



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**MILIMANI LAW COURTS ELCC NO.1055 OF 2015**

**MIJENGO LIMITED.....PLAINTIFF**

**VERSUS**

**NJOWAMBU (KENYA) LIMITED.....DEFENDANT**

**RULING**

1. The application that is the subject of this ruling is the one dated 7/12/2021 and filed by the plaintiff. The principal order sought is for the court to be pleased to suspend the highlighting of the written submissions and/or tendering of oral submissions on 8/12/2021, and second that the Court be pleased to grant leave to the Plaintiff to reopen its case limited to adducing additional evidence *inter alia* the letter dated 28/2/2013 and land rates payment requests dated 17/4/2014.
2. The context of the application is that both the case of the plaintiff and of the defendant have been marked as closed and the court had directed counsel to file their final written submissions before retiring to write the judgment.
3. By way of background, this suit was commenced by way of a plaint which was filed on 23/10/2015. In his plaint, the applicant contended that he entered into a sale agreement with respect to land known as LR No. 4953/4349 situate in Thika Municipality, Thika Municipality, Thika District measuring 2.707 hectares at an agreed purchase price of Kshs 40,005,000.00.
4. The Plaintiff averred that the fundamental terms of the agreement was completion date of 90 days as from 20.02.2013 and construction of the perimeter wall around the property, delivery to the plaintiff of all documents to effect transfer, deposit by vendor of the original grant with the plaintiff's lawyer by the defendant, approval obtained by defendant for construction of the wall and that since the property was sold with vacant possession the defendant would ensure there no squatters on the land.
5. Further the plaintiff was to meet the cost of construction of the perimeter wall at Kshs. 7.5 million and he paid Kshs. 4 million in advance. That the defendant has willfully failed to perform its obligation under the sale agreement and failed to convey the property as the per the sale agreement dated 23.02.2013.
6. The Plaintiff avers that LR No. 4953/4349 situate in Thika Municipality is unique and irreplaceable and therefore he seeks due performance.
7. The Plaintiff therefore prays for judgment against the defendant and seeks a permanent injunction against the defendant restraining him from selling or alienating or disposing of the proprietary interest in LR 4953/4349, an order for specific performance and that the defendant complies with the terms of sale of the agreement made on 20.03.2013. Further the plaintiff seeks and order that the defendant hands over all completion documents as per clause 7 of the agreement with 14 days and in default the Registrar of the court be authorized to execute a transfer of LR No. 4953/4349 situate in Thika to the plaintiff.
8. The Plaintiff (by way of counter claim) filed defence and counterclaim and denied every allegation and averred that through their advocates they duly notified the plaintiff vide a letter dated 19/03/2019 that the agreement dated 20/02/2013 had become frustrated for reasons that the suit parcel of land LR 4953/4349 had become subject to political interference. Further that the defendant was unable to fulfil its obligations as the consent granted by the Council for construction of the perimeter wall had been revoked.
9. Further that there were subsequent notices to rescind the agreement dated 20/02/2014 which the plaintiff chose to ignore. The Defendant therefore avers that the sale agreement has become void on account of being frustrated and lack of consent from the Commissioner of Lands and the Local Authority. The defendant has always been willing to refund the plaintiff the monies paid the subject parcel of land.
10. The Plaintiff (by way of counter claim) has also filed a counter claim in which he reiterates that the agreement dated 20/02/2013 in respect to the sale of land reference number LR 4953/4349 was unenforceable due to lack of consents and approvals by the Council for construction and political interference.

11. Further he avers that clause 13 special condition B and E (viii) of the agreement of sale dated 20/02/2013 provided inter alia:

- a) If construction of the perimeter wall should be delayed, inhibited or stopped for any reason then such delay stood to be treated as a breach by the vendor for its obligation
- b) If the vendor failed to comply with its obligation then the purchaser had the discretion of rescinding the agreement
- c) That the vendor would immediately disclose any event or circumstances that would constitute a breach of the warranties in the agreement.

12. He contends that despite giving notices via various correspondences to the Defendant (by way of counter claim) dated 19/03/2014, 18/06/2014, and 18/08/2015 through its advocates, of intention to rescind the agreement dated 20/02/2013 and refund a deposit of Ksh 10,000,000 million paid, the defendant ignored the said notices and continued to unlawfully withhold the grant to the suit property.

13. The Plaintiff (by way of counter-claim) avers that as a result of the defendant's unwarranted decision to ignore its notices to terminate the agreement dated 20/02/2013 and continued withholding of the original grant, to land reference number 4953/4349 has resulted in loss of Ksh 9,522,000 being opportunity cost for lack of use of the suit land in addition to the fundamental breach of the plaintiff's right to ownership of property.

14. He wherein he pleaded that the applicant actually occupies the land parcel Nakuru/Ngongongeri/1026 and not the land parcel Nakuru/Ngongongeri/1040 as he claims. He also pleaded that the applicant has been resident on the land for only 7 years. He sought orders of eviction and mesne profits against the applicant.

15. In this application, the applicant is seeking to have the court to suspend the highlighting of the written submissions and/or tendering of oral submissions slated for 8/12/2021. Further that Court be pleased to grant leave to the Plaintiff to reopen its case limited to adducing additional evidence inter alia the letter dated 28/02/2013 and land rates payment requests dated 17/04/2014.

16. He avers that he retrieved a letter dated 28/02/013 and a land rate payment request dated 17/04/2014 from its archives. Further he contends that the two (2) documents are crucial for the final hearing and determination of the issues in dispute in the suit. Therefore, the letter dated 28/02/2013 will assist this Honorable Court appreciate the full facts leading to the dispute, and the cause of delay for the parties to comply with the terms of the agreement.

17. The Plaintiff contends that the documents sought to be adduced were not available when the Plaintiff was directed to file a bundle of documents, and the failure to provide the same is not deliberate and that the Defendant will not suffer any prejudice if the documents are admitted on record.

18. The manner in which a trial is conducted is laid down in Order 18 of the Civil Procedure Rules, 2010. Generally, the plaintiff starts by presenting his evidence, then the defendant follows. After they have presented their evidence, the parties may proceed to make submissions before the court renders judgment. There is provision for recall of a witness in Order 18 Rule 10, but this is recall of a witness who has already testified. In so far as pre-trial disclosure of evidence is concerned, Order 3 Rule 2 does provide that the plaintiff needs to disclose his evidence at the time that the plaint is filed, and for the defence, disclosure is made at the time that the defence is filed, pursuant to the provisions of Order 7 Rule 5. There is a window for disclosing additional evidence but this needs to be done before trial commences.

19. Save for the above, I know of no other provision for recalling a witness or allowing a party to re-open their case to present new evidence not disclosed before. It would thus fall within the discretion of the court whether or not to allow a party to re-open his/her case to adduce additional evidence, but this is a power that needs to be used with lots of restraint for the reason that the rules do set out that parties need to disclose their evidence before trial commences, and it is the duty of a party to ensure that he/she is satisfied with the evidence they wish to present before trial commences.

20. A trial should not be used as fishing ground for new evidence to fill in the gaps that the opposing party may have created, for this negates the very essence of pre-trial disclosure. It must be clear that the new evidence could not be available to the applicant even after exercise of due diligence. The position should not be for one party, after the other has tabled his evidence, to now start looking for evidence specifically to counter what the other party has said. That would be encouraging parties to go on a fishing expedition and a hearing will never end. Indeed, the structures in the Civil Procedure Act, and the Civil Procedure Rules, provide what would pass for a fair trial of a civil suit and it would need exceptional and/or extraordinary circumstances for a court to depart from them.

21. This is what the applicant asks me to do but I am not persuaded to exercise my discretion in his favour. It is not said that the evidence that the applicant now wishes to introduce was lost, misplaced and therefore not available to him before the trial commenced. The applicant already knew what the respondent was going to present at the pre-trial stage, and if he thought that what he had was inadequate, or that it was necessary to present some additional evidence to counter that which the respondent proposed to present, he could have sought for time to find and adduce it. He never did.

22. What is now sought to be introduced could certainly have been made available all this time and of course we are not dealing with a situation where it is said that the respondent had hidden this evidence so that it could never have been available to the applicant there before. It is clear to me that it is an afterthought by the applicant to seek the mentioned additional evidence after the respondent has already closed his case. Such practice should be frowned on and ought not to be encouraged.

23. In the case of *Joseph Ndungu Kamau vs John Njihia (2017) eKLR*, where the good judge Ohungo J allowed the plaintiff to adduce additional evidence just before the date of highlighting of written submissions, the circumstances were different from the prevailing circumstances. First, there had been intention to adduce that file and the defendant was aware of that intention. Indeed, it would have been

produced at the time the plaintiff presented his evidence if it was available. Secondly, the file could not have been made available for presentation and could not have been presented as an exhibit earlier because it had been misplaced.

24. That is not the situation that we have here. What is being referred to as “new evidence” could have been presented if the applicant so wished before he closed his case. Nowhere have we been told that this evidence was lost and could not be traced. Even now the plaintiff is only talking about documents in his archive, this means it was accessible all along.

25. It is important to note that the Civil Procedure Rules lay out the manner in which civil trials are to be conducted, and the essence of those rules is to ensure a fair trial. The chances of leading to an unfair trial, barring exceptional circumstances, are very high, if the court departs from these rules.

26. It is for the above reasons that I am not persuaded that this application is merited and it is hereby dismissed. The cost shall be in the cause.

**DATED, SIGNED AND DELIVERED THROUGH VIRTUAL COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY 2022.**

.....

**MOGENI J**

**JUDGE**

**In presence of : -**

Mr. Muthee for the plaintiff/applicant.

Ms. Njoka h/b for Mr. Ngaruiya and Mr. Mugambi for the defendant/respondent.

Mr. Vincent Owour.....Court Assistant