



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ethics and Anti Corruption Commission v Sang & 3 others (Environment & Land Case 81 of 2018) [2023] KEELC 932 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 81 OF 2018  
MC OUNDO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**ETHICS AND ANTI CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**REBECCA CHEPNGENO SANG ..... 1<sup>ST</sup> DEFENDANT**

**KENNETH C KOMEN ..... 2<sup>ND</sup> DEFENDANT**

**LYNETTE JEBET RONO ..... 3<sup>RD</sup> DEFENDANT**

**WILSON GACHANJA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff, *vide* his plaint dated the December 11, 2018 brought suit against the defendants seeking:
  - i. A declaration that the allocation to the 1<sup>st</sup> defendant by the 4<sup>th</sup> defendant and subsequent issuance of the lease to the 1<sup>st</sup> defendant land parcel LR No 631/1833 Kericho county comprised within government house number Keri/Hou/Hg 2 and subsequent transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was irregular, fraudulent and illegal and consequently null and void.
  - ii. An order for rectification of the register by cancellation of the grant and all entries on the land register for the suit property, land parcel LR No 6381/1833 within Kericho county, made to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  - iii. An order for the director of surveys to cancel the surveys for suit property and compile a plan which will be registered as the land housing government house number Keri/Hou/Hg 2.
  - iv. An order of permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession or in any other



manner howsoever from dealing with the suit property otherwise than by transfer or surrender to the government of Kenya.

- v. Costs of and incidental to the suit
  - vi. Any other or further relief the court may deem fit and just to grant.
2. There was no appearance for the 4<sup>th</sup> defendants.
  3. On the December 18, 2018, by consent interim orders of the status quo in respect of Kericho LR No 631/1833 were issued to the effect that the 1<sup>st</sup>-3<sup>rd</sup> respondents shall not transfer, charge, continue with construction development or in any other manner encroach on the suit property pending the hearing and determination of this suit. Parties were then directed to comply with pre-trial directions.
  4. On the February 20, 2019 the plaintiff informed the court that they had received the 4<sup>th</sup> defendant's documents but the 1<sup>st</sup>-3<sup>rd</sup> defendants had not yet complied. Counsel for the 1<sup>st</sup>-3<sup>rd</sup> defendants then sought for 14 days to comply and were granted with a corresponding leave to the plaintiff to respond within 7 days after service.
  5. The matter was then scheduled for mention for the March 20, 2019 to confirm compliance, on which day the court had been informed that that counsel needed more time to file the defence in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, as well as to put in their list of documents and witness statements. The court obliged him and a further mention date was set for the April 8, 2019 to confirm compliance.
  6. On the said date, the plaintiff's counsel had informed the court that she had just been served with the statement of defence by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants wherein she had sought for 7 days to respond. The court obliged her and set the matter for mention for the May 22, 2019 to confirm compliance, on which day, whereas the plaintiff had informed the court that they had complied with the pre-trial directions, counsel for the 1<sup>st</sup> to 3<sup>rd</sup> defendants sought for more time to comply and in as much as the plaintiff's raised an objection, she was overruled wherein court granted the defendants leave to file and serve their amended defence and counterclaim within 6 days and thereafter the plaintiff to file a reply within 7 days. A mention date was set for the June 12, 2019 to confirm compliance and fix a hearing date.
  7. On the June 12, 2019, counsel for the 1<sup>st</sup>-3<sup>rd</sup> defendants sought to have their defense and counterclaim, which had been filed outside the stipulated period, be deemed to have been duly filed. The court obliged them and the matter was set for hearing for the October 28, 2019 with leave to the plaintiff to file, within 21 days, any additional documents, if need be, since the plaintiff had just been served with the 1<sup>st</sup>-3<sup>rd</sup> witness statements.
  8. The matter proceeded for hearing on the February 24, 2020 wherein PW1 was stood down so that his counsel could put her house in order by rearranging her documents and paginating them. Further hearing then commenced on the September 29, 2020 wherein PW1 completed giving his evidence and further hearing was scheduled for the November 2, 2020.
  9. The matter did not proceed as scheduled but on January 28, 2021, the evidence of PW2 was taken and further hearing was slated for March 22, 2021 wherein courts closed down due to the covid-19 pandemic. In the interim an application dated July 13, 2021 was filed by the applicant seeking to introduce new evidence in form of an additional witness Mr Wilson Kibichii, and his witness statement in support of their case. The application was allowed *vide* a ruling delivered on November 11, 2021 wherein the respondents had been granted leave to respond within 14 days and to recall the plaintiff's witnesses, if need be, for cross-examination. Parties by consent then agreed to take a hearing date and file their statements within seven days and the hearing was scheduled for the February 8, 2022 wherein the evidence of PW3, PW4 and PW5 were taken. Further hearing was then scheduled for the



March 23, 2022 where the plaintiff sought to call had two remaining witnesses being the surveyor and investigating officer before closing their case.

10. On the said date, the testimony of PW 6 was partially taken in the absence of defence counsel who sought for time to study the evidence adduced so as to cross-examine the witness. PW 6 was then stood down and the evidence of the investigating officer PW7 taken. Further hearing was then scheduled for the June 6, 2022 wherein PW6 was to be recalled for cross-examination.
11. Come the June 6, 2022 and whereas the plaintiff was ready to proceed, the court had been informed that there was pending an application dated June 3, 2022 filed by the 1<sup>st</sup> -3<sup>rd</sup> defendants seeking to call in additional witnesses to produce the documents that had been marked for identification, which documents were relevant to both the plaintiff's case as well as the defence case.
12. The court was of the opinion that the said application sought to call a whole line up of witnesses. That it should not be lost that the plaintiff's case was substantially heard, and it would not be in the interest of justice and fair hearing to allow the same proceed while this application is still pending. It then directed that the day's matter be taken out of the cause list for hearing pending the hearing and determination of the said application, through written submission.
13. Vide the said application dated the June 3, 2022 the 1<sup>st</sup>-3<sup>rd</sup> defendants sought leave to introduce new evidence of M/s Legend Valuers Limited and Mr S M Kamanja.

### **Applicants' Submissions**

14. In the submissions in support of their application, the 1<sup>st</sup> -3<sup>rd</sup> defendants argued that they, at this stage of the suit, could introduce additional witnesses to testify and produce documents that were already before this court since the plaintiff had not closed its case and that some of the witnesses were to be called by the plaintiff.
15. That the court should administer substantive justice by allowing the documents already filed in court to be produced by the witnesses named in their application. That by calling additional witnesses, the plaintiff would not suffer any prejudice since some of the documents had already been marked by the court and were awaiting production.
16. That the plaintiff/respondent had contributed to the need to file the application by failing to call Sylvia Inziani and Mr Mibei amongst others who were on its list of witnesses thereby denying the applicant an opportunity to cross-examine them.
17. That the law allowed the court to exercise its unfettered discretion in allowing a party to call and/or recall witnesses for examination-in-chief, cross-examination and re-examination. That by giving leave to the applicant to call additional witnesses, the court would get an opportunity to adjudicate over the real issues in controversy and make a decision on merit.
18. The applicant relied on the provisions of article 159 of the *Constitution* of to submit that the hearing of disputes should be on merit. That they sought to produce evidence that both parties had. That S K Kamnja retired in the year 2016 having worked with the ministry of lands, housing and urban development as a senior deputy director /acting estates director.
19. That no prejudice would be caused to the plaintiff/respondent as they had filed similar documentary evidence in their bundle of documents and would therefore have an opportunity to cross-examine them.
20. That the plaintiff had sought for similar orders and had been allowed in a ruling delivered on November 11, 2021 and this clearly indicated that the plaintiff/respondent would not be prejudiced whatsoever



if the defendants/applicants were also allowed to call the witnesses mentioned. That the court had already set its own precedent in the instant matter. Reliance was placed on the decision in *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR.

21. That pursuant to the provisions of article 50 of the *Constitution*, parties ought to be given an opportunity to present their case before court fairly. That since the court had broad powers of management under the *Environment and Land Court Act*, it was only justifiable if they were allowed to call the witnesses mentioned to testify and produce the documents in their possession so as to enable the court arrive at a decision on merit.

### **Plaintiff's Submissions**

22. In response and in opposition to the application, the plaintiffs replying affidavit and submissions were to the effect that the provisions of orders 3, 7 and 11 of the *Civil Procedure Rules* required parties to furnish their evidence in advance before the commencement of the trial. That order 3 rule 2, provided that when filing suit, a party(plaintiff) needed also to file a verifying affidavit, list of witnesses, statements of witnesses and copies of documents to be relied upon at the trial, whereas order 7 rule 5 enumerated the documents to accompany a defence and a counterclaim filed under rule 1 and 2.
23. That it was clear for the above provisions that both the plaintiff and the defendants were supposed to have furnished their evidence when filing their pleadings to make clear to the other party, the nature of evidence they would face at the trial.
24. That indeed the provisions of article 50 (1) the *Constitution* were clear that every party deserved a fair trial, and therefore a trial would not be fair if a party was allowed to hide his evidence and ambush the other party at the hearing.
25. That they would not have an opportunity to rebut the new evidence sought to be introduced by the defendants/applicants and that this was an ambush by the defendants/applicants and therefore a violation of the provisions of article 50(1) of the *Constitution*. That it would not be fair to the plaintiff, for the court to allow the defendants/applicants, at this late stage of the proceedings, to fundamentally alter the character of their case to one that the plaintiffs never contemplated when tabling its evidence.
26. That the provisions of article 159 (2) (d) of the *Constitution*, mandate courts to administer Justice to all parties without undue regards to procedural technicalities. However, where the evidence to be adduced, would cause undue prejudice to the other party, the court should not entertain such evidence. That they would be greatly prejudiced were the application allowed since all their witnesses had testified.
27. That the applicants were approbating and reprobating by stating in paragraphs 3-6 of their supporting affidavit sworn on the June 3, 2022 that they needed to call the author of document marked "DMFI-1" whilst in paragraph 6 of the same affidavit, they are praying to be allowed to add several witnesses. This was a clear demonstration that the application was an afterthought and frivolous. That the court had inherent jurisdiction to prevent abuse of its process.
28. That the applicants had not laid down any basis or demonstrated the reasons why they never filed all their evidence as provided for under the *Civil Procedure Rules*, so as to enable the court exercise its discretion in their favour. That the notice of motion dated June 3, 2022 ought to be dismissed with costs.



## Determination

29. I have considered the submissions by counsel and find that the issues that arise for determination herein as being;
- i. Whether the defendants should be allowed to adduce additional witness statement/evidence.
30. It is indeed no doubt that the plaintiff in this case had completed calling their evidence and what was remaining was the cross-examination of PW6 who had testified in the absence of the defence counsel. The provisions of order 3 and 7 of the *Civil Procedure Rules* mandate parties to a suit to file their respective list of documents as well as a list of witnesses' statements in support of their case while instituting a suit. The general tenor of the *Civil Procedure Rules* is that parties ought to disclose their case at an early stage to avoid ambush, delay and increase of costs, and this requirement is imposed on a defendant when filing the defence and counterclaim, if any, under order 7 rule 5 of the rules.
31. Upon the satisfaction at the pre-trial conference, under order 11 of the rules, the matter was set down for hearing where it was expected that all the parties will have made full disclosure so that either party knows the case that they will face at the trial.
32. This notwithstanding even after the pre-trial conference, it is trite that a court has the power to allow the parties to call further witnesses or produce further documents, as per the provisions of order 18 rule 10 of the *Civil Procedure Rules* and section 146 of the *Evidence Act*, so as to ensure that each party is afforded a fair trial as guaranteed under article 50 (1) of the *Constitution*.
33. In the case of *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, the court held as follows;
- “The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. this flows from the provisions of article 159 (2) (d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules”.
34. The applicants have indicated to the court that since the respondents had sought to introduce new evidence that in the interest of justice that they too be allowed to introduce the evidence so sought. With due respect these are two different scenarios for in the first instance, the application was made by the plaintiff before they had closed their case wherein the defendant /applicant had the liberty to cross-examine the said evidence which in my view was a level playing field and not prejudicial to the defence. In the instant case, however, the trial had reached an advanced stage/its tail end where allowing the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants to record new statements and file new documents would amount to allowing them to make up their case and fill gaps at the very end of the trial.
35. However courts have held time and again that the mistake of counsel ought not to be visited upon a litigant and that the court should endeavor to assert and preserve a litigant's rights to be heard without placing undue weight on a litigant's counsel's mistake.



36. It was held in the case of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR that;

“Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pre-trial or in the course of the trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The *Civil Procedure Act* and rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time of disposition. Since the procedural directions are meant to serve substantial justice it follows therefore careful weight should be given to facially legitimate and *bonafide* reason for any procedural errors or omission in order to exercise discretion for the interest of justice”.

37. I find that although the plaintiff/respondent has opposed the application for valid reasons that their witness had already given evidence and that by allowing the application at this late stage of the proceedings, the defendants would fundamentally alter the character of their case to one that the plaintiffs never contemplated when tabling its evidence, the plaintiff has not demonstrated how allowing evidence to be adduced of the documents they themselves had would be prejudicial to their case.

38. Indeed the letter dated the January 25, 2016, which Mr SM Kamanja seeks to produce was marked as “DMF1” and formed part of the defendant’s documents whereas the valuation report dated December 2018 by M/s Legend Valuers Limited was included as a document in the additional affidavit by the 2<sup>nd</sup> defendant which had been sworn on the June 7, 2019 and which also formed part of the court records. I find that the same will not amount to an ambush as the plaintiff was made aware of the existence of the proposed witness right from the beginning of its case.

39. I find that allowing these statements as additional evidence will not prejudice the plaintiff’s case but will in fact enable the court arrive at a just determination of the matter. The defendants should be given an opportunity to present or defend their case fairly.

40. To this end and in the spirit of article 50 (1) of the *Constitution* and section 3A of the *Civil Procedure Act*, I allow the application with the following directions.

- i. That only statements of M/s Legend Valuers Limited and Mr S M Kamanja shall be filed and served upon the plaintiff within the next 14 days upon delivery of this ruling.
- ii. The plaintiff shall have a right to file rejoinder statements within 14 days upon service, to call or recall the witnesses for further examination in chief, cross-examination or re-examination on matters arising therein.
- iii. The cost of this application to abide the outcome of the main suit.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 16TH DAY OF FEBRUARY 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

