



Tomno & another v Cheron & 3 others (Environment & Land Case 144 & 152 of 2019 (Consolidated)) [2023] KEELC 750 (KLR) (13 February 2023) (Ruling)

Neutral citation: [2023] KEELC 750 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 144 & 152 OF 2019 (CONSOLIDATED)
LA OMOLLO, J
FEBRUARY 13, 2023**

BETWEEN

**REBECCA CHEPKOECH TOMNO AKA REBECCA WESLEY
TOMNO PLAINTIFF**

AND

**ESLEEN TARKOK CHERONO 1ST DEFENDANT
LEAH MUKURU 2ND DEFENDANT
EDMOUND CHERONO 3RD DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 152 OF 2019**

BETWEEN

**ESLEEN TARKOK CHERONO (SUING AS AN ADMINISTRATOR OF ESTATE
OF RAYMOND CHERONO TOMNO) PLAINTIFF**

AND

REBECCA WESLEY TOMNO DEFENDANT

RULING

1. This ruling arises from an objection raised by the plaintiff in respect of directions issued by this court on the order and timelines for filing of submissions by the parties.
2. The issue in contention is who between the plaintiff and the defendants should file submissions first.



Factual Background.

3. This suit was commenced by way of a plaint dated November 14, 2019 and filed on November 15, 2019. The plaintiff seeks the following orders:
 - a) A declaration that the plaintiff is the lawful owner of all that parcel of land known as Baringo/Ravine-102/242.
 - b) An order compelling the 2nd and 3rd defendants to grant vacant possession to the plaintiff of all that parcel of land known as Baringo/Ravine-102/242 and in default they be forcibly evicted therefrom.
 - c) An order directing the 1st defendant to remove the caution she has placed on all that parcel of land known as Baringo/Kabarnet-102/242 and in default the District Land Registrar-Kabarnet he ordered to remove the caution.
 - d) A permanent injunction restraining the Defendants either by themselves, their agents, servants, employees, tenants or otherwise howsoever from entering, occupying, charging, carrying on any development or dealing with all or any portion of that parcel of land known as Baringo/Ravine 102/242 in whatsoever prejudicial to the interest of the plaintiff.
 - e) General damages for trespass and unlawful interference with the plaintiff's property rights pursuant to the provisions of section 75 of the [Land Registration Act, 2012](#).
 - f) Costs of the suit with interest till payment in full.
 - g) Any other or further relief this Honourable court may deem fit to grant.
4. The defendants on the other hand filed their statement of defence dated January 15, 2020 where they contend that they own the suit property with no obligation to transfer it to the plaintiff.
5. They denied all the other allegations in the plaint.
6. Both the plaintiff and defendants tendered evidence and what is left, before this objection was raised, was filing of submissions and judgment.
7. The conflicting views on the order for filing final submissions after hearing of the suit forms the basis of this ruling.

Issues For Determination.

8. The plaintiff filed her submissions on October 11, 2022 while the defendants filed their submissions on October 19, 2022.
9. The plaintiff cites order 18 rule 2 of the [Civil Procedure Rules](#) and numerous authorities in support of their arguments. She submits that the deduction to be drawn from reading order 18 rule 2 is that the party who adduces evidence last begins addressing the court generally on the case or making of the final submission. According to her, therefore, the defendants should file their written submissions first.



10. The plaintiff relies on the decision in *Remu Microfinance Bank Ltd v Robinson Muriuki Njeru* [2017] eKLR. Wherein it was held the word general address in order 18 rule 2 refers to submissions
11. The plaintiff also cites the decision in *Rasiklal Manickand Dhariwal & another v M/S MSS Food Product* wherein the Supreme court of India explores the meanings of the words ‘state his case’, ‘produce his evidence’ and ‘address the court generally’ occurring in order XVIII rule 2 sub-rule rule (1) and sub- rule (2). The plaintiff highlights the part of the holding that states that after evidence has been produced by all parties, a right is given to the parties to make oral arguments and also submit written submissions, if they so desire. It is further stated in the said decision, that the hearing of a suit does not mean oral arguments alone but it comprehends both production of evidence and arguments.
12. The plaintiff also cites the decision of *George Kinuthia Ndungu v British American Insurance (K) Co Ltd* [2012] eKLR. In this case it is observed that the plaintiff gives an opening address, calls evidence. If the defendant does not call evidence, the plaintiff submits and the defendant replies. if any case law is quoted, then the party beginning (plaintiff) has a right of reply but if no case law is quoted then the party beginning (plaintiff) would have no right of reply. It is further observed that if the defendant calls evidence, he is the one who would begin to submit and the plaintiff would reply. Thereafter, there would be no right by the defendant to reply.
13. The plaintiff has also cited the decision in *Donald Maganga Mwachipi v Ruth Sambo Shuma (Suing as the Administrator of the Estate of Elias Shuma Mwakireti)* [2015] eKLR wherein the court stated that submission appear to be a mandatory step unless parties confirm that they do not wish to make any and they request the court to pronounce judgment based on evidence adduced.
14. The plaintiff further cites the Indian decision of *Sultan Saleh Bin Omer v Vijayachand Sirimal* AIR 1966 1P 295
15. It is the plaintiff’s submission that order 18 rule 2 envisaged a situation where parties would make oral submissions in court. They further submit that the practice of filing written submission was adopted to save on judicial time which would be taken when making oral submissions.
16. In conclusion, the plaintiff submits that the practice adopted by courts in Kenya is erroneous and that we should get back on track on the correct procedure in conducting civil trials which is that the defendant should make their submissions first. The plaintiff also submits that India has amended the code of Civil Procedure to provide for filing of written arguments.
17. The defendants on the other hand identified one issue for determination i.e who between them and the Plaintiff should file their submissions first.
18. The defendants relies on order 18 rule 1 and 2 and submit that the same relates to oral arguments or submissions which this honourable court has discretion to order at the hearing. They add that the same does not refer to the written submissions as alleged by the plaintiff.
19. The defendants relies on the judicial decision in *Jeremiah Omollo v Kenya Wildlife Service* [2019] eklr, in which the learned judge examines the provision of order 18 rule 2 sub-rule (3) and observes that they are permissive for the reason that it begins with the words ‘unless the court otherwise’. The learned judge goes on to explain that this means that the court may order that such statements of address to the court generally which amount to closing speech are not necessary.
20. The defendants also cite the decision in *Mutegi Mugwetwa & County Ministry of Lands, Physical Planning Energy & ICT County Government of Tharaka Nithi & 5 others; Chuka Igambang’ombe Development Association (Interested Party)* [2019] eKLR, wherein the Learned Judge stated that in his



view, order 18 rule 1 and 2 relates to proceedings conducted orally and that it does not embrace written submissions.

21. The defendants further submit that the plaintiff having initiated proceedings against the defendants is bound by the principle that whoever alleges must prove as provided for under section 107 of the [Evidence Act](#).
22. In conclusion, the defendants submit that the plaintiff having tendered his evidence, she is duty bound to file her written submissions in order for the defendants to reply.

Analysis and determination.

23. Upon perusal of the submissions, it is this court's view that the main issue for determination is:

a) Who between the plaintiff and defendants should file their written submissions first.

24. I must admit that when the plaintiff raised the objection herein, I was a little surprised by it for the reason that I thought it to be an obvious legal and/or practice position. I nevertheless allowed parties to address me on it so that the rival positions might settle.
25. [Black's Law Dictionary 11th Edition](#) at page 1724 defines submission as;
'An advocate's argument'.
26. GT Pagone in 'Written -Advocacy: Writing with Effect and Persuasion,' in the book *Essays in Advocacy* 119,127 (Tom Gray et al eds., 2012) states thus;

Written submissions are intended as documents to persuade. The context in which they are created are numerous and not confined to court or tribunal hearings. Letters of demand and applications to government or other regulatory authorities can be seen as forms of written submissions. In their most basic form written submissions are written contentions for a position. The person or body to whom they are addressed may have forms, procedure or guidelines about how submissions would be prepared and presented and these will create the structured context and constraints which the written submissions must follow."
27. My understanding of written submissions in the context of Kenya is that they allow parties one last opportunity to persuade the Judge, magistrate or tribunal hearing a matter to make a determination in their favour, based on evidence and law that they have presented to court and also dissuade the judge, magistrate or tribunal from taking the position advanced by the opposing party.
28. I must point out from the outset that the [Civil Procedure Act](#) and rules in Kenya do not expressly make provision for written submissions. Consequently, the writing and filing of submissions is borne out of practice and is ingenuity of the bar and bench. Thus, the plaintiff typically is permitted to provide submissions first, the defendant then responds to the said submissions and the plaintiff, if need be, offers a rebuttal of defendant's submissions.
29. The rationale for this practice, in my view, is that the party with the burden of proof, the plaintiff, is given the advantage of both "primacy" and "recency" in making its case. The primacy and recency effect is the observation that information presented at the beginning (primacy) and end (recency) of a learning episode tends to be better retained than information presented in the middle.
30. Order 18 rules 1 and 2 of the [Civil Procedure Rules](#) is the law that makes provision for of hearing of suits and examination of witnesses. I reproduce it as hereunder:

Statement and production of evidence [order 18, rule 2.]



Unless the court otherwise orders—

- (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
- (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.
- (3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited. (Emphasis is mine)
- (4) The court may in its discretion limit the time allowed for addresses by the parties or their advocates

31. Order 8 rule 2 sub-rule (3) is particularly important for the reason that it is the provision that informs the position and arguments advanced by the plaintiff. This provision deals with right of address and in my view, it is a right of oral address. I draw this deduction from a further reading of order 8 rule 2 (3). The words used are;

‘...but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address...’.

In the course of an address means during an address. In grammar, these words are in the present participle tense. The rules are offering guidance to the court on the order of addresses during a hearing. Hearings are generally conducted orally and in open court.

Further, the heading of order 18 is ‘hearing of suits and examination of witness’. It is not farfetched to deduce that the rules envisaged under this provision relate to oral hearings.

32. I agree with the finding in *Mutegi Mugwetwa & County Ministry of Lands, Physical Planning Energy & ICT County Government of Tharaka Nithi & 5 others; Chuka Igambang’ombe Development Association (Interested Party)* (Supra) that order 18 rule 1 and 2 relates to proceedings conducted orally and that it does not embrace written submissions.

33. The plaintiff also submits that India has amended its code of Civil Procedure to provide for filing of written arguments. The said amendment is introduced into the Indian Civil procedure Code as order 18 rule 3A-3F. I note that those amendments make provision for written arguments which are intended to provide opportunity for the advocates to reduce their oral arguments in writing.

34. In Kenya we have not incorporated written submissions into our *Civil Procedure Rules*. The manner in which we navigate written submissions, as stated earlier, is borne out of practice. The place of submissions in Kenya is expressed in Nairobi Civil Appeal No 240 of 2011 *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR wherein it was held as follows:

“Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”



35. Importantly and flowing from this decision is that there is no compulsion on the part of a judge, magistrate or tribunal to wait and/or obtain written submissions from parties before he/she or it can render a decision. If this be the case, why should the order matter? Very often the court gives direction on filing submissions and certain parties comply while others don't. Should a court therefore not write a judgment or not take into consideration submissions filed by the defendant because the plaintiff did not file his/hers first as directed? How absurd would that be! It is for this reason that in *Ngang'a & another v Owiti & another* [2008] 1KLR (EP) 749, the court held that:

"As the practice has it and especially where counsel appears, a court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable." (Emphasis is mine).

Disposition.

36. In the result I find that the plaintiff's objection is not merited and is hereby dismissed with costs to the defendants.

37. Consequently, I issue directions as follows;

- a. The plaintiff shall file and serve submissions upon the defendant within 21 days of the date hereof.
- b. The defendants shall file and serve submissions within 21 days upon service.
- c. The matter shall be mentioned on March 27, 2023 for submissions and to take a judgment date.

38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF FEBRUARY, 2023.

L. A. OMOLLO

JUDGE.

In the presence of: -

No appearance for the Plaintiff.

No appearance for the Defendants

Court Assistant; Ms. Monica Wanjohi.

