



REPUBLIC OF KENYA



KENYA LAW
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**Gitau & 2 others v Attorney General & 10 others (Civil Case
57 of 2021) [2023] KEELC 20352 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20352 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CIVIL CASE 57 OF 2021
AE DENA, J
SEPTEMBER 29, 2023

BETWEEN

JOSEPH MWANIKI GITAU 1ST PLAINTIFF
**MILKA NJERI GITAU (SUING AS THE ADMINISTRATORS OF THE ESTATE
OF THE LATE SAMSON MWAURA GITAU) 2ND PLAINTIFF**
BRIGITTE KARL GITAU 3RD PLAINTIFF

AND

THE ATTORNEY GENERAL 1ST DEFENDANT
THE LAND REGISTRAR KWALE 2ND DEFENDANT
SAID BEDZENGA 3RD DEFENDANT
THE ESTATE OF THE LATE JUMA A KIMETSE 4TH DEFENDANT
HAMISI JUMA CHIMETSE 5TH DEFENDANT
FATUMA SAID KIMETSE 6TH DEFENDANT
MWANALIMA SAID NIMUPUGU 7TH DEFENDANT
ASHA SAID KIMETSE 8TH DEFENDANT
REHEMA JUMA KIMETSE 9TH DEFENDANT
JOHN ERICK MUSYOKA ANNAN 10TH DEFENDANT
GERARDINE MUMBUA MUSYOKA 11TH DEFENDANT



RULING

1. This ruling is subject of the oral application by the 5th Defendant to have his supplementary list of documents dated 26/7/2023 deemed duly filed as part of the court record. A similar application has also been made by the 10th and 11th Defendants who have also filed a supplementary list of documents dated 26/7/2023. Both applications are vehemently opposed by the Plaintiffs.
2. A brief history of this matter will suffice at this point. On 24/7/2023 the court commenced hearing of the Plaintiffs case. PW1 gave his testimony on the said date and so did PW2 Stephen Waweru Gitau. The matter further proceeded on 25/7/2023 where PW3 Purity Wanjiru Mwangi gave her testimony and the plaintiffs case was closed. At the close of the plaintiffs case, counsel for the plaintiff Mr. Tindi immediately made an application for the plaint to be amended pursuant to the findings of the site visit earlier made by the parties and the court to the disputed suit property. According to the plaintiffs, the site visit confirmed that the 5th defendant has fenced off part of the disputed parcel and hence the necessity to amend the plaint and include a prayer for damages for trespass and eviction of the said defendant. It should be noted that initially the plaintiffs had alleged that it was the 11th Defendant that had fenced off part of the suit property.
3. The application for amendment of the plaint was opposed by the Defendants counsel Mr. Waga and Mr. Sigey who stated that the Plaintiffs had already closed their case and it would be prejudicial to the Defendants to allow the amendment of the plaint. The court in its ruling allowed the application for amendment of the plaint based on the provisions of order 8 rule 3 of the Civil Procedure Rules on amendment of pleadings with the leave of court.
4. On 26/7/2023 when the mater came up for defence hearing Mr. Sigey Counsel for 5th Defendant intimated to court that a supplementary list of documents for the 5th Defendant had been filed and served upon the plaintiffs and further referred to the list of documents filed by the 11th and 12th Defendants. Mr. Tindi Counsel for the Plaintiffs in response to the filing of the supplementary lists of documents stated that the court never gave directions on filing of an independent survey report. He objected to the documents being made part of the courts record. Mr. Waga was not opposed to the filing of the said documents and stated that the court had allowed the amending of the plaint earlier on based on the finding that the 5th Defendant had fenced off a portion of the disputed property. He submitted that a quick perusal of the documents filed showed a difference between the suit property and the fenced property. That the 5th Defendant had not amended his defence but had instead filed the supplementary list of documents in rebuttal of the amendments made to the plaint. That the documents were filed so as to lead the court to the truth on ownership of the suit property.
5. In his oral submissions to the filing of the supplementary list of documents, the 11th defendant Mr. Musyoka stated that nothing had stopped the Plaintiffs from availing their own survey report. He stated that he had been accused of fencing part of the suit property and that informed his request for a site visit. Counsel submitted that the persons better placed to carry out the exercise were surveyors and not lawyers and hence the need for the 11th and 12th Defendants to procure their own surveyor who prepared a report that has been filed in the contested list of documents.
6. Mr. Sigey submitted that the list of documents was not an ambush and that the plaintiffs would be accorded the opportunity to cross examine the veracity of the documents presented.
7. Against the above background, the court will now apply itself on whether or not the supplementary lists of documents both dated 26/7/2023 should be allowed as part of the Defendants documents. The



only issue for determination is therefore whether the Applicants have met the threshold for the exercise of discretion in their favour.

8. The law governing filing of documents by the defence as set by the rules governing filing of pleadings is under order 7 rule 5 of the *Civil Procedure Rules*. The same provides as hereunder Documents to accompany defence or counterclaim [order 7, rule 5.]

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- a. an affidavit under order 4 rule 1(2) where there is a counterclaim;
- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses except expert witnesses; and
- d. copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.

9. I have perused the surveyors report for the site visit conducted on 21/7/2023, I believe at this point it will not be proper for the court to belabour into the contents of the same. I will however seek to determine whether the 11th Defendant had fenced off the parcel, I find that the contents of the report indicate that it is the 5th Defendant that has fenced off the parcel referred to by the Plaintiffs. In my view, the main reason as to why the 11th Defendant insists on having the independent survey report other than that prepared by the Deputy Registrar filed, is to clearly demonstrate the fact that the trespass earlier on alluded to by the Plaintiffs was not by him but by the 5th Defendant.
10. I have further perused the list of documents by the 5th Defendant. The list includes a title deed for Kwale/Diani/438 issued on 7/5/2007, letter of offer dated 24/7/1985, certificate of acceptance dated 2/9/1985, property rates request amongst other documents. I refer to the application earlier made by the Plaintiff in reference to the amendment of the plaint. It is noteworthy that the prayer for amendment of the plaint was made after the site visit. It is during the site visit that it was established that the 5th Defendant had fenced off part of the suit property and the prayer for damages for trespass and eviction is specifically made against the 5th Defendant.
11. Counsel for the 5th Defendant has intimated to court that the 5th defendant had opted to file the further list of documents in order to give a proper response to the findings of the site visit on fencing off the suit property. According to the 5th defendant, the documents are to ascertain the fact that he is the owner of the said property. One thing is very clear, the need to file the supplementary list of documents has been agitated by the amendment to the plaint. The question therefore is whether these additional documents will cause any prejudice to the plaintiffs if allowed on record. I am guided by an excerpt in *Johana Kipkemei Too v Hellen Tum* [2014] eKLR Justice Munyao stated as follows:

“This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. 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”.

12. It should be noted that despite making the above observations, the court in the above case did not allow the further list of documents as part of its record for the reason that in that particular suit, litigation was at an advanced stage and introduction of new evidence would obviously result in one of the parties stealing a march against the other. However, in answering the question as to whether any prejudice will arise in the event that the contested lists of documents are filed, this court takes cognizance of the peculiar circumstances under which the need to have the lists filed arose. It is noted that the 5th Defendant has not prosecuted his case and, in my view, the fact that a specific prayer for eviction and trespass has been made against him after commencement of hearing of the suit necessitates the defence and need for additional documents in defending himself.
13. The overriding objective of this court as stipulated under section 3 of the *Environment and Land Court Act* is to facilitate the just, expeditious, proportionate and accessible resolution of disputes. The court is duty bound to do justice to all parties. Having allowed the amendment on the plaint, I think it is only fair that the 5th defendant is allowed to file the documents he deems fit and necessary in his defence. The basic principles on independence of the judiciary dictate that matters before court are decided impartially and in accordance with the law. Impartiality in my humble opinion enjoins the provisions of article 159[2][d] of the Constitution and which dictates that each party is given an avenue to ventilate their case regardless of the procedural technicalities that might arise. I am guided by the holding in *Esther Wambui Njenga v Harrison Mwangi Nyota & 2 others* [2018] eKLR where the court opined that it is fair to allow each party to fully ventilate their case if for no other reason but so that the whole truth is revealed.
14. Based on the foregoing, the list of documents dated 26/7/2023 by the 5th Defendant and the list dated 26/7/2023 by the 11th Defendant are hereby allowed. There shall be no order as to costs. Parties to set down the matter for further hearing at the earliest opportune time given that the same is partly heard.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 29TH DAY OF SEPTEMBER, 2023

A.E. DENA

JUDGE

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

Mwaniki Gitau Plaintiff and holding brief for Mr. Tindi

Mr Waga for 1st and 2nd defendant

Mr. V. Omollo for 5th Defendant

Musyoka Annan for 10th & 11th defendants

Mr. Sigei for 4th, 6th, 7th, 8th & 9th Defendants

