



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC NO. 8 OF 2017 (OS)

(FORMERLY NKR ELC 55 of 2012)

MARY WAIRIMU MWANGI.....PLAINTIFF

VERSUS

MARY WANJA KAMIRA.....1ST DEFENDANT

THE ATTORNEY GENERA.....2ND DEFENDANT

RULING

1. The Applicant's Notice of Motion is dated and filed on the 27th July 2018 and, pursuant to the provisions of Section 1A, 1B, 1C (sic) and 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, and all other enabling provisions of the Law and the Constitution where the Applicant seeks to re-open her case in view of producing further evidence in support of her Case.

2. The said Application was supported on the grounds on its face as well, as on the Affidavit sworn on the 27th July 2018 by Mary Wairimu Mwangi the Applicant/plaintiff herein.

3. The Application was opposed by the 1st Defendant who filed her replying Affidavit dated the 20th December 2018 on an even date.

The Plaintiff/Applicant's Submission

4. It was the Applicant's submission that they sought to re-open their case so as to produce two documents marked as MWM 1 and MWM 2 in support of their case. That the two documents were fundamental to their case and had been listed in the Plaintiff's list of documents and supplementary list of documents.

5. That they had not been available due to the inadvertent mistake of the Plaintiff who did not avail them. That the Plaintiff had allowed her case to be closed because she thought the documents, or at least the document marked as MWN 1 would be referred to and produced by the 3rd Defendant. That now that the 3rd Defendant's case had been closed, she had promptly brought this application seeking for orders mentioned above for the ends of justice.

6. That the documents were not new as copies had been supplied as part of the pleadings. That the document marked MWM1 which they intended to produce was a certified copy having been certified by the Registrar in the year 2012 and therefore they would not call the Registrar to court against his will.

7. That the documents marked as MWM1 was an extract of the final member's register by Othaya Mahiga Chinga Co Ltd which was presented to the Land Registry- Nyandarua for purposes of issuance of title deeds to members. That the same bore the parcel number of each member, their names and ID numbers to which Parcel No 864 and 865 may be referred as their title number No Nyandarua/Ndaragwa/Uruku block 2(uruku)/864 and 865.

8. That the members' register showed the names of the members and their ID cards as against their two parcels. That the Plaintiff had a title deed for No 864. She was to obtain a title deed for parcel No 865 as per the same register, which she did not.

9. That there was a judgment entered against the 2nd Defendant on allegation of fraud which he perpetrated against the Plaintiffs leading to her failure to get registered for parcel No 865.

10. That the document they intended to produce would demonstrate the fraud in a clear manner since it showed that the names of the Plaintiff were super imposed by a stamp belonging to OMC EXFFACO Ltd together with a signature belonging to the 2nd Defendant. That the ID No

of the Plaintiff was also cancelled out by a pen and a new ID number written just above it.

11. The actions of the 2nd Defendant were not actions of the company, in that there was no company seal or signatures of two directors of the company.

12. That through the act of tampering with the register by the 2nd Defendant, the Plaintiff had lost the land which was then registered in the name of Simon Kamira Kabangi who had disappeared for three years.

13. That the 2nd document marked as MWM 2 had been referred to extensively during trial especially by the Plaintiff and DW2 the same showed that there had been arbitration proceedings that gave the Plaintiff parcel No 865 before tampering of the final register. The company was to give Simon Kamira Kabangi an alternative parcel of land.

14. The document was thumb printed by the Plaintiff, signed by Simon Kamira Kabangi, and DW2 among others.

15. That the said document was a very relevant document that would corroborate the testimonies on record that parcel No. 865 was granted/awarded to the Plaintiff whereby the final register was prepared and presented to the registry.

16. That the reason why the 1st Defendant was opposed to the present application was to try and conceal evidence or prevent the production of relevant evidence which would not be in her favour. That it was also meant to weaken the Plaintiff's case to defeat the cause of justice and to deny the court an opportunity to have all the requisite evidence before it in order to finally determine the issue in dispute. That the court of law ought to frown at such an attempt.

17. That the 1st Defendant was trying to lay claim to document MWM 1 wherein if indeed it was her exhibit, then there was no harm in letting the same be produced and she could also rely on it.

18. That the only difference between the 1st Defendant's exhibit and the document that they intended to produce, was that the one produced by the 1st Defendant must have been prepared before the resolution of the dispute at the tribunal and was therefore belated as it had been superseded by the one the Applicant intended to produce.

19. That Paragraph 4 of the 1st Defendant's replying affidavit seemed to admit the fact that the register the Applicant intended to produce was actually vital. That the 1st Defendant would suffer no prejudice if the application was allowed going by the contents of paragraph 4 of her replying affidavit.

20. That in the same spirit the court had allowed the production of Simon Kabangi's documents by the 1st Defendant so should it allow the production of this document.

1st Defendants Submission.

21. The application by the Plaintiff was opposed by the Defendant while relying on their replying affidavit sworn by the 1st Defendant on the 20th December 2018 in opposition there to.

22. Their submission was to the effect that the case before court went through a full hearing where the Plaintiff was allowed to tender all their evidence in support of her case. Guided by counsel, she closed her case. Thereafter the case was fixed for defence hearing. The 1st defendant together with her witness testified and were cross examined by the Plaintiff's Counsel.

23. That at the point of closure the Plaintiff's case, there was no indication that she intended to rely on any other evidence. According to the application, the Plaintiff appeared to assume that she would have relied on evidence that would be tendered by the 3rd Defendant.

24. This was the basis of the application before court. Counsel submitted that such a presumption was not based on any law. As it turned out, the 3rd Defendant did not testify and his case was ordered closed for non-appearance. That it was against this background that the application before court found itself in the court file.

25. That orders to recall of witnesses were not to be granted gratuitously/gratis without any basis. That the Plaintiff had not laid the necessary basis upon which the court could exercise its discretion to order a recall of the Plaintiff or re-opening of a closed litigation.

26. Counsel referred the court to the copy of register marked for identification DMF1 7.

27. That a look at the document marked as MWM 1 sought to be produced, the said was a certified true copy of an extract of the member's register bearing the plot No 864 and 985. That a look at that document and the letter applying for the same, the document annexed to MWM1, a letter by Siglai and Co advocate, is a document obtained by the Land Registrar, and the only person who would be competent to produce the document and explain any alterations therein would be the Land Registrar and not the Plaintiff.

28. That it was incomprehensible how that document could be produced when the Hon the Attorney General had been sued on behalf of the Land Registrar who was accused to have facilitated the alleged fraud.

29. That the date of alteration was not indicated and the Land Registrar, being an adverse party in this proceedings was neither a competent nor a compellable witness for the Plaintiff.
30. That granting the orders sought would amount to an exercise in vain because the document would not be admissible in law. That it was not authored by the Plaintiff and neither was the original in custody of the Plaintiff. How could it then be produced by the Plaintiff who would not be able to answer issues arising from that document.
31. That the 2nd document marked as MWM2 was referred to by DW2 which document was not authored by the Plaintiff and it appears to be arbitration proceedings held on 26th March 1997 by the D.O Ndaragwa and OMC directors. That although the Plaintiff and Simon Kamira Kabangi appear to be present, it related to plot No. 2135.
32. Counsel submitted that the document marked as MWM2 actually confirmed that the suit plot belonged to or was in occupation of Simon Kamira Kabangi and would not assist the Plaintiff to prove ownership of the suit plot, and therefore it would be a waste of time to allow the application since the document was one which could only be produced by the author, the District Officer Ndaragwa Division to also explain the circumstances under which the same was authored.
33. Counsel urged the court to find that the application was not merited as it did not meet the test for reopening a closed case and as such, it should be dismissed.
34. In rejoinder counsel for the applicant submitted that the 3rd Defendant's case was closed for non-attendance to testify not for non-appearance. That the documents they sought to produce, especially MWN 1, were obtained long before the case was filed in court.
35. That at that time, the Land Registrar had not been sued and there was no indication that he would be sued. That the land registry Nyandarua was a public office/institution where anybody including the 1st Defendant could apply for documents and obtain them, which documents included and was not limited to the official search and the land register.
36. That indeed they had on record the certification of the search and register for the land which documents were exhibited not by the land registrar but by the parties. The same case could therefore apply to the document marked as MWM1, documents which were applied for and obtained the same way a search documents would be applied for.
37. That the court had not been supplied with any authority or legal citation as to why the Plaintiff should not be allowed to re-open her case.
38. That the submission that the only person who could produce the document marked as MWM 1 was the Registrar, was untenable in law. The particular document was not a government document and therefore was not a document where the Government of Kenya had an interest in this case. That it was not authored by the Registrar or the Government of Kenya and that the 3rd defendant's case would not be prejudiced if that document was exhibited in the present case.
39. That the documents they sought to rely on were admissible in law and there was no authority to the contrary. The document was not a waste of time but was in the interest of justice.

Determination.

40. I have considered the application, the replying affidavit as well as the submissions by counsel to the respective parties herein. The Plaintiff by her Notice of Motion application dated 27th December 2018 seeks to re-open her case with a view to producing further evidence in terms of Documents marked as MWM 1 and MWM 2 giving reasons why she seeks to re-open her case. Her application was opposed by the 1st Defendant.
41. It is worth noting that both the Plaintiff and the 1st Defendant closed their case on the 15th February 2018 wherein the matter was scheduled for further hearing of the defence case on the 23rd May 2018.
42. On the said date wherein both the Plaintiff and the 1st Defendant were ready to proceed with the hearing wherein, the state counsel representing the 3rd Defendant, sought for an adjournment to file their list of documents and statements from the Land Registrar wherein they were granted 30 days to file the same and the matter adjourned to the 25th June 2018.
43. On the said date there was no appearance for the 3rd Defendant and neither had they filed their list of documents and statements. Since the date had been taken by consent of all parties involved, the 3rd defendant's case was closed and parties directed to file their submissions within the next 21 days with notice to the 3rd Defendants. The matter was scheduled for mention to confirm compliance on the 22nd October 2018, pending which the current application was filed.
44. The said application was argued on the 28th January 2019 in the absence of both the 2nd and the 3rd Defendants who were absent despite notice.
45. The Uganda High Court, Commercial Division in the case **Simba Telecom –v- Karuhanga & Another (2014) UGHC 98** had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case **Smith – versus- New South Wales [1992] HCA 36; (1992) 176 CLR 256** where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

46. The Ugandan Court in the case **Simba Telecom (supra)** held thus:

“I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

47. The Plaintiff in seeking to reopen her case so as to produce the document marked as MWM 1 submitted that she did not wish to call the Land Registrar to produce the said document. Indeed I find that this was the same document (MWM 1) that was objected to its production by the Defence who sought for it's the maker, the Land Registrar, to be called so as to produce it with the result that it was as marked as Plaintiff identification 3. Seeking to reopen the case therefore so as to produce the said document without the maker would amount to subverting justice.

48. Quite clearly the issue for the court to determine in the instant matter is whether the Plaintiff has provided a reasonable and justifiable basis for the court to exercise its discretion to allow her to re-open her case which was closed and wherein the parties were at a stage of filing their final submissions on the basis of the evidence adduced at the trial.

49. **In the case of Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR, Lady Justice Mary Kasango** held that

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”

50. The judge went on to observe thus:-

“...In my view if the plaintiff was allowed to re-open his case to so prove it (that a document produced by the defendant was different to the one he had) would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”

51. I find that in seeking to re-open their case, the Plaintiff is now seeking to fill gaps in the evidence in their case thereby attempting to have a second bite at the cherry which would be prejudicial to the Defendant herein.

52. In the premises and for all the above reasons, I find no merit in the Plaintiff's application dated 27th July 2018, the same is dismissed with costs to the Defendant. Parties to file their final submissions within the next 14 days.

Dated and delivered at Nyahururu this 27th day of February 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE