted the paradigm and article 50(4)of the *Constitution* now disallows such evidence...”



...the *Kuruma case* (supra) is therefore no longer good law. This article nonetheless applies to criminal law and not civil law, as it succinctly refers to "trial" as opposed to suit, and also relate to rights of an accused person. Admissibility of documentary evidence is explicitly provided for under the *Evidence Act*."

56. Quite clearly, the named decisions does not fortify or support the 2nd defendant's/applicant's case.
57. In a nutshell, the application dated the September 23, 2022, is not only misconceived, but same is also devoid and bereft of merits. In this regard, same be and is hereby dismissed with costs to the plaintiffs/respondents only.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Osodo h/b for Mr. S O Owino for the 2nd Defendant/Applicant

Mr. Gichuki for the Plaintiffs/Respondents

Mr. Nyakoye for the 1st Defendant/Respondent

N/A for the 3rd, 4th and 5th Defendant/Respondent

