



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 105 OF 2020

GEORGE KIMANI NJUKI.....PLAINTIFF

VERSUS

THE NATIONAL LANDS COMMISSION.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

INTRODUCTION:

1. The subject matter came up for Defense hearing and during the course of the testimony by the witness called on behalf of the 2nd & 3rd Defendants, an objection was taken touching on and/or concerning the admissibility of two documents, which were attached to the 2nd & 3rd Defendants' Bundle of Documents dated the 26th October 2021.
2. The gist of the objection, was that the documents under reference namely, the Development plan for Nairobi South, Reference Number 42.28.85.9, dated 5th June 1985, as well as proposed Lang'ata Residential Part Development plan, were neither legible, nor were same certified under the hand of the authorized officer, to warrant same being produced and utilized as exhibits.
3. It was further contended by the Plaintiff's counsel that in the absence of certification, as required under the provisions of Section 79 of the Evidence Act, Chapter 80, Laws of Kenya, the impugned document were therefore incapable of being admitted as Documentary Evidence.
4. Confronted with the objection, Senior litigation counsel Mrs. Nyawira, contended that the objection was misconceived and/or misplaced. For clarity, counsel stated that the said documents are Public Documents and therefore same can be produced and admitted in evidence at the instance of the witness, who is stated to be a Public officer.
5. On the other hand, the Senior litigation counsel also contended that the Plaintiff's counsel had not filed any Notice of Objection to the production of the impugned documents, as required under the law. For clarity, the Counsel placed reliance on the Provisions of Section 68 and 69 of the Evidence Act, Chapter 80, Laws of Kenya,
6. In the premises, the senior litigation counsel posited that having not issued and/or filed the Notice of objection to the Documents in question, the objection by the Plaintiffs counsel should be over ruled.
7. Be that as it may, the Senior litigation counsel when invited by the court to correctly interpret the provision of Section 68 and 69 of the Evidence Act, Chapter 80, Laws of Kenya, same thereafter conceded the objection. In this regard, the impugned documents were thereafter marked for identification.
8. Subsequently, the witness for the 2nd & 3rd Defendant, was in the Witness box proceeded to and testified and same was thereafter cross examined and re-examined.
9. Nevertheless, at the close of the re-examination counsel for the 2nd & 3rd Defendants sought for an adjournment and leave to summon and/or call the Director of Physical Planning or such other Officer, working in the Department of Physical Planning to come and produce the impugned Documents and adduce further Evidence.

SUBMISSIONS BY THE PARTIES

SUBMISSIONS BY THE 2ND & 3RD DEFENDANTS

10. Counsel for the 2nd & 3rd Defendants submitted that the impugned Documents are public documents and therefore the court should allow same to be produced in evidence by the concerned and/or authorized officer.
11. Secondly, counsel also submitted that the said Documents will go along way in helping the court to resolve the issue in dispute between the parties.
12. Thirdly, the counsel submitted that the said Documents were filed and served upon the Plaintiffs counsel on the 26th October 2021. In this regard, it was stated that the Plaintiff and his counsel were therefore aware of the import and tenor of the said Documents.
13. In the premises, it was stated that the Plaintiff would therefore not suffer any prejudice, to warrant the non-admission of the Documents.

SUBMISSIONS BY THE 1ST DEFENDANT

14. On her part, counsel for the 1st Defendant associated himself with the submissions of the 2nd & 3rd Defendants.
15. Secondly, counsel for the 1st Defendant also submitted that the impugned documents are indeed Public Documents and hence the court should be able to take Judicial notice of the same.
16. Thirdly, counsel submitted that the said Documents are critical and important and therefore the same ought to be admitted in Evidence and in any event, no prejudice, shall be caused and/or suffered by the Plaintiff.

PLAINTIFFS SUBMISSIONS

17. The Plaintiff contended that the Parties to the subject suit had been afforded the latitude and/or liberty to file any relevant and appropriate documents before pre-trial/case conference.
18. However, counsel for the Plaintiff contended that the 2nd & 3rd Defendant, failed to file and/or serve the relevant documents either in accordance with the law or before the pre-trial conference.
19. On the other hand, the Plaintiff also submitted that to the extent that the Documents were neither legible nor signed, same therefore fall short of the provision of Section 79 of the Evidence Act, Chapter 80, Laws of Kenya.
20. Besides, counsel submitted that the Plaintiff having closed his case, the summoning and/or calling of any witness, whose name had not been supplied and/or availed prior to the Plaintiff's testimony, would cause undue prejudice to the Plaintiff.
21. In the premises, the Plaintiffs counsel therefore opposed the summoning and/or calling the Director of Planning or any representative thereof, as well as the reliance on the impugned documents, which were admitted not to have been signed and/or approved by the authorized officer.
22. Consequently, the Plaintiff's counsel sought to have the 2nd & 3rd Defendants' cases to be closed.

ISSUES FOR DETERMINATION

23. Having reviewed the oral submissions tendered by and/or on behalf of the 2nd & 3rd Defendants, as well as the rejoinder submissions, the following issues are germane for determination;

I. Whether the Documents which are now sought to be produced were duly signed/approved by the authorized officer and if not, whether same are admissible.

II. Whether a Witness whose name was not stipulated and/or contained in the list of witnesses and for whom the adverse party had no notice, can be allowed to testify.

III. Whether the Plaintiff is disposed to suffer prejudice, if the impugned Documents are admitted in Evidence.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Documents which are now sought to be produced were duly signed/approved by the authorized officer and if not, whether same are admissible.

24. Whilst dealing with the first objection, which related to and/or concerned the admissibility of the impugned Documents, Senior litigation counsel, Mrs. Nyawira, confirmed that the said documents were neither legible nor signed by the authorized officer.

25. On the other hand, counsel also conceded that the said documents were neither endorsed with a certificate stamp, certifying same to be true copies of the Original thereof nor were same authorized under the provisions of Section 79 of the Evidence Act.

26. Be that as it may, during the cross examination of the 2nd & 3rd Defendant witness, same also confirmed both in her Evidence in chief and in cross examination, that the Documents were neither signed nor approved.

27. Before resolving the issues as to whether or not the impugned documents can be produced and admitted in evidence, it is important to take into account the provisions of Section 81 of the Evidence Act Chapter 80 laws of Kenya, which provides as hereunder.

81. Proof by certified copies

Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies.

28. From the foregoing provision, it is apparent that a public document can either be produced in evidence by way of producing the original document or secondary evidence, but the latter would require to be duly certified. To the extent that the document sought to be produced and upon which the intended witnesses are to testify on, is neither certified nor signed, same remains inadmissible.

29. Nevertheless, there is concession by the 2nd & 3rd Defendants advocates, as well as the confirmation by DW1, that the said documents are not signed. Based on the foregoing, the question that must be addressed, is whether the unsigned and therefore unauthenticated documents can be produced before the court and admitted in evidence.

30. In my humble view, the fact that the documents, which were availed to the court, were neither signed nor approved, same therefore do satisfy the provisions of Section 81 of the Evidence Act, Chapter 80, Laws of Kenya.

31. In my humble view, such documents are not admissible and therefore same cannot be relied upon and/or otherwise, be therefore subject of admissibility, even if the witness seeking to produce same, is a Public officer.

32. In a nutshell, I find and hold that the said Documents are not admissible, for purposes of resolving the subject dispute or at all.

ISSUE NUMBER 2 & 3

Whether a witness whose name was not stipulated and/or contained in the list of witnesses and for whom the adverse party had no notice, can be allowed to testify; and

Whether the Plaintiff is disposed to suffer prejudice, if the impugned documents are admitted in evidence.

33. Pursuant to the provision of Order 7 Rule 5 of the Civil Procedure 2010, any Defendant, the 2nd & 3rd Defendant not excepted, are obligated to file *inter-alia* the List of Witnesses, Witness Statements and Bundle of Documents.

34. As concerns the List of witnesses, same is required to contain the names of all the witnesses that are expected, to be called and/or summoned by the adverse party.

35. At any rate, the list of Witnesses and the Witness Statement are supposed to be filed and served on the adverse party prior to the scheduled hearing and therefore to enable the adverse party to prepare for and appreciate all the issues in dispute.

36. Be that as it may, it is conceded by the counsel for the 2nd & 3rd Defendant that the names of the witnesses, who were sought to be summoned and/or called, were neither contained in the list of witnesses nor were same disseminated before the hearing and closure of the Plaintiff's case.

37. Suffice it to note, that the Plaintiff herein testified and closed his case, without being warned that such other witnesses, including the Director of Planning or his designate will also be called as a witness.

38. Nevertheless, it is also important to note that the counsel for the 2nd & 3rd Defendants, also did not seek for leave to file any Supplementary list of witnesses. Besides, no Leave was sought to file any Complaint and duly certified copies of the impugned Documents.

39. In the premises, it can be taken and/ or assumed that the 2nd & 3rd Defendants are not keen to file any Supplementary and/or additional List of witnesses, besides the 2nd & 3rd Defendants, also do not contest the fact that the Plaintiffs case has since been heard and closed.

40. In my humble view, the law requires Parties to disclose all the names of the witnesses that are supposed to be relied upon during the trial, as well as the bundle of documents, before the commencement of the plenary hearing.

41. Nevertheless, if there be any default, then the defaulting party is at liberty to seek for and obtain leave of the court to remedy the defect and/or deficiency. However, the Application and/or request to remedy the defect can only be addressed and/or granted where the Plaintiff or such other party has not testified and closed his/ her case.

42. As concerns the subject matter, the Plaintiff had testified and closed his case and the issue of the further witnesses, who are geared towards producing the impugned Documents, was not known to the Plaintiff, during the Plaintiffs testimony and neither was same forewarned about any new witnesses.

43. In my considered view the law requiring the filing and exchange the list of witness, list of documents was meant to bar litigation by ambush and/or surprised. On the other hand, was also meant to ensure that a Party is not ambushed and therefore prejudiced in the course of hearing and trial.

44. Be that as it may, in respect of the subject matter, the Plaintiff has testified and closed his case. Consequently, to allow the calling of any new witness and production of any new Documents, if any, which were unknown to the Plaintiff, at the time of closure of the Plaintiffs case shall prejudice the Plaintiff.

45. Notwithstanding the foregoing, it is also imperative to make it clear that Parties and litigants in Civil proceedings, are obliged and obligated to endeavor to and/or comply with the various provisions of the Procedural laws, including the civil Procedure Rules 2010.

46. And in the event of failure to comply, the defaulting party ought to take diligent and timeous steps, to remedy the default and deficiency.

47. Be that as it may, in the instant matter no timely and/or diligent efforts were made and no application was filed to remedy the defect, prior to, during and/or even before the closure of the Plaintiffs case.

48. In this regard, the breach and/or infraction of the procedural provisions of the law, has been brazen, intentional and/or unmitigated by counsel for the 2nd & 3rd Defendants. Consequently, the prejudice shall be caused and/or occasioned to the Plaintiff.

49. Suffice it to say, that adherence to and/or compliance with the Procedural law is part of our jurisprudence. Consequently, a party who disregards same, albeit without lawful or reasonable excuse, must suffer the consequence of such default.

50. In support of the foregoing, it is appropriate to refer to and take cognizance of the decision in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, where the court observed as hereunder;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure.

51. On the other hand, a party may argue that the court is obliged to render substantive justice and eschew procedural technicalities. But, it must be noted that substantive justice cannot be achieved and/or realized, if peremptory procedural rules, which guide the conduct of business in the various courts, are disregarded, ignored and uncared for, with abandoned.

52. In my humble view the procedural Law, which underpin Procedural justice are as important as the End result, the latter being Substantive justice. Simply put, the means justifies the end and therefore, one cannot advocate Justice while trampling upon Procedure.

53. In the premises, the 2nd & 3rd Defendant herein cannot break and/or breach the peremptory Rules and Procedure and when same are raised, a contention is thereafter ventilated, without any credible basis, that the court should ignore the breaches and infractions of the law.

54. At this point, it is important to restate the position of the law as captured in the decision in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR**, where the honourable Court of Appeal stated as hereunder;

“A five Judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS Civil Appeal No. 290 of 2012 as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”

55. In my humble view, the prejudice that the Plaintiff shall suffer, is evident and/or apparent, to the extent that new witnesses may be called and new evidence may be produced, which was beyond the imagination, conception and anticipation of the Plaintiff at the time of closure of Plaintiff's case.

FINAL DISPOSITION

56. The 2nd & 3rd Defendants herein, just as other litigants are obliged and/or obligated to comply with the Provisions of the law, including the provisions of the Civil Procedure Rules 2010.

57. Where there is any default, breach and/or infraction of the law, it behooves the 2nd & 3rd Defendants, to move with due diligence and

necessary haste, to remedy the default and/or deficiency.

58. Nevertheless, the 2nd & 3rd Defendants, cannot wait until after the Plaintiff has closed his case and midstream the Defense herein, to now come up and seek to call new witnesses and tender new Documents, which were neither disclosed nor made available to the Plaintiff during and up to the close of the Plaintiff's case.

59. In the premises, it is my finding and holding that to allow the 2nd & 3rd Defendants to summon and/or call new witnesses and produce new Documents, which were not within the conception of the Plaintiff up to and including the close of the Plaintiffs case, shall occasion undue prejudice and injustice.

60. Based on the foregoing, the oral Application by and/or on behalf of the 2nd & 3rd Defendants and which was supported by the 1st Defendant, be and is hereby Dismissed.

61. Costs of the Oral Application shall abide the cause.

62. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. J.P Machira for the Plaintiff.

N/A for the Defendants.