Lopuonyang v Longorenyang & 2 others (Environment & Land Case 165 of 2016) [2023] KEELC 280 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 280 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 165 OF 2016

FO NYAGAKA, J

JANUARY 26, 2023

(ON THE WHETHER OR NOT TO GRANT LEAVE TO THE PLAINTIFF TO FILE AND PRODUCE FURTHER DOCUMENTARY EVIDENCE AFTER TRIAL HAS COMMENCED)

BETWEEN

EMMANUEL SUMUT LOPUONYANG ..... PLAINTIFF

AND

PAULO LONGORENYANG & 2 OTHERS ..... DEFENDANT

RULING

1. This matter came up for hearing on May 19, 2022. That was after Directions on compliance with Order 11 of the *Civil Procedure Rules, 2010* had been given by this Court. By that time both the Plaintiff and Defendants were satisfied that all the steps they needed to take in preparation for the hearing had been made. That included exchange of a number of documents in readiness for presentation of evidence. Therefore, they were contented that all the information by way of witness statements and documents had been filed and exchanged between them.

2. Thus, on the said date, the Plaintiff testified as PW1. His cross-examination commenced but did not end due to constraints of time. He was stood down to June 29, 2022. During the further cross-examination, the witness became rather uncooperative in answering questions put to him by the defence. He answered them either irrelevantly or by giving testimony unsolicited for. Once a while he could fail to answer a question. At some juncture the Court directed that he stood down for further cross-examination on September 22, 2022.

3. On the subsequent date the Applicant filed the instant Application. It was dated September 21, 2022. The Applicant brought it under Sections 3, 3A and 63(e) of the *Civil Procedure Act* and Orders 11, 50 Rule 6 and 51 Rule 2 of the *Civil Procedure Rules*, and Section 19(2) of the *Environment and Land Court (ELC) Act*. The Application sought the following orders:

1. That this Honourable Court do grant the Applicant/Plaintiff leave to file and produce as evidence title for land parcel No West Pokot/Kongelai Group Ranch/351 out of time.

2. That costs be in the cause.

4. The Application was based on four grounds, namely, that the parcel number 351 in Kongelai Group Ranch was the subject of the instant suit; title thereto had since been issued to the Applicant after the last court appearance; the Applicant wished to produce the title as evidence although he had already testified but his cross-examination not concluded and the Defendants would not be prejudiced if the prayer was allowed.

5. The Application was supported by an Affidavit sworn by the Plaintiff on the same date, of September 21, 2022. The Affidavit echoed the contents of the grounds in support of the Application save that to it he annexed as ESL1 a copy of the title deed in respect of the suit land as described above. Indeed, the title showed on the face of it that it was issued to the Plaintiff, of Identity No 1259220 and P O Box 118, Kapenguria, on July 19, 2022. July 18, 2022 was on a date a month after the further cross-examination was undertaken on the Plaintiff.

6. The Application was opposed very strongly. The 1st Defendant swore an Affidavit on October 05, 2022 in response to the Application. In it he deponed that he had authority from the other Defendants to swear the Affidavit. He stated that the Application was designed to scuttle the court process, misplaced, incompetent, misconceived and brought under the wrong provisions of law. He deponed further that the action of the Applicant in procuring the title during the pendency of the Court process was meant to obstruct justice; that the Respondents would be prejudiced by the grant of the prayer sought and if granted it would occasion the suit starting afresh; that granting the prayer would necessitate the Defendants making an Application to amend the Defence to include a Counterclaim thus delaying the suit; the Application was an abuse of the court process; that having been obtained six years after the institution of suit the alleged title was suspect and fraudulently obtained since the players thereto knew well of the existence of the instant suit; the issuance of the title amounted to interference of the Court process and a distortion of evidence; that at one time the Applicant had claimed that his parcel of land was Plot No 177 and not 351; the issuance of the orders would occasion a miscarriage of justice; the grant of the orders sought would necessitate addition of other parties not in the suit to be enjoined; the applicant was out to conceal some facts; and the existence of the alleged title distorted the other documents produced in evidence thus causing confusion. He prayed that the application be dismissed with costs.

7. In response to the Reply, the Applicant swore a Further Affidavit on October 11, 2022. He deponed that at paragraph 3 of the Plaint he pleaded that the Group Ranch land was already subdivided but titles were yet to issue; he produced in evidence the map of the Ranch to show the extent and size of plot No 351; titles had since issued and anyone who paid for his/hers would be issued with their respective document as was done on July 19, 2022; he did not commit any fraud in obtaining the said title; no stay of issuance of titles had been given by the Court as to stop the same being done; the Defendants did not Counterclaim ownership of parcel No 351 and no prejudice would be occasioned if the evidence of the title is produced as the case was only of trespass to the Applicant's land.

SUBMISSIONS

8. At the end of the preliminary steps in the Application the Court directed that it be disposed by way of written submissions. The Applicant filed his dated October 18, 2022 on the same date. The Respondents filed theirs dated October 21, 2022 on October 31, 2022.

9. After summarizing the Application, its prayers and the contents of the Affidavits both in support and opposition to it, the Applicant submitted that the cause of action in the suit was one of trespass to land and the title was only evidence of ownership. Further, he stated that it was not possible for him to include the title at the time of filing the list of documents because it had not been issued. He stated that he had included as a document to be relied on and produced in evidence a copy of the map of Kongelai Group Ranch to show ownership of parcel No 351. He then stated that no prejudice would be occasioned to the Plaintiff since cross-examination was on-going and no other witness had testified hence the Defendants could be given leave to produce any other documents they too wished to if need arose. The Plaintiff then relied on the cases of ELDORET ELC CASE NO 975 OF 2012 (*Johana Kipkemoi Too vs Helen Tum*) (2014) eKLR and KITALE ELC CASE NO 113 OF 2014 (*Edward Nyongesa Ndeke vs Sila Ambatia & others*). He then concluded that Section 19(2) of the *Environment and Land Court Act* obligates this Court not to be bound by procedural rules but to apply rules of natural justice in its determinations.

10. The Respondents, on their part, submitted that the title was not amongst the documents in the Plaintiff's custody both at the time of filing suit and giving evidence. They stated that the Court could not extend time to accommodate production of a document that was not available or in existence in the first place and since the title was obtained after the Plaintiff had given evidence in Court, it was suspect. They contended that the Application was an abuse of the process of the Court and if it was granted it would prejudice the Defendants. They reiterated their view in opposition to the Application that it was a waste of the Court's time and if granted would necessitate applications to amend the Plaint and cause the suit to start afresh. They stated further that the provisions of law relied on did not support the Application and that based on the demeanor of the Plaintiff while testifying so far, the Court should not grant the orders sought.

ISSUES, ANALYSIS & DETERMINATION

11. I have considered the Application in totality and the Affidavit in opposition thereto, the law, the submissions by all counsel and the circumstances within which it was brought. The following issues commend to me for determination: -

    a. What the applicable law is in an application of this nature.

    b. Whether the application is merited.

    c. What orders to issue including who to bear costs.

12. I begin with the analysis of the first issue.

What the applicable law is in an application of this nature

13. The Applicant brought the instant Application under a number of provisions of law. The Respondent opposed it by, among other contentions, that it was brought under the wrong provisions of law. In the Common Law legal system, one important thing that should always be clear and never escape the mind of all parties in any matter before the Court is that the issue/s in it constitute a question or set of questions each which must be answered in order to either succeed or defend it successfully. Therefore, it is not enough for a party to put forth an issue before the Court and assume that the Court will pick it up, scour through the junk of material strewn all over the documents and make a finding on the issue. The Common Law being an adversarial system, the judge cannot and ought not to descend from his passive position of impartiality to the arena and seek to answer questions for parties. It will be a dereliction of duty: the duty to be impartial and unbiased and also appear to be so, and as much as

possible, except in seeking clarifications passively, listen to and adjudicate on a matter and then make a finding thereon.

14. It therefore behooves parties to prepare thoroughly and methodically present their issues before the Court and lead the judge to the conclusion they wish him to reach. This is because by the time a party brings an issue to Court or decides to answer to one that is already filed against him or her, he or she must have weighed the material or circumstances obtaining and concluded or settled in the mind that he/she has a merited claim to urge or defence/opposition to mount. Nobody should waste the court's precious limited time in bringing an issue that is frivolous or mount a challenge to one for the sake of it. Such parties ought to be punished severely with imposition of heavy costs, with the step of striking out their pleadings, and, if repetitive, be kept at bay with other sanctions in addition to costs. For instance, they can be declared vexatious litigants.

15. Further, it therefore falls squarely on parties to assess the strength of their cases or perspectives before they burden the Court with calling on them to make decisions on the issues. The old style of systematic presentation of issues before Court should not be forgotten. It is that parties ought to ask themselves what the issue is, the rule or legal provision basing it, the facts obtaining in the case as they apply to the legal provision, and then the conclusion to draw from the interplay of the previous two aspects. If there is a disconnect between any of the threads joining the four points of call, then either there is no issue capable of being presented before the Court or the party has not done its (home)work properly and in both instances he should never move the Court on the intended issue. This is a good sieve of matters for presentation for adjudication.

16. If a party makes the step of not taking himself/herself through such soul searching or sieving process, he/she ought to bear the costs of moving the Court for no good reason. Thus, for instance, where a Plaintiff files a suit without complying with Order 3 Rule 2 of the *Civil Procedure Rules, 2010* on lists of and both written witnesses' statements and documents, attendant sanctions should flow automatically as night follows day. In my view, a Plaintiff or Claimant who files a case without those necessary documents accompanying the pleadings is one who is not serious and such matter should be quickly removed from the system by striking it out. Such are the parties whose matters clog the system. Similarly, a defendant who does likewise should not be favoured. He does not have to defend the matter. He can admit the claim. That is why the procedure on admission of claims exists. On this, Order 2 Rule 11, Order 11 Rule 5(2)(a), Order 12 Rule 3(2) and Order 13 (on Admissions) of the *Civil Procedure Rules, 2010* is clear.

17. I have stated the points above for the reason that the Respondent herein opposed the Application before me on the ground that it was brought under the wrong provisions of law and was therefore misconceived, incompetent and misplaced. He did this in the Replying Affidavit. He did not expound this contention in any way anywhere else, including in submissions. All he added in the submissions was a sentence that the provisions relied on did not support the claim. How that was the position he did not explain it? In essence, therefore, the Respondent set his own question and failed to answer it. That was sad. All he did was akin to what farmers who grow grain in a bird-infested region who fail to guard their crop. Instead they erect scarecrows strategically so that the birds are warded off by them. But that is only for the first and second day. From the third onwards the birds being intelligent discern that this "thing" is motionless except flipping its 'hands' when wind blows. They thereafter even build nests thereon. So, in the instant Application, since the Respondent's contention is 'motionless' let me build a nest thereon by analyzing the provisions relied and comparing the facts herein with them together with the relevant ones. This is a surprise to the Respondent because he could not expect the Court to determine the issue *suo moto*.

18. The Applicant cited Section 3 of the *Civil Procedure Act*. The provision is on the special jurisdiction of this Court exercisable in absence of any specific provisions regarding the matter before it. In my view this provision is not applicable in the present circumstances as the law governing the prayers sought is clearly stipulated in the Rules as shall be explained below. He cited Section 3A also. The provision regards the inherent power of the Court to make such orders as the ends of justice call for. Again, from the Act, he cited Section 63(e). The provision is on the need to make interlocutory orders as may be deemed just and convenient to prevent the ends of justice from being defeated. The two provisions are relevant in so far as they lay the basis of moving the Court in the interlocutory stage for purposes of the ends of justice being reached.

19. With regard to the Orders 11 of the Civil Procedure Rules which he cited, while the Applicant did not specify the Rule applicable, it is clear that the Order, particularly Order 11 Rule 3, is the basis upon which pre-trial directions were given in regard to the steps the Plaintiff and Defendants were to take when bringing and Defending the suit respectively. To be clear, it is the Order which requires the filing and exchange of documents between the parties, prior to any hearing, as it breathes life in terms of firming timelines to Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules, 2010. This provision is thus applicable.

20. Order 50 Rule 6 and 51 Rule 2 relate to the power granted to the Court to enlarge time for the doing of an act prescribed by the Rules and the form of the Application, respectively. Section 19(2) of the *Environment and Land Court Act* is to the effect that this Court shall be bound by the procedure as laid down in the *Civil Procedure Act*. Both provisions are applicable.

21. However, in regard to the submissions by the Applicant on Section 19 of the ELC Act, this is where this Court found the Applicant to be extremely subtle towards misleading it. The provision does not in any way stipulate that this Court is not bound by or should disregard the procedure laid down in the *Civil Procedure Act*. By reading the word "not" into the provision, he imported a totally different meaning to the law. He acted as the serpent in the garden of Eden (that is, for those who read and believe the Holy Bible) when he asked the woman, "Did God really say, 'You must not eat from any tree in the garden'?" (Genesis 3: 1, NIV), yet God had said, "You must not eat fruit from the tree that is in the middle of the garden, and you must not touch it, or you will die" (Genesis 3:2, NIV). As is clear from the text, the serpent substituted the phrase "any tree" with "the tree that is in the middle", and that caused the sin problem in this world to date. I hope the Applicant did not intend to cause the forever fall of judicial reasoning on the meaning of this provision! If anything, the provision buttresses the need to rely on the procedure.

22. As much as the Applicant wished to convince this Court to rely on the rules of natural justice, he should have been candid. He ought not have gone to the extent to misleading the Court on the import of the provision. This Court would have rather that he submitted that it is bound by the procedure in the Act but Article 159(2)(d) of the 2010 *Constitution* mandates it not to be bound unnecessarily by technicalities and then submit on how his Application fell outside of being dismissed on a technicality.

23. In addition to the above, the Applicant who is the Plaintiff herein moved this Court for the grant of prayers in relation to compliance with Order 3 Rule 2 and Order 11 Rule 3 (a) of the Civil Procedure Rules besides Section 28(b), (c), (g) and (h) of the *Practice Directions on Proceedings in the Environment and Land courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts*, Gazette Notice No 5178 (hereinafter referred to as the Mutunga Rules, 2014).

24. Apart from the specific matters such as election petitions, whose procedures and timelines are specifically provided for, and other provisions for taking procedural steps in filing and exchange of

documents in courts of higher hierarchy than this one, the provisions above are the ones which call for the filing and exchange of a list of documents and copies of thereof besides written statements of non-expert witnesses in civil proceedings.

25. In terms of the provisions stated, the step of filing documents ought to have been done at the filing of the Plaint. Although there is provision for a party to seek leave of Court to file further witness statements, the law of procedure is silent on whether a party who does not file all documents in support of his case or defence can seek leave to file and serve a further list and copies of documents. The Provisos to Order 3 Rule 2 and Order 7 Rule 5 of the Civil Procedure Rules are the one that give parties change to move the Court to exercise its discretion to permit filing and service of witness statements. Both stipulate that, "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."

26. Sub-rule (c) referred to in each of the Rules provides for the filing of witness statements other than those of experts. As to the considerations to be made when the Court is called upon to exercise its discretion judiciously to grant leave or not, there is an avalanche of decisions that have gone to the extent of listing them. Since the instant Applicant is not for grant of leave to file further witness statements, I will not delve into the analysis of the law on that herein lest it prolongs this ruling as to tire lazy minds in reading it. I confine myself to the prayer for filing of further lists of and further documents.

27. The provisions for filing of documents that accompany a Plaint or Defence and/or Counterclaim consist of Sub-rules (d) of both Rules which provide for filing. Clearly, the Provisos referred to in the paragraph preceding the previous one does not give room for leave to be sought to include documents not filed together with Plaints, Defences, and/or Counterclaims. Using the statutory rule of interpretation, Expressio unius est exclusio alterius which means the expression of one thing is the exclusion of the other, it goes without saying that the grant of leave to file documents not filed at the same time with any set of the three pleadings stated above is not contemplated by the Rules Committee hence the legislature since the Rules were enacted into law through Parliament. It was not expressly provided for.

28. The question that then arises naturally is, what should a party who fails to file the list of documents and copies thereof together with the Plaint, Defence or Counterclaim do? What is the fate of such a pleading? Different opinions have been given by different Courts. I wish not to dwell much on these. But I must state that in regard to the failure to file documents to accompany the Plaint, Defence or Counterclaim as required by the Rules, unless it is shown that the document(s) were either not in existence at the time of filing the pleadings referred to or was not humanly possible to access them at the time of filing, Courts should be hesitant to allow parties to file them later. If the Courts do not put their foot down on this, justice will be denied by unnecessary delays and parties would be encouraged to try their matters by instalments or by guesswork or first peeping into the other party's case and considering how strong or weak it is before putting in their evidence. This would encourage fishing expeditions and "cooking" or "manufacturing" of evidence.

29. A very high bar should be laid in order for a party to convince the Court that he/she did not deliberately withhold evidence by way of documents from the Court at the time of filing the case or answering the claim. And as the spirit of the legislature and the nation would have it, that is why the Rules do not provide for late filing of the documents. Unless they are amended to provide for otherwise it should be clear to parties that it is not a walk in the park to come to Court to request for time to file documents. Parties who fall into that practice should have their cases dismissed or defences struck out. For what explanation does one have to file in Court only pleadings? What case does he/she have then, unless it is an Admission or a Preliminary Objection on a point of law?

30. Lastly, the purpose and overriding objective of the law, particularly Section 1A of the *Civil Procedure Act* and Court therefore is, among others, to facilitate the just and proportionate resolution of dispute, realization of justice and not to obstruct it. I have said enough on the provisions cited.

(b) Whether the Application is merited

31. The Applicants moved the Court on for leave to permit him to file a further list of documents and include the title to the suit land as part of the documents to be relied on in evidence. He has done so when cross-examination is going on. The document was not in existence or available at the time of filing suit or the initial bundle of documents. Clearly, he could not have contemplated the existence of that document as to include it in the initial List. At the same time since the alleged trespass onto his alleged parcel of land began at some point, he could not wait until he obtained title thereto in order to file suit. Were that to be the requirement in law, one wonders what would happen if each owner of a parcel of land was obligated to first of all be registered as owner in order for him to bring a cause of action such as this: many a party would lose ownership due to the doctrine of Adverse Possession catching up with their inaction. I note the contention by the Respondent in answer to the Application: It is as summarized below.

32. The Respondent opposed the Applicant mainly on the grounds that he was apprehensive that the granting the Application would necessitate them looking for additional evidence, applying for amendment of the pleadings to introduce a Counterclaim, applying to enjoin additional parties to the suit, and the suit starting de novo. While apprehension is good, the contention by the Respondents seems to point to a disposition of parties who did not present to Court all evidence within their possession when putting forth their Defence just for the reason that they thought the Plaintiff had a weak case, and since he seems to be making it stronger he ought to be prevented by all means from doing so. In any event, the need to adduce evidence to counter the one sought to be introduced is not prejudice to the Respondents.

33. To be clear, none of the four contentions the Respondent put forward amounts to any prejudice that would be occasioned to the Defendants. Whatever the delay or other process that may arise from the grant of the orders can be compensated by way of damages. In any event, the allegation that the title whose copy is sought to be filed and relied on in evidence is fraudulent is not reason for preventing the party from adducing it in evidence. The adverse parties will have opportunity to demonstrate to the Court how it is fraudulently obtained and the Court will make a finding on it.

34. Given the fact that the suit is still at the initial stage of evidence taking, and that the Defendant could have opportunity to examine the document and cross-examine the Plaintiff on it before he concludes evidence, and given that the document was not within reach of the Plaintiff at the time of filing suit so as to make him barred from adducing it in evidence later for reason of having failed to exercise due diligence in bringing it to be part of the Record and the attention of the adverse party, I am of the view that no prejudice would be occasioned by granting leave to the Plaintiff to file and serve the Document before further Cross-Examination.

c. What orders to issue and who to bear the costs of the Application

35. I have found that the application before me is meritorious. It succeeds or is allowed on the following condition: that the Applicant filed and serves a Further List of Documents together with the copy of the title to land parcel No West Pokot/Kongelai Group Ranch/351 within the next ten (10) days.

36. Costs follow the event, but the situation before me is unique. It is the Applicant who has brought the Application. The Respondent, although he opposed the Application innocently did so. Thus, the Plaintiff/Applicant will bear the costs of the Application.

37. The suit will be mentioned on March 02, 2023 for fixing a date for further hearing.

38. Orders accordingly.

Ruling dated, signed and delivered at Kitale via Electronic Mail on this 26th day of January, 2023.

HON DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE