



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 325 OF 2009

ESTHER MUKULU MUTUKU.....PLAINTIFF

-VERSUS-

RAHAB M'KIAMA.....1ST DEFENDANT

METRA INVESTMENTS LIMITED.....2ND DEFENDANT

DIANA RACHEL KAVEDZA.....3RD DEFENDANT

RULING

INTRODUCTION

1. The subject matter herein was fixed and/or listed for further hearing on the 2nd March 2022, and when same was called out during the call over and for purposes for Parties confirming whether same were ready for hearing, counsel for the Plaintiff pointed out that same was ready for hearing, with two witness but added a rider that same shall be raising an objection to certain Documents and Witness Statements that were filed by the 3rd Defendant on the 15th February 2022.
2. On the other hand, counsel for the 1st, 2nd and 3rd Defendants, confirmed that same shall be ready to proceed with the hearing and thereafter same sought for time allocation.
3. Having heard preliminary submissions and arguments from the counsel from the respective Parties, the court certified the matter for hearing and time was allocated to the Parties. For clarity, it was ordered and/or directed that the hearing shall proceed at 12 noon, in open court.
4. Come 12 noon, when the matter was called out, counsel for the Plaintiff rose to her feet and took out an objection, whereby same applied to have the 3rd Defendant's Further Supplementary List and Bundle of Documents, as well as Further Supplementary list of witnesses all dated 15th February, 2022 struck out and/or expunged from the court record.

SUBMISSIONS:

5. First and foremost, it was the Plaintiff's counsel submissions that the said Documents, had been filed without leave of the court and secondly, long after the pre-trial conference had been taken and/or concluded.
6. Secondly, the Plaintiffs' counsel submitted that the filling of Supplementary List of Documents, as well Supplementary List of witnesses has also been done, long after the Plaintiff had testified and also concluded her testimony. In this regard, it was contended that the introduction of the said new Documents and Witness Statements, will substantially prejudice the Plaintiff.
7. Based on the foregoing, the Plaintiff 's counsel therefore implored the court to strike out and expunge the 3rd Defendant's Further Supplementary Bundle of Documents and Further Supplementary List of Witnesses.
8. On his part, counsel for the 1st and 2nd Defendants contended that the said Documents filed by and/or on behalf of the 3rd Defendant would go along way in helping the court to ascertain and/or authenticate various issues concerning ownership of the suit property and

therefore it was/is in Interest of Justice to allow and/or accommodate the Documents.

9. At any rate, counsel for the 1st and 2nd Defendants further submitted that there are only two Documents which have been added in the two sets of Documents namely, the Electronic Certificate in respect of the Photographs and a Witness statement, which is said to relate to a Grandson of the Plaintiff.

10. Essentially, counsel for the 1st and 2nd Defendants therefore contended that there was no demonstrable prejudice, that could be suffered by the Plaintiff herein, if the impugned documents are admitted by the court and utilized during the hearing of the case.

11. On behalf of counsel for the 3rd Defendant, it was submitted that though the impugned documents were filed without leave, the filing thereof, was meant to avert delay and/or to defeat the scheduled hearing, which was imminent and therefore counsel Contended that it was in the Interest of justice to file the Documents and thereafter seek to validate same on the Floor of the court.

12. It was counsel's further submission that though he filed two sets of Bundles, one containing Documents and the other containing List of Witnesses and Witness Statements, most of the Documents in the two sets, are Documents which are already in court and same were merely being refiled, for purposes of indexing and pagination, to make it easier for the Court to discern the pages where the Documents are found.

13. Premised on the foregoing, counsel submitted that only two Documents are new and which hitherto not been filed before the court. For convenience, counsel pointed out that the new Documents included the Witness Statement of the Plaintiff's Grandson and Electronic Certificate, relating to Photographs, which are already part of the court record.

14. Other than the foregoing, counsel for the 3rd Defendant also submitted that though he did not seek for and obtain leave beforehand, the issue of extension of time beforehand, is a matter of discretion of the court and the court can consider same, even after the act has been done.

15. Notwithstanding the foregoing, counsel also relied on and/or invoked the provision of Article 159 (2) (d) of the Constitution 2010, and counsel emphasized that the court should be prepared to ensure that substantive justice is dealt with, without undue regard to procedural technicalities, which will vitiate and/or affect enjoyment of the Individual Constitutional Right.

16. In terms of whether the Plaintiff would suffer a prejudice, counsel for the 3rd Defendant admitted and acknowledged that the Plaintiff is exposed to suffer prejudice on account of the fact that the Plaintiff has since testified and concluded her testimony, but added that what is important is the nature of the prejudice versus the inconvenience to be suffered by the Defendants.

17. Based on the foregoing, counsel for the 3rd Defendant therefore submitted that the prejudice that the Plaintiff is exposed to suffer is one that is capable of being atoned for by payment of Costs. In this regard, the prejudice is neither fundamental nor irreparable.

18. Finally, the 3rd Defendant also submitted that if the introduction of the two new documents were to be injurious to the Plaintiff, then the Plaintiff's counsel was at liberty to apply to re-call the Plaintiff and to address whatever, new issue that same may seek to address and/or deal with.

19. Nevertheless, counsel pointed out that it would not be in the interest of justice, to strike out and/or expunge the subject documents, yet the dispute touches and/or concerns Substantial issues concerning land which is an emotive and substantive issue.

20. In view of the foregoing, counsel for the 3rd Defendant therefore pleaded with and/ or otherwise implored the court to allow the said Documents to remain as part of the court record.

21. In the alternative, counsel for the 3rd Defendant contended that if the court was inclined to expunge the documents from the record of the court, on the basis that same were filed out of time and without leave of the court, then the court should consider granting leave to enable the 3rd Defendant to regularize her position and to place on record all material under her custody and possession, that would enable the court to reach a just and substantive determination in respect of the subject matter.

22. In her rejoinder, counsel for the Plaintiff stated that is immaterial whether the Documents are only two or otherwise, what is important is that the said impugned Documents were filed and/or lodged without leave of the court and in this regard, the said impugned Document ought to be expunged.

23. It was counsel's further submission that if the 3rd Defendant had wished to file any witness statement and/or documents, outside the

prescribed timelines, then it behooved the 3rd Defendant to apply to court, seek and obtain leave and not to behave as if same was law unto herself.

24. In view of the foregoing, the Plaintiff, therefore contended that the Application, was merited, lawful and hence same should be allowed. Consequently, the entire Documents bound together and dated the 15th February 2022, should be expunged.

ISSUES FOR DETERMINATION

25. Having listened to the objection taken and/or raised by and/or on behalf of the Plaintiff and having similarly listened to the response made by and/or on behalf of the Defendants, the following Issues arise and are germane for Determination;

a. Whether the Documents, namely Bundle of witness statement and Further Supplementary Documents, filed by and/or on behalf of the 3rd Defendant, are lawful or otherwise.

b. Whether the Documents filed without Leave on behalf of the 3rd Defendant ought to be expunged.

c. Whether the court has a discretion to grant Leave to the 3rd Defendant to file Further Documents and list of witnesses and an additional Witness Statement in the matter.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1 & 2

Whether the Documents, namely Bundle of Witness Statement and Further Supplementary Documents, filed by and/or on behalf of the 3rd Defendant, are lawful or otherwise.

Whether the Documents filed without Leave on behalf of the 3rd Defendant ought to be expunged.

26. It is trite law that a Defendant who is served with summons to enter appearance and Plaint, and who is keen to defend a suit, is obliged to enter appearance and thereafter file a statement of defense, where necessary.

27. Besides, such a Defendant is also called upon to file her list of witness, witness Statements and Bundle of Documents.

28. For coherence, the Documents which I have alluded to in the immediate preceding paragraph, ought to be filed alongside the Statement of Defense in line with the provision of **Order 7 Rule 5 of the Civil Procedure Rules 2010.**

29. However, though the 3rd Defendant herein filed various Documents, including list of witness and witness Statements beforehand and prior to the impugned documents and list of witness, the subject documents and list of witnesses were however being filed out of time.

30. To the extent that the documents and witness statement were being filed out of time, it behooved the 3rd Defendant to seek for and obtain leave beforehand, before filing the said documents. Nevertheless, it was admitted that No such leave was ever sought for and/or obtained.

31. In the premises, it is my finding and holding that the subject Documents which were filed without leave are therefore irregularly and unlawfully filed and placed in the record of the court. In this regard, the impugned documents are therefore illegal and unlawful.

32. Premised on the foregoing, I proceed to and do hereby strike out and expunge the 3rd Defendant's Further Supplementary List and Bundle of Documents and Further Supplementary List of witness dated the 15th February 2022.

33. In doing so, I am guided by the decision in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**, where the Supreme Court observed as hereunder;

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘Document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time.

However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time

without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

ISSUE NUMBER 3

Whether the Court has a Discretion to grant Leave to the 3rd Defendant to file Further Documents and list of Witnesses and additional witness Statements in the Matter.

34. In the course of responding to the objection which sought to expunge the Further Supplementary list and Bundle of Documents and Further Supplementary Lists of Witnesses, the counsel for the 3rd Defendant herein made a feeble plea that in the event that the court found that the Documents had infringed upon the law and that same were therefore bound to be expunged, then same sought to be granted liberty and/or leave to regularize the position and thereby file Compliant Documents.

35. The request by counsel for the 3rd Defendant herein, did not attract any objection and/or opposition from counsel for the Plaintiff, whose main objection was directed against the Documents which had irregularly and unlawfully been filed and served upon her by counsel for the 3rd Defendant.

36. I am aware that Parties are obliged to comply with the Rules of procedure and in particular the procedural timelines, provided and/or stipulated under the law, to enable the business of the court, to be managed in an efficient and efficacious manner. Nevertheless, this does not mean that compliance shall attract and/or reach perfection.

37. Time and again, there would be instances that the court would called upon to exercise discretion and ensure that justice is done to all the Parties. In such situation, the court would have to calibrate and way all the obtaining circumstance and thereby arrive at a just and expedient conclusion that serves the interests of both Parties as well as Equity.

38. In respect of the subject matter, it is only the Plaintiff who has since testified and the rest of the Plaintiffs witnesses are yet to testify. Consequently, it is still possible for the Plaintiff to be recalled and to re-testify, over and in respect of the new Documents and the additional witness statement, which is proposed to be adduced by the 3rd Defendant and in this case, no prejudice and/or injustice will accrue and/or be occasioned.

39. To the contrary, if the 3rd Defendant is locked out and/or barred from bringing forth the proposed Documents and the additional witnesses, the 3rd Defendant shall have been denied, perhaps a segment of the evidence that may have tilted the case in her favor. In this regard, there is a likelihood of the 3rd Defendant being prematurely driven from the judgment seat.

40. Be that as it may, this being a court of law, the court does not exists to mete out punishment against the defaulting parties, including the 3rd Defendant, for not having been diligent, in crafting and filing all the requisite documents. Nevertheless, I must hasten that I do not wish to sanction apathy and slovenliness of the part of any of the litigants. For clarity, Parties must endeavor to comply with Procedural rule insofar as same were never made in vain.

41. On the other hand, I am aware that blunders and/or mistakes shall be made from time to time and because same are made, it does not mean that a Party must suffer punishment, including denial and/or deprivation of a right to Fair hearing.

42. In this regard, I can do no better than to borrow the words of Hon Justice Apaloo JA, (as he then was) in the case of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR**, where he observed as hereunder;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

43. In short, I am minded to grant to an in favor of the 3rd Defendant an opportunity to file a Further Supplementary List and Bundle of Documents and Further Supplementary List of Witnesses and witness Statements, albeit within a circumscribed timeline.

FINAL DISPOSITION

44. Having reviewed the issues for determination which were set out and/or outlined herein before, I come to the conclusion that the objection which was taken by counsel for the Plaintiff was indeed merited.

45. Nevertheless, the orders that commend themselves to me and which I hereby make are as hereunder;

a. The Further Supplementary List and Bundle of Documents filed by the 3rd Defendant and dated the 15th February 2022, be and are hereby expunged.

b. The Further Supplementary List of Witnesses filed by the 3rd Defendant and dated the 15th February 2022, be and is hereby expunged from the court records.

c. The 3rd Defendant be and is hereby granted leave to file compliant Supplementary List and Bundle of Documents, as well as Supplementary list of witnesses and witness Statements and same be filed and served within 7 days from the date hereof.

d. The Plaintiff be and is hereby granted corresponding Leave to file and serve any additional list and bundle of Documents, if any, as well as Witness Statements, if any, and same to be filed and served within 7 days from the date of service by the 3rd Defendant.

e. The 1st & 2nd Defendant are also at liberty to file and serve any additional List of witnesses, witness Statements and further Documents, if any, and same to be filed and served within 7 days from the date of the Ruling hereof.

f. Other than the timelines and the latitude granted vide this Ruling, no Party shall file any further Documents and/or Witness Statements, whatsoever and/or howsoever, in this particular matter, unless the Leave of the court shall have been sought for and/or obtained beforehand.

46. The subject matter was listed for hearing and it is the documents which were filed by the 3rd Defendant herein, which precipitated the objection and thereby occasioned the technical adjournment and by extension the resultant ruling. In this regard, it is only just, expedient and equitable that the 3rd Defendant be condemned to meet the cost of the Plaintiff.

47. In the premises, I direct that the 3rd Defendant shall pay to and in favor of the Plaintiff thrown away costs which are hereby assessed and certified in the sum of kes.20, 000/= only and the same to be paid within 14 days from the date of this Ruling and in default, the Plaintiff shall be at liberty to execute.

48. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mrs. Mutua for the Plaintiff

Miss. Nekesa H/B for Mr. Mutunga for the 1st & 2nd Defendants

Miss Nekesa H/B for Mr. Simiyu for the 3rd Defendant