REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI - MILIMANI

ELC NO. 573 OF 2011

THOMAS KINYUA MBEU.....PLAINTIFF

=VERSUS=

MAURICE NDAMBUKI KITIVO.....DEFENDANT

CONSOLIDATED WITH

ELC 631 OF 2011

MAURICE NDAMBUKI KITIVO.....PLAINTIFF

=VERSUS=

THOMAS KINYUA MBEU & 3 OTHERS.....DEFENDANTS

(In respect of the oral application by the Plaintiff's advocate

to summon a new witness after the close of the case)

RULING

Background:

1. Before me is a rather unusual application. I call it unusual because of the manner in which it was made and its timing.

2. Upon the close of the Defendants' case, the Plaintiff's advocate rose and made an oral application praying that the Court summons a Land Officer from the Ministry of Lands to come and answer questions that the Land Registrar, who had appeared in court as a witness for the 3rd and 4th Defendants was unable to answer during cross-examination. The Plaintiff's advocate in his application told the Court that arising from what had transpired during his cross-examination of the Land Registrar, it was obvious that a Land's Officer would have been a more useful witness in terms of giving evidence regarding the allocation of the suit property to the 2nd Defendant in this case. The 2nd Defendant is the one who had sold the land (suit property) to the 1st Defendant.

3. The Plaintiff's advocate invoked the provisions of article 159 of the Constitution and the Oxygen rules urging the Court to allow his application. He submitted that it would serve the ends of justice in spite of the fact that parties had already closed their respective cases.

Response by the Defendants

4. The Plaintiff's advocate application was strongly opposed by the advocates for the Defendants. They argued that it was un-procedural and irregular coming after all the parties had closed their respective cases.

5. The Advocate for the 1st Defendant particularly pointed out that the conduct of civil cases and the summoning of witnesses are matters governed by specific provisions of the law and cannot be said to be mere technicalities. He referred to Order 18 of the Civil Procedure Rules which makes provisions on the conduct of suits.

6. He further stated that the plaintiff's application was a fishing expedition coming too late in the day.

7. The 1st Defendant further submitted that case had, before being set down for hearing gone through the pre-trial procedures where the Plaintiff had the opportunity to issue notices to produce documents and even seek witnesses summons for witnesses he thought would help his case. The application by the Plaintiff is an afterthought.

8. Finally, he 1st Defendant submitted the view that the Plaintiff's application was not anchored in law and lacked merit.

9. The Advocate for the 3rd and 4th Defendants on her part also opposed the Plaintiff's application, associating with the submissions of the 1st Defendant's Advocate. She stated that the Plaintiff's application was too late, coming after the case was closed. Her opinion was that re-opening the case would be a dangerous move that would also set a bad precedent. Litigation must come to end. Calling a witness after parties have closed their cases cannot surely be said to serve justice.

Court's Determination.

10. As already stated earlier, the Plaintiff application was made immediately after the close of the Defendant's case. Apparently, the plaintiff's Advocate was not satisfied by the responses of the Land Registrar who was a witness of the 3rd & 4th Defendants. The witnesses in cross-examination expressed her view that the information that the Plaintiff's advocate was seeking from her should have been sought elsewhere. The process of allocation of land was the function of a different department referred to as Land Administration.

11. I must point out that the Land Registrar (DW2) came to court as a witness for the 3rd and 4th Defendants. She was not a witness called by the Plaintiff. The Plaintiff has sued the 3rd and 4th Defendants accusing them of perpetuating fraud and illegality alongside the 1st and 2nd Defendants. In paragraph 20 of his Plaint, the Plaintiff particularized his claim against the 3rd and 4th Defendants accusing them amongst other things, causing the 2nd Defendant to be registered as the proprietor of the suit property without any and/or proper documentation.

12. The Land Registrar came to Court to respond to and answer the allegations of fraud and illegality against her office. She was not in court as a witness for the plaintiff. Apparently, the Plaintiff had hinged his hopes on the witness giving evidence regarding the process of allocation of the land in dispute in the case.

13. The 1st Defendant's advocate while opposing the application by the plaintiff pointed out that the Plaintiff was engaging in a finishing expedition. The Plaintiff had had his day in Court. He testified and produced his documents in support of his case before closing his case. He had the leeway to call all the witness he wished to.

14. This is a case that has been in Court for the last 10 years. It has gone through pre-trial procedures and the parties had the opportunity to seek production of documents or even compel their production where the opposing parties were unwilling to voluntarily produce documents.

15. Whereas it may be allowable to re-open a case after it has been closed, it should not and must not be allowed where it is intended to help one party to fill up gaps in evidence.

16. In the case of **Raindrops Ltd – Vs County Government of Kilifi (2020) eKLR,** the Court cited and quoted the Canadian Encyclopedia Digest Evidence (V) 12, (a), which summarized the approach a Court should adopt in assessing a party's conduct as a relevant factor as follows: -

> ***"Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered while some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.***
>
> ***(1) Whether the evidence; if it had been properly tendered. Would probably have altered the Judgment, and***
>
> ***(2) whether the evidence could have been discovered sooner had the party applied reasonable diligence.***
>
> ***Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger, the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel."***

17. In the case of **Hannah Wairimu Ng'ethe Vs Francis Ng'anga & Another (2016) eKLR,** the court declined to allow re-opening of the case and stated that:-

> ***"…the court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has had the advantage of counsel from the inception of this case".***

18. In **Odeyo Osodo Vs Rael Obara Ojuok & 4 Others (2017) eKLR,** the Court stated that the discretion whether or not to re-open a case which the applicant had previously closed should be exercised with caution not arbitrarily whimsically and only in favour of an Applicant

who has established sufficient cause.

19. Coming back to the case before me, I am not persuaded that the Plaintiff has established sufficient cause to warrant the re-opening of this case after all parties have had their day in Court and closed their respective cases. The Plaintiff's application is an afterthought tactically calculated to fill some gaps in evidence. It is noteworthy that the Plaintiff is not even seeking to recall a witness to explain an issue that may have been left hanging or produce a document that may have inadvertently left out. The Plaintiff is seeking to call a new witness to bring documents that the Plaintiff had not requested production of from the Defendants.

20. It has become fashionable for litigants to hide behind article 159 of the Constitution every time they find themselves in a situation of 'falling short of procedural requirements or limits'. They call upon the Court to do substantive justice without undue regard to technicalities. In the instant case, the issue before me cannot be termed as a mere procedural technicality. The horizons of justice are vast and wide. Justice must be exercised within the limits set by the Statutes; in accordance with the law.

21. The upshot is that the Plaintiff's application is disallowed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Ms Wainaina for the Plaintiff

Ms.Kerubo for the 3rd & 4th Defendants

None appearance for the 1st Defendant

None appearance for the 2nd Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE