



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC ORIGINATING SUMMONS NO. 105 OF 2016

IN THE MATTER OF

ORDER 37 RULES 16, 17, 18 AND 19 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF

LAND TITLE NO'S KIANJAI KIANJAI/4120, 4690, 807 AND 5989

BETWEEN

GEORGE MUREGA IBUI1ST PLAINTIFF

SALOME RIGIRI TWANAMPIU 2ND PLAINTIFF

ESTHER WAIRURI MUREBU 3RD PLAINTIFF

VERSUS

TITUS KIREA IBUI..... 1ST DEFENDANT

JOSHUA KIREA MBIRITHI..... 2ND DEFENDANT

STEPHEN KIREMA MBIRITHI 3RD DEFENDANT

GEORGE KIRANKI MBIRITHI 4TH DEFENDANT

RULING

1. On 27.1.2022 PW3 was stood down to file and supply the correct minutes for the meeting held on 15.8.2009 and 7.8.2010 respectively. Likewise, the plaintiff was ordered to supply accurate copies of **P exh 7 – 15** before the next hearing together with certified copies of the land adjudication officer's records.
2. Mr. Mwirigi advocate for the defendant also sought leave to file a supplementary list of documents his client had applied from the District land adjudication and settlement officer Tigania West on 2.4.2019 and which he had incidentally received on 27.1.2022 vide a letter dated 26.1.2022. He urged the court to find that there will be no prejudice occasioned to the plaintiff if the application was allowed.
3. Further, counsel submitted whereas time had been given to file the documents, the 1st defendant had no way of knowing when the said officer would supply the documents.
4. The court ordered the documents to be passed on to the plaintiffs' counsel so as to see if they had any objection and perhaps file a consent to that effect. However, later on, it was indicated the plaintiffs were opposed to the leave being sought.
5. Parties were therefore ordered to file written submissions for and against the request which they did dated 17.2.2022 and 10.2.2022 respectively.

6. The 1st defendant submits the court has wide powers to allow such a request given PW3 was yet to complete his evidence in chief, an opportunity was also extended to the plaintiffs to furnish better and clearer copies and that there was no demonstration of what prejudice would be occasioned since the plaintiff will have a window to file further evidential documents and if necessary, apply for the recall of PW1 and PW2. Reliance was placed on *Mohamed Abdi Mohamud –vs- Ahmed Abdullahi & 3 Others [2018] eKLR, Meru High Court Civil Appeal No. 543 of 2019, Johana Kipkemei Too –vs- Hellen Tum [2014] eKLR.*
7. Lastly, the 1st defendant submitted the court should not prevent a party from adducing relevant evidence on a technicality which will assist the court to attain justice in the matter.
8. Opposing the request for leave, the plaintiffs submitted what was sought to be adduced as additional documents was A/R Objection proceedings which was coming after PW1 and PW2 had testified and PW3 was at the tail end of his evidence hence they will be prejudiced and subjected to injustice since their claim was that there was no A/R Objection.
9. Additionally, counsel submitted the 1st defendant had in his possession the A/R proceedings while PW3 was starting to testify but he withheld that information until it was too late. Counsel submitted **Order 7 Rule 5 (d) of the Civil Procedure Rules** had no room for extension of time to file documents as held in *Johana Kipkemei Too (supra).*
10. In addition, counsel also submitted the A/R objection proceedings was neither pleaded nor mentioned anywhere in the 1st defendant's pleadings and or documents hence it was a belated afterthought.
11. Further, counsel submitted clear timelines on compliance with **Order 11 of the Civil Procedure Rules** were given on 3.2.2021 and later on 22.2.2021 but the defendant belatedly filed their bundle which was admitted out of time. The court was urged to reject the attempt by disallowing the request.
12. On 30.5.2017, parties by consent agreed to have the status quo maintained by occupying the site they were at the time with no transfer of the suit land and the application dated 20.7.2016 was marked as spend.
13. Further, parties agreed to file compliance documents within 30 days' time. This was not adhered to as at 12.10.2017 hence an extension was given till 22.11.2017 when party attended court. On 2.10.2018, a hearing was set for 6.2.2019 and parties were ordered to file and exchange bundles of statements and documents within 60 days.
14. On 6.2.2019, the court allowed the originating summons to be amended and served within 30 days together with accompanying statements and documents. The respondents were ordered to file their documents within 30 days upon service.
15. On 3.2.2021, the court allowed three additional defendants namely 5th, 6th and 7th defendants to the suit. The three were also allowed to file replies and documents by 13.2.2021 and paginated bundles to be filed by 20.2.2021.
16. On 22.2.2021, parties appeared ready to proceed and the 1st defendant's documents though filed late were admitted as if filed on time.
17. PW1 and PW2 testified following which the plaintiffs sought for a further amendment of the originating summons. The court allowed the request to be done within 30 days. A further hearing date was set for 26.5.2021. Mr. Mwirigi advocate referring to the plaintiffs' list of documents No. 1 – 9 sought for the makers of the said documents to avail the originals at the hearing. By a ruling dated 19.5.2021, the court overruled the request. The plaintiffs were therefore allowed to produce the documents without calling the makers.
18. Having set the background of this matter, the 1st defendant first reply to the originating summons was the replying affidavit sworn on 18.4.2017.
19. On 12.2.2021, the 1st defendant filed a witness statement and a list of documents dated 12.2.2021. In the said list, letter dated 2.4.2019 made to the lands office requesting for documents was not attached.
20. Further, in all the 1st defendant's responses and witness statements, nothing was mentioned concerning any A/R Objections and its relationship to this defence.
21. **Order 7 Rule 5 (2)** requires a party filing a defence to accompany it with a list of witnesses, witness statements and documents to be relied upon in the suit.
22. Looking at this file, parties have been given more than enough chances to comply with **Order 11**. In none of those instances did the 1st defendant allude to some documents he had requested for from the lands office relating to this matter. There has been no specific prayer or request made for witness summons to be issued to the District land adjudication and settlement officer.
23. Similarly, there was no specific request made for leave to furnish additional documents before PW1 took the witness stand. Even looking at the evidence of PW1 and PW2, there were no specific questions put to the witnesses that there had been A/R Objection to the subject parcels of land.
24. Whereas the court has powers to allow for additional evidence and documents, there must be a nexus, basis, reasons and considerations on how the said documents are relevant, explanation why they were not furnished on time, the prejudice to be occasioned to the other party and the overall impact on the overriding objective under **Article 159 2 (d) as read together with Sections 1A, 1B and 3A of the Civil**

procedure Act, Section 46 of the Evidence Act and Sections 3 and 13 of the Environment and Land Court Act.

25. In my considered view, the additional documents shall definitely change the character and the nature of the further originating summons and the defence herein. It would mean the matter to literally start **denovo**.

26. There has been no explanation why the documents allegedly requested for over 3 years ago would be availed midstream during the trial. It shows the 1st defendant never intended to use them and or if he knew of their existence, he withheld them until it was too late so as to ambush the plaintiffs and or await to hear their case and perhaps fill in the gaps in his defence. This court should not allow such a party to do so otherwise, it would amount to an abuse of the court process.

27. Further, the court has not been availed those documents to establish their relevance or appropriateness to the suit.

28. In ***Rhoda S Kiilu –vs- Jiangxi Water and Hydropower Construction Kenya Limited [2019] eKLR***, this court with approval cited Supreme Court of Kenya decision in ***Cyrus S.K. Jirongo –vs- Soy Developers Ltd & 9 Others [2020] eKLR*** where it was held a party must show that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial and was not within its knowledge as could not have been produced at the time of the hearing and that a party seeking such orders should not appear as if abusing the court process or rather dubiously and ingeniously seeking to restructure or reconstitute its case or make corrections to its case.

29. For the above, my view is that the application herein lacks merit and the same is disallowed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 23RD DAY OF MARCH, 2022

In presence of:

C.P. Mbaabu for plaintiffs – present

Mwirigi for defendants – present

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE