REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 196 OF 2013

PETER WELLINGTON WAMBORA.....PLANTIFF

VERSUS

MARY ATIENO & 4 OTHERS.....DEFENDANTS

RULING

Peter Wellingtone Wambora, ***(hereinafter referred to as the Plaintiff)*** testified in chief and was cross-examined by the counsel for the defendants. Today's date was taken for Re-examination by ***Professor Patrick Lumumba Otieno, counsel for the Plaintiff*** , who now prays that the Plaintiff be allowed to produce further documents namely the allotment letter, a certificate of official search and rent and rate payment certificates to answer questions asked in cross examination. Counsel submits that when parties last appeared before the court, the plaintiff gave his testimony in chief. He relied on documents that had been filed which documents were in the lists of documents that are on record. He states that the parcel of land was given to the plaintiff vide an allotment in the year 1997. After being examined in chief, the plaintiff was subjected to cross-examination by the counsel representing the various defendants. During cross-examination a series of questions were passed to him relating to the following issues: -

1. **Whether he had a letter of allotment.**

2. **Whether he had communication from the Commissioner of Lands then in office.**

3. **Whether he ever conducted a search on the status of land.**

4. **Whether if he had an allotment he satisfied the conditions of allotment.**

5. **Whether he made any payment in land rent or rates to relevant authorities.**

6. **Whether he reported the issue of encroachment to relevant authorities.**

According to Professor Lumumba, these issues can only be answered by way of producing the necessary documents that answer the questions specifically. These documents did not form part of the documents originally filed and the same are available including payments made to the Government of the Republic of Kenya and Kisumu Municipality Council upto the year 2022. It is in the interest of Justice that the plaintiff be allowed to produce the documents. He relied on Articles 50 of the Constitution of Kenya 2010 that deals with fair hearing. He also relied on Section 146 of the Evidence Act Chapter 80 the laws of Kenya. Specifically, Article 146 (3) of the Evidence Act cap 80 Laws of Kenya. All the issues raised were referred to in the cross-examination. He contends that the plaintiff can raise a new matter germane to the issues herein and the other parties can cross examine.

Mr. Odeny, learned counsel for the 22nd defendant opposed the production of the new documents. He submitted that this ought to have been by way of a formal application. The request will be an ambush against the defendants at the stage of re-examination. The parties were to comply with rules under order 11 of the Civil Procedure Rules 2010. They have not been told why the documents were not filed.

Section 146 (3) of the Evidence Act does not give the court power to grant leave to file further documents. Re-examination has not been done hence the application is pre-mature.

Mr. P.D.Onyango, learned counsel for the 18th defendant opposed the application and argues that the application was to be made before pre-trial. The plaintiff had all the opportunity to apply for the courts leave to file a further list of documents but he did not. They have not been told why the documents were not filed. According to Mr P.D. Onyango, Article 50 of the Constitution of Kenya 2010 deals with fair hearing, both parties had to be given a fair hearing. It would not be fair hearing to introduce new documents now. Article 159 (2) d does not

assist a party who is not vigilant.

M/s Essendi, learned state counsel on behalf the Honorable Attorney General opposed the application on grounds that this was an ambush. In support of Article 50 of the constitution of Kenya 2010, she submits that both parties need fair hearing. All documents should have been filed before the start of hearing. The documents are meant to answer question that have been asked in cross-examination.

Mr. Abande, learned counsel for the 4th, 7th, and 12th defendants argues that this application that seeks the discretion of the court is not anchored on any law and that production of documents is governed by Order 11 of the Civil Procedure Rules 2010. Production must be exercised judiciously. He argues that this is an old matter filed in 2013. There are interim orders in force. The defendants have no luxury of time.

Mr. Nyaga, learned counsel for 19th Defendant/applicant, opposed the application on grounds that there must be an end to litigation. Introducing new evidence midway, proceedings will never end. The plaintiff ought to have made a formal application. The Evidence Act Section 146 (3) Cap 80 Laws of Kenya does not allows filing of documents.

Professor Lumumba in reply submitted that the application is made judiciously out of good law, practice and reasons. There will be no trial de-novo. There is no new evidence being produced. Specialized courts were introduced so that they are not bound by the old rules. The most important fact is that is that justice is done. The court should on its own motion require Government departments to produce the documents. The Registrar f Lands should be asked to produce the documents in the interest of justice. This court has commanded the surveyors to file a report and the report is on record. The plaintiff should be allowed to produce letter of allotment and evidence of rates clearance certificates and such correspondence that took place between the plaintiff and the republic of Kenya.

I have considered the application and the provisions relied upon and do find that counsel for plaintiff relies on Section 146 (3) of the Evidence Act Cap 80 Laws of Kenya that provides.

> **"(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."**

This section of the Evidence Act speaks for itself and does not provide for the filing of new documents. The import of section 146 (3) is that where the Re-examination raises new issues the person who cross examined will be allowed to cross examine on the new issues. Ideally, re-examination should not raise new issues. The relevant provisions of law for the introduction of new documents are Order 3 Rule 2, 7 rule 5 and 11 of the Civil Produce Rule 2010. Order 3 rule 2 provides.

> **"2. All suits filed under rule 10) including suits against the government, except small claims, shall be accompanied by —**
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> **(a) the affidavit referred to under Order 4 rule 1 (2);**
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> **(b) a list of witnesses to be called at the trial;**
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> **(c) written statements signed by the witnesses excluding expert witnesses; and**
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> **(d) copies of documents to be relied on at the trial including a demand letter before action:**
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> **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. "**

The same applies to defendant when filing defence under order 7 Rule (5) which provides.

> **"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."**

It is only with the leave of court that documents may be supplied later. However, this should be at least within 15 days before the pre-trial conference contemplated under order 11 rule 7. The provisions of order 3 rule 2 and order 7 rule 5 are meant to pre-empt trial by Ambush.

Article 50 (1) of the Constitution of Kenya 2010 provides that every party deserves a fair trial and this court observes that it is contestable that a trial will not be fair if a party is allowed to introduce evidence during re-examination. The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from producing evidence without complying with the provisions of order 3 rule 2 and order 7 rule 5 of the Civil Procedure Rules 2010.

However, the court is a shrine of justice and has the power to do justice to all the parties and not to be strictly barred by procedural technicalities. This finds favour with the provisions of Article 159 (2) of the Constitution of Kenya 2010 that provides:-

> **"2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles**

a. justice shall be done to all, irrespective of status;

b. justice shall not be delayed;

c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3);

d. justice shall be administered without undue regard to procedural technicalities; and

e. the purpose and principles of this Constitution shall be protected and promoted."

In applying Article 159 (2) of the Constitution 2010, the court should consider the Prejudice to be suffered by the other party. The court should also consider the discovery of the new document to be produced, the stage of proceedings and other factors as the reasons are not limited as it depends on each case.

In this matter, I do find that the pre-trial conference was conducted sometimes on the 21st day of March 2019 when a hearing date was given. The Plaintiff has already testified and has been cross-examined. The matter is coming up for re-examination. It will be prejudicial to the defendants if the plaintiff is allowed to file new documents now in the midstream of a hearing and the leave might change the course of proceedings. Moreover, the documents sought to be filed by the plaintiff are not new documents that the plaintiff could not have filed before the pre-trial conference. Allowing the application will be assisting the plaintiff delay the fair hearing of this matter filed almost 9 years ago. I do find the application not merited and do hereby dismiss the same. Matter to proceed for re-examination.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.