



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**SUCCESSION CAUSE NO. 104 OF 2012**

**IN THE MATTER OF THE ESTATE OF JEBUIGUT CHERUIYOT JERICH(DECEASED)**

**AND**

**IN THE MATTER OF EVANS CHUMBA.....1<sup>ST</sup> APPLICANT**

**VERSUS**

**IN THE MATTER OF ELIAS KIMUTAI.....1<sup>ST</sup> APPLICANT**

**RULING**

1. The applicant (Evans Chumba) moved this court by a notice of motion application dated 30.9.2019 seeking to be granted leave to file a supplementary list of witnesses out of time and for costs of the application.
2. The grounds in support of the application are that hearing of the cause was for 2.10.2019 and he is desirous to call 6 more witnesses. Failure to file their witness statements was not intentional and it would be fair that the same be allowed. That the applicant stands to suffer irreparable loss if the same is not allowed.
3. The supporting affidavit was sworn by Evans Chumba who in addition to the grounds averred that the witnesses he intends to call are well conversant with the issues in dispute and that the application has been brought in good faith and its in the interest of justice that the same be allowed.

**RESPONSE**

4. Pius Kosgei, the administrator to the estate swore an affidavit and responded by stating that his advocate on record had read the application and explained it to him. He averred that the applicant had filed a list of witnesses on the 15.9.2015 and all have testified. He further filed a supplementary list of witnesses dated 28.6.2018 filed in court on the 3.7.2018 and the two witnesses are yet to testify. The instant application to call 6 more witnesses will result to a waste of judicial time and it shall result to ambush on the other party. The principle of fair hearing demands that the respondents be given a chance to testify and this is a delay tactic as the matter has been in court for over 7 seven years. The applicant has not given any justifiable reason for not filing list of witnesses before the conclusion of the pre-trial directions.
5. The application is misguided and the same ought to be dismissed with costs.

**Submissions**

**Applicant's submissions**

6. It is his submission that the respondents replying affidavit is full of misconceptions and is a denial of a right to fair hearing. In ***Johana Kipkemei Too v. Hellen Tum[2014]eklr***, the court analysed factors to consider before allowing a party to put in additional documents, they include:

- i. *Discovery of new documents (This is not relevant herein as the applicant intends to call witnesses and not documents)*
- ii. *The stage of the proceedings*
- iii. *Whether any party would suffer prejudice and*

iv. Whether it would be in the best interest of justice

7. The applicant is yet to close his case and therefore allowing more witnesses shall not result to an ambush. The court was urged to invoke Article 159 of the Constitution. In **Christopher Kioi & anor v. Winnie Mukolwe & 3 ors [2013]eklr**, the court held as follows: “Article 159 of the Constitution also enjoins the court to administer justice without undue regard to procedural technicalities. Having considered all the circumstances herein. I find that granting leave to the plaintiff to bring forth witness will not be prejudicial to the defendant and interested party herein. They will have an opportunity to respond to the said statement..”

8. Lastly the court was urged to allow the application.

#### **Respondents’ submissions.**

9. This court was urged to find that the applicant is introducing new evidence in the middle of a hearing. In **Mohamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 ors [2018]eklr**, the court laid down the guiding principles for additional evidence which include:

- i. The additional evidence must be directly relevant to the matter before court and be in the interest of justice.
- ii. It must be established that, if given it would influence or impact the result of the verdict
- iii. It is shown that it would not have been obtained with reasonable diligence for use at the trial process, was not within the knowledge of or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence
- iv. Where the additional evidence adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit
- v. The evidence must be credible in the sense that it is capable of belief
- vi. The additional evidence discloses a stronger prima facie case of will deception on the court
- vii. Whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process.

10. Further parties were to comply with *Order 11 rule 7(2) and (3) of the Civil Procedure Rules* and that the applicant had filed a list of witnesses on the 15.9.2015 who have already testified and a supplementary list of witnesses was filed on the 28<sup>th</sup> June and 3<sup>rd</sup> July 2018 and they too have testified. Allowing the applicant to call a further 6 witnesses would be a waste of judicial time and the same won’t be in the interest of justice in regard to *Article 159 of the Constitution*. In **Republic v. Ali Babitu Kololo [2017] eklr**, the court held, “it has been said from time to time that the unfettered power of the court to receive additional evidence should be used sparingly and only where it is shown evidence is fresh and would make a significant impact on the determination of the matter.”

#### **Analysis and determination**

11. The issue that arises is whether the applicant should be granted leave to file a further supplementary list of witnesses.

12. The applicant herein has moved the court seeking leave to file a list of further 6 witnesses. The application has been opposed by the respondent. *Order 11 of the Civil Procedure Rules* governs parties on filing of a suit in court and what is expected of them upon compliance with *Order 3 rule 2* which states as follows:

“2. All suits filed under rule 10 including suits against the government, except small claims, shall be accompanied by —

- (a) the affidavit referred to under *Order 4 rule 1 (2)*;
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action:

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

13. The applicant was required to first comply with the above order at the initial stage of filing this succession cause. From the record it is clear he filed a list of 5 witnesses dated 15.9.2015 and filed in court on the 16.9.2015. The respondents filed his list of 10 witnesses dated 21.10.2015 and filed in court on 26.10.2015. The applicant filed a supplementary list of witnesses dated 28.6.2018 and filed on the 3.7.2018.

14. The record shows that the 5 witnesses whose statements were filed in court on the 16.9.2015 testified on the 11.6.2019. The respondents

averred that the 2 witnesses in the further list of witnesses had testified contrary to the court records which confirms that they are yet to testify.

15. The applicant urged this court to invoke *Section 1A* of the *Civil Procedure Act*.

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

16. The applicant has a duty to assist the court achieve its overriding objective by complying with *Order 11*. The applicant filed his supplementary list of witnesses and 5 of his witnesses have already testified. The applicant cannot purport to keep on adding more witnesses in the course of the hearing. This amounts to filling in the gaps noted during the hearing and is prejudicial to the adverse party. The applicant at filing of the suit knew what his suit was about and the evidence he needed to call in support.

17. *Order 7 rule 5* and *Order 3 rule 2* are in place to avoid trial by ambush. The court in pre-trial conference ensures compliance with the orders by the parties before commencing hearing. *Article 50(1)* of the *Constitution* provides that each party deserves a fair trial and this fair trial cannot be so if a party is allowed to keep ambushing the adverse party with fresh evidence in the course of the trial. In the supporting affidavit, Evans Chumba swore that the witnesses he intends to call are well conversant with the issues, if this is so he should have listed them as part of his witnesses at the time of filing the suit.

No reason is given why they were not considered as essential witnesses at the onset of the matter. Allowing the application will prejudice the respondent. The application therefore lacks merit and is dismissed with costs to the Respondent.

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 21<sup>st</sup> day of December, 2020.**

In the presence of:-

Miss Tum is for the Petitioner (absent)

Mr. Songok for the objector

Ms Gladys - Court assistant