



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**HCCC NO. 53 OF 2010**

**CHARO KAJEMBE.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

- 1. MARTIN W. SARO**
- 2. KAZUNGU SARO**
- 3. JOSEPH MWARINGA**
- 4. JOHANA KADODO**
- 5. JUSTIN KAJOGOLO**
- 6. SIKUBALI KAHINDI KHASO**
- 7. MRS MARY FURAHA**
- 8. FELIX NGUMBAO**
- 9. ROFASI SULUBU**
- 10. OMAR NDAA**
- 11. MAE K. NAULI**
- 12. MRS KADZO J. ZIRO.....DEFENDANTS/APPLICANTS**

**RULING**

**Introduction**

1. What is before me is the Defendants' Application dated 30<sup>th</sup> October 2013 seeking for the following orders:

**(a) That the Defendants/Applicants herein be allowed to call two witnesses namely J.W.NJENGA the then Malindi District Officer and one other Defendant and be allowed to file documents which have come to their attention.**

**(b) That costs of this Application be provided for.**

2. The Application is premised on the grounds that the Defendants have come across documents which were not within their reach at the time of the hearing and that the said documents if brought to the attention of the court will assist the court to arrive at a just decision.
3. According to the depositions of the Applicants most of the documents they intend to rely upon are held by the office of the President through the District Officer while others are held by Agricultural Development Corporation; that it has been very difficult for them to obtain such documents and that they have since managed to obtain a few photocopies.
4. It is the Defendant's case that it would be fair and just that this suit be re-opened to enable the Defendants to testify and call their witnesses.
5. The Plaintiff/Respondent filed his Replying Affidavit on 31<sup>st</sup> October 2013 and deponed that the Defendants applied to close their case after calling one witness and the Defendants' Application for adjournment was disallowed.
6. It was the Plaintiff's/Respondent's deposition that he has since filed his submissions as ordered by the court; that the court has not reviewed its orders of 2<sup>nd</sup> October 2013, that the whereabouts of the witness and documents that the Applicant is seeking to introduce were known to the Defendants since 2009 and that there is no good reason why the Defendants did not issue summons to witness.
7. It is the Respondent's case the issues raised in the current application are res judicate and the Defendants can only file an appeal.
8. The parties filed their respective submissions which I have considered.

**Analysis and Findings**

9. On 18<sup>th</sup> July 2013, the Plaintiff closed his case after four witnesses testified. On the same day, the Defendants' advocate sought for an adjournment on the grounds that he wished to file additional documents and more specifically letters from the District Commissioner, the Agricultural Development Corporation and the Minutes of the Community. I allowed the Defendants' advocate to raise the Application on a later date after serving the copies that he sought to rely on on the Plaintiff.
10. When the matter came up for defence hearing on 2<sup>nd</sup> October 2013, the Defendants' Advocate did not renew his application for leave to file a further list of documents and witness statements at the start of the defence case as earlier directed by the court. Instead, DW1 testified and was cross-examined whereafter the Defendants' Advocate applied for adjournment to call four more witnesses.
11. The Application for adjournment was opposed by the Plaintiff's Advocate on the grounds that the Defendants had not filed the list of the witnesses that he was proposing to call and he should not be allowed to build on his case in the process of testifying. In my Ruling, I observed that the Defendant should have filed the witness statements in the matter before the Plaintiff closed his case. I declined to allow the Defence to file any additional witness statements.
12. The Defendants/Applicants advocate then made a fresh oral application and applied for witness summons to issue to the District Commissioner and to the Mayor who was in the office in the year 2011. That application was again opposed. The court dismissed the oral application on the ground that the proposed witnesses were not amongst the Defendants' list of witnesses. I further stated that the Defendants were trying to "undo" my earlier ruling disallowing the filing of a further list of witness statements.
13. The parties then agreed to file written submissions in respect to the suit. The Plaintiff filed his submissions on 10<sup>th</sup> October 2013. The Defendant on the other hand filed the current application which is asking for the same relief that I disallowed on 2<sup>nd</sup> October 2013.
14. Having already made a ruling on the issues that the Defendants have raised in the current application, I find and hold that the Application dated 30<sup>th</sup> October 2013 is res judicata.
15. In the circumstances, and for the reasons I have given above, I dismiss the Defendants' Application dated 30<sup>th</sup> October 2013 with costs.

Dated and Delivered in Malindi this **21<sup>st</sup>** Day of **March 2014**

**O. A. Angote**

**Judge**