



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELC NO. 405 OF 2013**

**ELIJAH SOMBORIOT CHERUIYOT & 3 OTHERS .....PLAINTIFFS**

**VERSUS**

**ANTHONY KIARIE WAITHAKA & 3 OTHERS.....DEFENDANTS**

**RULING**

***(Pre-trials; parties reaching a consent that witness statements be adopted in evidence without calling the persons as witnesses; whether such consent is in concert with the manner provided for proceeding with a civil suit before the Environment and Land Court; Civil Procedure Act applies to such suits; same providing for attendance of witnesses; Practice Directions allowing for adoption of statements as evidence in chief; even in such instance, person must attend to adopt it and be subject to cross-examination; caution however necessary in applying this provision; consent not adopted; matter to proceed in the usual manner; witnesses to attend to testify in chief and to be cross-examined)***

1. This suit was commenced by way of plaint filed on 5 June 2013. It is averred that in the year 2002, the 1st plaintiff purchased the land Laikipia Marmanet North Rumuruti Block 2 (Ndurumo)/ 6529 from one Mary Wambui George. The 2nd and 3rd plaintiffs, who are man and wife, aver that they purchased the land parcel Laikipia/Marmanet North Rumuruti Block 2 (Ndurumo) / 6530, from Esther Oruta, Monicah Wanjiku and Mary Wambui George. The plaintiffs then became registered as proprietors. However, on 12 August 2012, the 1st defendant became registered as proprietor of the two land parcels and on 23 January 2013, he sold the land to the 2nd, 3rd and 4th defendants. He became registered after obtaining a decree from the Land Disputes Tribunal adopted in Nyahururu PMC Land Disputes Case No. 15 of 2011. Before the Tribunal, he had sued Esther Oruta, Monica Wanjiku and Mary Wambui George. It is averred that when the Tribunal got seized of the matter, the said parcels of land were not in the names of the three persons sued before the Tribunal but in the names of the plaintiffs. It is further averred that Monica Wanjiku had died in the year 2001 and could not have participated before the Tribunal. In this suit, the plaintiffs want to nullify the award of the Tribunal and have themselves reinstated as registered proprietors of the suit land.

2. The 1st defendant filed defence through the law firm of M/s Gakuhi Chege & Company Advocates, whereas the 2nd, 3rd and 4th defendants filed defence through the law firm of M/s Sigilai Joel & Company Advocates. They also filed their respective witness statements and bundle of documents in compliance with the Civil Procedure Rules, 2010. The parties also agreed at 29 issues to be tried.

3. When the matter came before me for a pre-trial conference, counsels recorded a consent in the following terms :-

(i) That the witness statements be adopted as the evidence of the parties in the two consolidated suits.

(ii) That the documents in the lists of documents be produced as exhibits of the parties in the 2 consolidated suits in accordance with the numbering thereof. The entire court file in Nyahururu PMCC Land Dispute Case No. 15 of 2011 be produced in the two consolidated suits as part of the plaintiff's exhibits.

(iii) The 2 consolidated suits be disposed of by the witness statements as adopted above and written submissions. The plaintiff's submissions be filed in 14 days and the defendants' submissions be filed 14 after service.

(v) Today's costs in the cause.

4. I hesitated adopting the above consent because I was not sure that it is tandem with the rules and I asked parties to appear today for a ruling on it.

5. I have considered the matter and for the reasons that follow, I am unable to adopt the said consent.

6. The matter is before the Environment and Land Court which is the court established by the Environment and Land Court Act, 2011. Section 19 of the Environment and Land Court Act, provides for the procedures to be followed by the court. It is drawn as follows :-

### ***19. Procedure and powers of the Court***

*(1) In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.*

*(2) The Court shall be bound by the procedure laid down by the Civil Procedure Act.*

7. It will be discerned at this stage, that the procedure that the Environment and Land Court follows is that prescribed by the Civil Procedure Act. The Civil Procedure Act, does have some rules which direct the manner in which proceedings are to be conducted. Order 18 applies and in my view, the provisions of Order 18 Rules 1, 2 and 3 are material, and I have set them down. They provide as follows :-

#### ***1. Right to begin [Order 18, rule 1.]***

*The plaintiff shall have the right to begin unless the court otherwise orders.*

#### ***2. Statement and production of evidence [Order 18, rule 2.]***

*Unless the court otherwise orders—*

*(1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.*

*(2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.*

*(3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited.*

(4) *The court may in its discretion limit the time allowed for addresses by the parties or their advocates.*

**3. *Witnesses to be examined in open court [Order 18, rule 3.]***

*The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.*

8. It will be observed from the above, and especially from the provisions of Order 18 Rule 3, that evidence of witnesses is supposed to be taken orally in open court. The words used are "shall" meaning that this is mandatory.

9. I am aware that the Civil Procedure Rules, do provide for the filing of witness statements and list of documents. I am also aware of the Practice Directions on Proceedings in the Environment and Land Courts, and On Proceedings Relating to the Environment and The Use and Occupation of, and Title to land and Proceedings in Other Courts, issued by the Honourable Chief Justice on 25 July 2014. Direction 16 (c) is drawn as follows :-

*(c) Witness Statements shall contain sufficient detail so that:*

*(i) The witness will adopt his/her statement as his/her evidence in chief ; and*

*(ii) Thereafter only minimal highlighting and production of documents (in examination in chief) may be required before the witness can be cross-examined.*

10. It would appear from the above that the court is given discretion for witness statements to be adopted as evidence in chief. But even where this is applied, I think the witness must attend court, be sworn, and thereafter, adopt his statement as his evidence in chief. I am not of the view that the attendance of the witness can be dispensed with and his statement adopted in his/her absence. Moreover, such witness is also subject to cross examination which means that he/she must be present to be cross-examined. That said, I would however on my part advocate for extreme caution in the utility of this particular direction for two reasons. First, Practice Directions do not supercede set down rules of procedure and as I have pointed out above, Section 19 of the Environment and Land Court Act, provides specifically that the Civil Procedure Act applies to proceedings before the said court. Secondly, it should never be forgotten that the best evidence is that taken directly from the witness. As opposed to a statement, the court will have opportunity to assess the demeanor of the witness and also hear directly from the witness. The witness will give evidence in his/her own words. That to me is much more superior than a statement whose language and presentation can be influenced by the person recording the statement. In terms of quality, the statement can never beat direct evidence from a witness. I think the issue of adopting statements is meant to save time, but we must be careful that the same does not adversely influence the fair and just determination of the matter, which is the primary objective of any proceeding in court.

11. For the above reasons, I decline to endorse the consent of the parties. I instead direct that the matter do proceed for hearing in the usual manner, meaning that the witnesses should attend in person and be led in both examination in chief and cross-examination.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**NAKURU**

**In presence of : -**

Mr. Kinyua Njogu for plaintiffs

Mr. Oumo holding brief for Mr. Chege for 1<sup>st</sup> defendant and also holding brief for Mr. Sigilai for 3<sup>rd</sup> and 4<sup>th</sup> defendants.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**NAKURU**