



Sutton Holdings Limited v Nyamunga & 2 others (Environment and Land Case Civil Suit 22 of 2018) [2023] KEELC 802 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 802 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 22 OF 2018
SO OKONG'O, J
FEBRUARY 16, 2023**

BETWEEN

SUTTON HOLDINGS LIMITED PLAINTIFF

AND

ERIC OPON NYAMUNGA 1ST DEFENDANT

LAND REGISTRAR KISUMU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. What is before the court is the 1st Defendant's Notice of Motion application dated December 19, 2022 brought under Order 50 Rule 1 of the [Civil Procedure Rules](#) and Articles 25 and 159 of the [Constitution](#) of Kenya, 2010 seeking the following orders;
 1. That the court be pleased to grant leave for the 1st Defendant/Applicant to file further list of documents and witness statements.
 2. That upon grant of prayer 1 above, the Plaintiff/Applicant be at liberty to file further list of documents or recall witnesses.
 3. That costs of the application be provided for.
2. The application is brought on the grounds set out on the face thereof and on the affidavit of the 1st Defendant sworn on December 19, 2022. The 1st Defendant has averred that the Plaintiff tendered its evidence and closed its case on November 7, 2022. The 1st Defendant has averred that his advocates were served by the 2nd Defendant with its list of documents and witness statements on the said date of the hearing of the Plaintiff's case. The 1st Defendant has averred that upon perusal of the said documents that were served upon his advocates by the 2nd Defendant, his advocates discovered that



there were parallel registers for the suit property. The 1st Defendant has averred that his advocates sought an adjournment to take instructions from him on the said new information since he was not present in court but the application was disallowed by the court. The 1st Defendant has averred further that he had not obtained copies of the record of appeal and the judgment that was made in Kisumu Criminal Appeal No 53 of 2014, Luke Ochieng Ogada v Republic. The 1st Defendant has averred that the documents that he wishes to file in court will assist the court to determine the issues in controversy between the parties with finality. The 1st Defendant has averred that it would be just and expedient to grant the orders sought for the ends of justice to be met. The 1st Defendant has averred that no prejudice would be occasioned to the Plaintiff if the application is allowed since it will be at liberty to recall its witness who has already testified to give further evidence on the documents to be filed by the 1st Defendant. The 1st Defendant has averred further that he has managed to trace one, George Kwanyah Odidi from whom he purchased the suit property and would like to call him as a witness in the suit.

3. The application is opposed by the Plaintiff through a replying affidavit sworn by Aman Kurji on February 6, 2023. The Plaintiff has contended that the 1st Defendant did not file a list and bundle of documents even after being given more time to do so by the Deputy Registrar and as such the issue of filing a further list of documents does not arise. The Plaintiff has contended further that the 1st Defendant is not candid in that it is not true that the 1st Defendant only learnt of the parallel register for the suit property from the documents that were filed in court by the 2nd Defendant. The Plaintiff has averred that the 2nd Defendant did not file any list of documents and that as way back as August 5, 2019, the 1st Defendant was aware of the existence of the parallel register for the suit property. The Plaintiff has averred further that the 1st Defendant had not given any indication that he wished to file as part of his documents the record of appeal in Kisumu Criminal Appeal No 53 of 2014, Luke Ochieng Ogada v Republic and the judgment that was delivered in that case in support of his case. The Plaintiff has averred that in any event, the said criminal case was determined on June 18, 2015 and no explanation has been given by the 1st Defendant why he did not procure the said record of appeal and judgment earlier. The Plaintiff has averred that the record of appeal which the 1st Defendant is seeking to file as part of his further bundle of documents is bulky and the Plaintiff would find it difficult to respond to the same having closed its case. The Plaintiff has contended further that the 1st Defendant has never indicated to the court that he wished to call George Kwanyah Odidi as his witness and that no one stopped the 1st Defendant from taking a witness statement from the said George Kwanyah Odidi before the hearing of the suit commenced. The Plaintiff has averred that the 1st Defendant's application if allowed would cause further delay in this old matter. The Plaintiff has contended that the application is aimed at filling the gaps in the 1st Defendant's case having listened to the Plaintiff's case. The Plaintiff has contended that the documents sought to be introduced by the 1st Defendant are prejudicial to the Plaintiff.
4. The application was heard on February 13, 2023. The 1st Defendant/Applicant's advocate reiterated that the 1st Defendant wished to file a further list of documents comprising mainly of the record of appeal that was filed in Kisumu Criminal Appeal No 53 of 2014, Luke Ochieng Ogada v Republic and a further witness statement. On his part, the Plaintiff's advocate reiterated that the 1st Defendant did not file any list of documents and as such what he has sought is not leave to file a further list of documents but a belated attempt to be allowed to comply with discovery under Order 11 of the [Civil Procedure Rules](#) after the Plaintiff has already closed its case.



Analysis and determination:

5. The Plaintiff brought this suit against the 1st Defendant on April 30, 2018 seeking among others, a declaration that the Plaintiff is the lawful registered owner of all that parcel of land known as Title No Kisumu/Korando/1973(the suit property) and an order for vacant possession. The 1st Defendant filed a defence on September 14, 2018 in which he averred that he was the registered owner of the suit property. The 1st Defendant averred that the suit property was transferred to him on July 27, 1990. The 1st Defendant averred that sometime in 2000, one, Luke Ochieng Ogada fraudulently transferred the suit property to himself before transferring the same to one, Noorez Nishar Shamji from whom the Plaintiff acquired the property. The 1st Defendant averred that he lodged a complaint with the police against the said Luke Ochieng Ogada. The 1st Defendant averred that Luke Ochieng Ogada was arrested, charged and convicted of fraud. The Plaintiff filed amended plaint on March 16, 2022 in which it added the 2nd and 3rd Defendants to the suit. The 1st Defendant filed an amended defence on May 5, 2022 while the 2nd and 3rd Defendants filed their joint statement of defence on April 14, 2022. I have not seen on record any witness statement or list of documents filed by the 1st Defendant. I have noted that on July 14, 2022, the 1st Defendant asked for time to file his list of documents and was granted 14 days to do so by the Deputy Registrar. No list of documents was filed by the 1st Defendant. The 2nd and 3rd Defendants filed a witness statement on July 4, 2022. The 2nd and 3rd Defendants did not file any bundle of documents. The hearing of the suit commenced on November 7, 2022 when the Plaintiff's case was heard and closed. The suit was thereafter fixed for further hearing on February 20, 2023 when the defendants are expected to tender their evidence.
6. I have considered the 1st Defendant's application together with the supporting affidavit. I have also considered the Plaintiff's replying affidavit filed in opposition thereto. Section 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya gives the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is not disputed that the court has the discretion to allow a party to a suit to file a list of documents or further list of documents and a witness statement or additional witness statements at any time in the course of the proceedings. What is in dispute is whether the 1st Defendant has established sufficient cause to warrant the exercise of that discretion. The court's discretionary power must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in [Patriotic Guards Ltd v James Kipchirchir Sambu](#) [2018] eKLR as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
7. From the affidavit evidence placed before the court and submissions by the parties, I am not satisfied that the 1st Defendant has given a good reason or excuse for his failure to file a list of documents and witness statements during the case management stage even after time was extended for him to do so. I am in agreement with the Plaintiff that all the excuses put forward by the 1st Defendant for his failure to file a list of documents and witness statements on time are neither reasonable nor convincing. In



Attorney General v Law Society of Kenya & another [2017]eKLR the court defined sufficient cause as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black’s Law Dictionary, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

8. In *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040, Apaloo J stated as follows:

“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 heard on merit. 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.”

9. The 1st Defendant’s shortcomings mentioned above notwithstanding, I am of the view that the evidence sought to be adduced by the 1st Defendant through the proposed testimony of George Kwanyah Odidi and the list of documents to be filed comprising of the record of appeal in Kisumu Criminal Appeal No 53 of 2014, Luke Ochieng Ogada v Republic and the judgment delivered in that case would assist the court in arriving at a just decision in this rather convoluted suit. I am also of the view that the cause of justice would be better served if the application before the court is allowed. I have noted from the record that the 1st Defendant did not file witness statements and a list of documents. If the court disallows the current application, the 1st Defendant will be unable to defend himself in this suit. In *Richard Nchapi Leiyangu v IEBC & 2 others*, Civil Appeal No 18 of 2013, the court stated that:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

10. I am not convinced that the Plaintiff stands to suffer any prejudice that cannot be compensated in costs. The documents that the 1st Defendant intends to file are contained in a record of appeal that was filed in the High Court in a criminal appeal that was lodged by Luke Ochieng Ogada. Luke Ochieng Ogada is alleged to have fraudulently acquired the suit property and transferred it to the person from whom the Plaintiff is said to have acquired the same. The fact that the said Luke Ochieng Ogada was arrested and charged for fraudulently acquiring the suit property was pleaded by the 1st Defendant. That fact is not new to the Plaintiff. The record of appeal that Luke Ochieng Ogada lodged in the High Court in the appeal against his conviction by the lower court which contains the proceedings of the lower court and the judgment of that court, and the judgment of the High Court in the said appeal cannot therefore take the Plaintiff by surprise. The fact that the 1st Defendant claims to have purchased the suit property from one, George Kwanyah Odidi whom the 1st Defendant wishes to call as a witness is also not new to the Plaintiff. Although the Plaintiff has closed its case, the Plaintiff is at liberty to apply



to reopen its case and to recall its witness who has given evidence to give further evidence and to call additional witnesses if necessary. I am therefore unable to see in what manner the Plaintiff would be prejudiced if the application by the 1st Defendant is allowed and the Plaintiff is awarded the costs of the application and given liberty to reopen its case and recall its witness who has given evidence to testify further and to call additional witnesses if necessary.

11. Due to the foregoing, I am inclined to exercise my discretion in favour of allowing the application. The 1st Defendant's application dated December 19, 2022 is allowed on the following terms;
1. The 1st Defendant is granted leave to file a list of documents and witness statements within 7 days from the date hereof.
 2. The Plaintiff is granted leave to reopen its case and to recall its witness who has given evidence to give further evidence if necessary.
 3. The Plaintiff is also granted leave to file a further list of documents and to call additional witnesses if necessary. Further list of documents and witness statements by the Plaintiff if any shall be filed within 21 days of service of the 1st Defendant's list of documents and witness statements upon the Plaintiff.
 4. The 1st Defendant shall pay to the Plaintiff thrown away costs and the costs of this application assessed at Kshs 30,000/- payable forthwith and in any event before the next hearing date.

DATED AND DELIVERED AT KISUMU ON THIS 16TH DAY OF FEBRUARY 2023.

S OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms Muthee for the Plaintiff

Mr Munuango for the 1st Defendant

Mr Mwamba h/b for Ms Masaka for the 2nd and 3rd Defendants

Ms J Omondi -Court Assistant

