



**Oyolla v Awange & 2 others (Environment & Land Miscellaneous Case E035 of 2022) [2023] KEELC 16063 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16063 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E035 OF 2022**

**JO MBOYA, J**

**FEBRUARY 27, 2023**

**BETWEEN**

**JOHN KENNETH AJIMA OYOLLA ..... PLAINTIFF**

**AND**

**PERES ANYANGO AWANGE ..... 1<sup>ST</sup> DEFENDANT**

**RED ROSE REALTORS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**GOLD GREEN LIGHT RESIDENCE LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The subject matter came up for hearing on February 22, 2023, whereupon the Plaintiff testified and was thereafter cross-examined by the Advocates for the Defendants. However, at the close of the testimony by the Plaintiff, the Plaintiff's counsel intimated to the Honourable court that same was keen to procure and obtain witness summons in respect of the Director, Teleposta Pension Scheme, for purposes of same attending court and giving evidence on behalf of the Plaintiff.
2. As a result of the foregoing intimations, the counsel for the Defendants indicated that same shall be averse to the request by and at the instance of the Plaintiff. In this regard, counsel for the Defendants signaled their opposition to the intended summoning of the named witness.
3. Owing to the foregoing, the court then issued directions that the informal application be ventilated and in this regard, the respective advocates proceeded to and rendered their submissions, pertaining to and concerning whether the court could issue the witness summons to the intended witness.

**Submissions by the parties**

4. On behalf of the Plaintiff, learned counsel submitted and pointed out that the evidence of the said intended witness, will not be easy to procure without issuance of witness summons by the court.



- Additionally, counsel submitted that same had made efforts to procure the attendance of the named witness, but had not been successful in so far as the intended witness was not willing to attend court and give evidence, albeit without witness summons having been issued.
5. Other than the foregoing, counsel for the Plaintiff also contended that the testimony of the intended witness shall enable the court to appreciate the true details of the dispute and therefore to deal with and resolve all the issues in controversy, once and for all.
  6. Furthermore, it was contended that the summoning of the intended witness will not prejudice the Defendants, in so far as the Defendants have already been put on notice, as pertains to the nature of the evidence to be tendered by the intending witness.
  7. Other than the following it was also stated that though the name of the intended witness had not been captured and reflected at the foot of the List of witnesses, in terms of Order 3 Rule 2 of the [Civil Procedure Rules](#), the failure to capture the name of the said witness, was a procedural lapse, which ought not to vitiate the Plaintiff's right to call the witness.
  8. At any rate, it was submitted that there are times when the court should not cling to undue procedural technicalities and thereby block essential and critical evidence, that would otherwise have been helpful in determining the issues in dispute.
  9. On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, learned Counsel Mr E K Mutua (SC), raised and highlighted three (3) salient issues, *inter-alia*, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their statement of defence on the basis of the single list of witness and witness statement, without anticipating that an additional witness would be called by the Plaintiff.
  10. Having crafted and filed the statement of defence and the witness statement on the basis of what had hitherto been filed and served by the Plaintiff, it was contended that the filing of the proposed additional witness statement and calling of the intended witness would unduly prejudice the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  11. Secondly, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have denied that the Plaintiff ever paid any monies towards and on account of the purchase of the suit property. In this regard, counsel added that if the Plaintiff is allowed to call further evidence with a view to proving payment of the disputed monies, it shall be tantamount to affording the Plaintiff an opportunity to litigate by ambush and in instalments.
  12. In addition, it was contended that the summoning of the intended witnesses and the production of the evidence attendant thereto, would similarly amount to affording the Plaintiff an opportunity to test the defence cases and thereafter to resort to and procure additional evidence to better his case.
  13. Furthermore, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also submitted that the current application by the Plaintiff has been brought too late in the day, and in so far as the Plaintiff had the occasion to mount the application during and at the pre-trial stage, to enable the court to properly deal with the issue.
  14. To the extent that the impugned application is being made too late in the day and long after the hearing has commenced, the Plaintiff ought not to be granted the leave sought. In any event, counsel added that the Plaintiff has not met the requisite threshold for the grant of the leave sought.
  15. On behalf of the 3<sup>rd</sup> Defendant, learned counsel submitted that the intended summoning of the witness, at the foot of the current application and the adduction of the evidence by the said witness, will be prejudicial and detrimental the 3<sup>rd</sup> Defendant.



16. Other than the foregoing, counsel also contended that the Plaintiff has since been cross-examined and the calling of the new witness would confer undue advantage to and in favour of the Plaintiff.
17. Essentially, learned counsel for the 3<sup>rd</sup> Defendant has therefore invited the Honourable court to find and hold that the intended summoning of the witness and the attendant evidence will breach and violate the 3<sup>rd</sup> Defendant's right to Fair Hearing.

### **Issues for Determination**

18. Having evaluated the submissions that were ventilated by and on behalf of the advocates of the respective Parties, I find that the following issues are pertinent and thus worthy of determination:-
  - i. Whether the failure to include the name of the Intended Witness in the List of witnesses and to extract the requisite witness summons prior to the scheduled hearing ought to vitiate the Plaintiff's right to summons the intended witness.
  - ii. Whether the Defendant's herein would suffer undue prejudice and/or detriment, if the current application is granted.

### **Analysis And Determination**

#### **Issue Number 1**

Whether the failure to include the name of the Intended Witness in the List of witnesses and to extract the requisite witness summons prior to the scheduled hearing ought to vitiate the Plaintiff's right to summon the intended witness.

19. The Plaintiff herein filed and commenced the instant suit vide Plaintiff dated March 3, 2022 and which Plaintiff was accompanied by *inter-alia* a list of witnesses and witness statement, illuminating the Plaintiff's claim.
20. For coherence, the Plaintiff herein had signaled and indicated that same shall only be calling one witness, namely, himself. Indeed, the Plaintiff duly attended court and testified on February 22, 2023.
21. Nevertheless, the Plaintiff has now mounted an application before the court and same is seeking to be afforded an opportunity to summon the Director, Telposta Pension Scheme, with a view to having the intended witness to testify and confirm to the court that indeed the various amounts of monies which were deducted from the Plaintiff's bank Account in terms of the various statements, were indeed credited to and in favour of the Telposta Pension Scheme.
22. Whereas, it was incumbent upon the Plaintiff to supply and avail to court a comprehensive list of witnesses and witness statement, however, the Plaintiff herein failed to do so.
23. Be that as it may, the Plaintiff has now approached the Honourable court and is seeking to be afforded an opportunity to call a witness, whose name had neither been disclosed nor captured in the List of Witnesses.
24. Suffice it to point out that it was indeed necessary for the Plaintiff to supply all the names of the witnesses. However, the question that does arise is whether the failure by the Plaintiff to supply and avail a comprehensive list of witnesses and witness statements, should bar the Plaintiff from summoning an additional witness and in this case, the Director Telposta Pension Scheme.



25. To start with, it behooves all the parties to ensure that their pleadings and documents are properly organized and served on the adverse Parties. However, there does arise instances where a lapse falls at the doorstep of a particular litigant and hence, the concerned Litigant is obliged to approach the Honourable Court with an application, like the one beforehand.
26. In such a situation, can it be said that such a party ought to be denied and deprived of an opportunity to call a particular witness, whose presence and evidence may be helpful and of great assistance to the court in resolving the dispute.
27. In my humble view, whereas the Rules of Procedure ought not to be taken for granted, but there are certain instances where the breach or failure to comply with the rules of procedure, ought not to drive a litigant away from the seat of justice.
28. If there was any such case, then I am of the humble opinion that the subject matter fits within the four corners, where the rules of procedure ought not to be elevated to a fetish. For clarity, it is not lost on the court that the dispute herein pits a son in law (read the Plaintiff) and a mother in law (read the 1<sup>st</sup> Defendant), among others, who are tussling over ownership of the suit property.
29. Furthermore, the kind of evidence which the Plaintiff is seeking to procure and bring forth relates to whether or not the monies were paid to Telposta Pension Scheme, at the request and instance of the 1<sup>st</sup> Defendant and towards purchase of the suit property.
30. In the premises, the intended evidence, if at all, relates to an issue that was certainly within the knowledge of the 1<sup>st</sup> Defendant in so far as it is stated that the suit property had been allocated to her, but same implored and impressed upon the Plaintiff to join hand in the purchase and acquisition of the suit property.
31. Given the nature of the intended evidence and coupled with the kind of relationship obtaining between the Plaintiff and the 1<sup>st</sup> Defendant, it would be appropriate and imperative that the totality of the evidence available, be called upon to enable the dispute to be resolved on the basis of merit, as opposed to undue technicality.
32. Nevertheless, I must point out that the fact that I am intended to offer indulgence in respect of the subject matter, does not mean that I am happy with the blatant disregard of the rules of procedure by counsel for the Plaintiff. Far from it, the counsel for the Plaintiff ought to be warned that such flagrant disregard of the rules may no doubt, turn out to be costly and fatal.
33. In any event, it suffices to invite the attention of counsel for the Plaintiff to the dictum of the Court of Appeal in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012, where the court stated and held as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.”



34. Despite the foregoing, I am prepared to offer reprieve and instead abide by the decision of the Supreme Court in the case of *Moses Mwicigi & Others vs IEBC & Others*, [2017] eKLR, where the Supreme Court stated and observed as hereunder:-

(65) This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

(66) Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159 (2) (d) of the Constitution, which proclaims that, "... courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the Courts.

(67) As an instance, there are times when the disregard of Rule 33 of the Supreme Court Rules clearly undermines the Court's ability to deliver justice to all the parties in a dispute. (This is concerned with the mode of instituting appeals). In such a situation, the shield of Article 159 (2) (d) will not be deployed by the Court in aid of the offending litigant. Such is, however, not the case in the instant appeal. Notwithstanding the failure to adhere to all the requirements of the Rule at the initial stages, by the appellants herein, their subsequent actions did ensure that the Court was not without all the requisite documentation, for undertaking a consideration of the matter.

(68) We are therefore not inclined to invalidate the appeal on ground only that it does not stand on all fours with Rule 33 of this Court's Rules. An invalidation, indeed, would deprive the Court of an opportunity to pronounce itself on substantial questions of law raised by the submissions of counsel for all the parties.

35. Premised on the foregoing, I come to the conclusion that the failure to comply with the provisions of Order 3 Rule 2 of the Civil Procedure Rules, as well as Order 16, Order 1 of the Civil Procedure Rules, ought not to deny the Plaintiff an opportunity to summon and bring forth the witness from the Teleposta Pension Scheme, for purposes of authenticating if at all, the monies alluded to by the Plaintiff were duly transmitted to and received by the Scheme and on what/ whose account.

36. To surmise, I hold the view that the intended witness will be of great of help and assistance to the court and by extension the Parties, so as to facilitate an effective and effectual determination of the issue before hand, once and for all.

## Issue Number2

Whether the Defendant's herein will suffer undue prejudice and/or detriment, if the current application is granted.



37. In the course of opposing the application by an on behalf of the Plaintiff herein, both counsel for the Defendants had contended that the summoning of the intended witness and the adduction of the evidence by the intended witness, will unduly prejudice the Defendants.
38. Furthermore, both counsel contended that the Defendant's herein crafted and prepared their statements of defence on the basis that the Plaintiff herein would only be calling one witness and not otherwise.
39. Despite the submissions by counsel for the Defendants, I beg to point out that no evident prejudice or detriment will occur or arise, if the intended witness is summoned to appear before the court and to give evidence in the manner sought.
40. On the other hand, it is not lost on the court that the Defendants' herein shall also be at liberty, to file further witness statements and additional list of documents, if deemed necessary and appropriate.
41. Additionally, it is worthy to state and reiterate that the Defendants shall also be at liberty to cross-examine the intended witness and thereby impeach his/her evidence, subject to the documents, if any, that would be placed before the court.
42. In the premises, I come to the conclusion that the summoning of the intended witness shall not prejudice the Defendant's case, which in any event, is yet to commence. Nevertheless, if there be any prejudice then same is compensable in monetary terms, by an award of costs.
43. Finally, it is also imperative to state that the fact that a mistake occurred at the onset, when counsel for the Plaintiff was crafting and preparing the documentation in respect of the subject matter, does not mean that the Plaintiff/Principal party ought to be subjected to discipline and/or punishment merely because of a blunder, lapse and or default by counsel, who is deemed to be knowledgeable of the law.
44. In this regard, it is appropriate to borrow and adopt the wise words of Hon Justice Apaloo, Chief Justice (as he then was), in the case of *Philip Keipito Chemwolo vs Augustine Kubende & Anothers*, [1986] eKLR.

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

45. In the premises, if there was any prejudice, to be suffered by the Defendants' herein then same is capable of being atoned for by an award of costs. In any event, the prejudice can also be addressed by giving corresponding liberty to the Defendants to file additional documents and witness statements, where appropriate.

### **Final Disposition**

46. Having evaluated and analyzed the named issues for determination, it must have become apparent and evident that the impugned lapse by and at the instance of the Plaintiff's counsel, ought not to be relied upon and utilized to dis-entitle the Plaintiff of an opportunity to summon the intended witness.



47. To do so, in my humble view, would be tantamount to the court meting out punishment as against the Plaintiff, merely because his chosen advocate mis-read or mis-applied the relevant procedural law.
48. Consequently and in the premises, the informal application mounted by the and at the instance of the Plaintiff be and is hereby allowed. In this regard, I therefore make the following orders:-
- a. The Plaintiff be and is hereby granted Leave to file a Supplementary List of witnesses containing the details of the named/intended witness from Teleposta Pension Scheme and same to be filed within twenty one (21) days.
  - b. The Plaintiff shall also extract and file the witness statement of the intended witness and same to be filed and served within twenty one (21) days from the date hereof.
  - c. The Plaintiff shall also file and serve a further/supplementary bundle of documentation relating to the evidence to be tendered by the intended witness and same to be filed and served within twenty one (21) days from the date hereof.
  - d. The Defendants' herein shall be at liberty to file and serve Further Supplementary List and Bundle of witnesses and additional witness statements, if any, and same to be served and filed within twenty one (21) days from the date of service by the Plaintiff.
  - e. The Defendants shall also be at liberty to file additional bundle of documents, if any, and same to be filed within similar timelines in terms of the preceding clause.
  - f. Witness summons shall issue to the intended witness in terms of clause (a) hereof.
  - g. The Plaintiff shall bear the costs of the informal application.
49. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023**

**OGUTTU MBOYA**

**JUDGE**

**In the presence of:**

**Benson – court assistant**

**Mr. B M. Musyoki for the Plaintiff**

**Mr. Kioko holding brief for Mr. E.K. Mutua (SC) for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Mr. Ahmed for the 3<sup>rd</sup> Defendant.**

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