



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELC NO 774 OF 2017

JOSEPH KIHARA MWAURA.....PLAINTIFF

VERSUS

EARTHLINE PROPERTIES LTD.....1ST DEFENDANT

MERWIN HOLDINGS LTD.....2ND DEFENDANT

MERCLAIRE HOLDINGS LTD.....3RD DEFENDANT

ARBEE LOGISTICS LTD.....4TH DEFENDANT

SAMUEL KARONJI KIMANI.....5TH DEFENDANT

PATRICK MBAU MALIKA.....6TH DEFENDANT

HIRAM KAGO MUKUNA.....7TH DEFENDANT

MICHAEL MUHIA KINUTHIA.....8TH DEFENDANT

GLADYS KARAMBU MIRITI.....9TH DEFENDANT

JUDY WANJA KIGETTAH.....10TH DEFENDANT

CHIEF LAND REGISTRAR.....11TH DEFENDANT

ATTORNEY GENERAL.....12TH DEFENDANT

RULING

1. On 9/12/2021 the Plaintiff’s case commenced with the testimony of PW1, **Joseph Kihara Mwaura**. Thereafter the Plaintiff’s Learned Counsel Mrs. Kihika orally applied to substitute the second witness on record on grounds that the witness statement at page 65 of the Plaintiff’s Trial Bundle at page 65 was erroneously included and there are additional documents that have been brought to her attention by the Chairman of Githunguri Ranching Company.
2. All the Defendants strenuously opposed the application. They argued that acceding to the Plaintiff’s application would amount to introducing new witnesses and evidence; litigating the Plaintiff’s case in installments and that pretrial conference having been concluded, such a request is equivalent to re-opening of the case. It was also pointed out that the said Chairman of Githunguri Ranching has been in office since 2009 (*as per PW2 witness statement*) and thus had ample time to present the said documents before the hearing.
3. In a brief rejoinder, Mrs. Kihika relied on Article 159 of the CoK to buttress her request to produce additional documents. That the Defendants will not suffer any prejudice as they can recall any witness and file their supplementary documents if need be. She beseeched the Court to exercise discretion and allow her substitute the second witness.
4. The Plaintiff wishes to substitute PW2, who according to the Plaintiff’s List of Witnesses dated 3/10/2017 is the **John Maina Mburu** -

Chairman of Githunguri Ranching Co. Ltd. According to PW's witness statement dated 18/10/2019, he has held that position since 12/9/2009. The Plaintiff's Counsel did not disclose what kind of documents that she just learnt about and which witness was coming to produce them other than PW2. Further the Court was not informed when the purported documents came to light. This is despite the Plaintiff being categorical in his List of Witnesses at No.3 that they would call any other witness with leave of Court.

5. It is not in doubt that pre-trial conference was concluded and the hearing of the matter has started. This case was filed on 4/10/2017 and almost six years on, only one witness has testified. Whilst Article 159 (2) (d) Constitution of Kenya requires Courts to administer justice without undue technicalities, Article 159 (2) (a) and (b) dictate that justice shall be administered to all and without delay. The Defendants' sentiments in opposing the application are valid.

6. The rights to access to justice and fair hearing are well entrenched in the Constitution as well. The Court record shows that the matter was certified ready for hearing on 14/3/2019. The hearing was slated for 23/10/2019 but hearing was adjourned at the Plaintiff's instance. It was argued that PW2's statement was filed late and despite protests from the Defendants which the Court readily agreed with, the Court nevertheless referred the matter for PTC. The Plaintiff was granted 15 days to file all relevant documents. On 17/12/2019, when parties were to confirm compliance with Pre-trial directions, the Plaintiff had not complied. The next mention date was 10/2/2020, again the Plaintiff had not complied and a further date of 23/6/2020 was reserved. On the said date, none of the parties appeared.

7. Later on 7/9/2020, Plaintiff's counsel confirmed having been supplied with documents. She further sought summons to issue for Cpl Thomas Karithi attached to DCI land fraud unit. The request was granted. Next, the Plaintiff filed an application dated 18/2/2021 seeking enforcement orders but later withdrew it on 21/4/2021 before hearing was reserved for 9/12/2021. I have highlighted the history of the Court proceedings to demonstrate that the Plaintiff had ample time to move the Court formally for a period of two years but failed to do so.

8. The Civil Procedure Rules are silent as to what should happen later on in case a party wishes to introduce additional list of witnesses and witness statements. However it is trite that the Court can allow such statements to be introduced where good reasons are given as to why the statements could not be filed before hearing. The Court has to use its discretion to allow or disallow the introduction of such statements/witnesses beyond the permitted period depending on the unique circumstances of each case. In this case the Plaintiff is yet to close his case and the Defendants have yet to commence their defence. The Defendants shall have the opportunity to rebut the evidence of the witness.

9. Being guided by Art 159(2) (d) of the Constitution of Kenya and purely in the interest of justice the application shall be allowed

10. Final orders;

- a. **The Plaintiff is allowed to substitute and file the witness statement within 15 days from the date of this Ruling.**
- b. **The Defendants shall upon service have 15 days to file additional witness statements/documents in rebuttal (if needed).**
- c. **Costs shall be in favour of the Defendants.**

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

PLAINTIFF – MS. KAMOTHO HOLDING BRIEF FOR MRS. KIIHIKA

DEFENDANT 1 - ABSENT

DEFENDANT 2 – 10 – KAGO

DEFENDANT 11 & 12 – ABSENT BUT SERVED

COURT ASSISTANT - PHYLLIS