



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 38 OF 2012**

**LAWI KIGEN KIPLAGAT.....PLAINTIFF**

**VERSUS**

**JAPHETH AMENYA RATEMO (Legal representative of THOMAS RATEMO OIRA).....DEFENDANT**

**R U L I N G**

1. The plaintiff, Lawi Kigen Kiplagat gave evidence, was cross examined by the defendant and re-examined by his counsel on 3<sup>rd</sup> March 2020 after which the plaintiff's case was closed. The defendant, Thomas Ratemo Oira (now deceased) who himself an advocate appeared in person and represented himself. Mr. Japheth Amenya Ratemo, the son of the deceased and also an advocate of the High Court of Kenya was on 21<sup>st</sup> April 2021 substituted as the defendant in place of his late father to represent the estate.

2. On 29<sup>th</sup> October 2021 the now substituted defendant, Japheth Amenya Ratemo filed a further witness statement dated 25<sup>th</sup> October 2021 and simultaneously also filed a supplementary list of documents dated 25<sup>th</sup> October 2021. This provoked the plaintiff to file the Notice of Motion dated 18<sup>th</sup> November 2021 which is the subject of this ruling. The application is expressed to be brought under Order 2 Rules 13 & 15, Order 8 Rules 2 and 3 and Order 51 Rule 1 and Section 3, 3A & 63 of the Civil Procedure Act. The application prays for orders: -

1. Spent.

2. *That the honorable court be pleased to strike out the defendant's supplementary list of documents dated 25<sup>th</sup> October, 2021 for being filed without leave of court and when pleadings had already closed and the plaintiff has even closed his case.*

3. *That the honorable court be pleased to strike out the defendant's further witness statement dated 25<sup>th</sup> October, 2021 for being filed without leave of court and when pleadings had already closed and the plaintiff has even closed his case.*

4. *That the honorable court be pleased in the alternative to order that all documents procured by the defendant/respondent in contempt of court orders issued on 26<sup>th</sup> October, 2012 are null and void ab intio and the same cannot be relied upon by the defendant/respondent in this case.*

5. *That cost of the application be provided for.*

3. The application was supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the plaintiff dated 18<sup>th</sup> November 2021 and filed in court on 19<sup>th</sup> November 2021. The applicant's contention is that the applicant filed the further documents without leave of the court and that it was too late in the day for the documents to be introduced; that the documents were always in the possession of the defendant and there was no explanation why they had not been filed earlier; that the plaintiff had closed his case and the deceased defendant who was the principal actor was not available to be subjected to questioning respecting the documents; and further that the introduction of the new evidence at this late stage in the proceedings would be prejudicial to the plaintiff. The plaintiff further contended the documents sought to be introduced were in the custody and possession of the defendant since 2012 and there was no reason given why they were not exhibited in the defendant's primary bundle of documents and the supplementary bundle of documents.

4. The defendant filed a replying affidavit dated 31<sup>st</sup> January 2022 in opposition to the plaintiff's application in which he set out the history of the dispute in considerable detail. The contents of the affidavit relate to a large extent to the evidence the defendant will presumably present during the defence hearing and not so much as to the admissibility of the defendant's supplementary list of documents filed on 29<sup>th</sup> October 2021. Respecting the admissibility of the supplementary list of documents dated 25<sup>th</sup> October 2021, the defendant averred that the defendant had with the leave of the court filed an earlier supplementary list of documents dated 20<sup>th</sup> June 2018 which the plaintiff did not object to. The defendant deposed that item No.1 in the list of documents filed on 29<sup>th</sup> October 2021 was a payment receipt for

Kshs.2,443,600/= to Agricultural Settlement Fund on Account of LR 722/34 and that the Nos of the cheques making the payment were endorsed on the face thereof showing respective amounts in respect of each cheque. He deponed that these were the cheques shown as items 3,4 and 5 in the defendants supplementary list of documents dated 25<sup>th</sup> October 2021. The defendant further averred that through the amendment of the plaint following his substitution as the legal representative of his deceased father the plaintiff introduced a new cause of action against the defendant under clause 5 (g) when he pleaded thus:-

*(g) Illegally procuring a title deed for the suit property during subsistence of this suit and while there were court orders injunction/restraining him from procuring a title deed of the suit property.*

5. The defendant's position was that it was necessary to align the defence through the further witness statement in order to respond to the new cause of action.

6. The parties canvassed the application by way of written submissions. The defendant/respondent filed his submissions simultaneously with his replying affidavit on 14<sup>th</sup> February 2022. The plaintiff filed his submissions on 21<sup>st</sup> February 2022. I have reviewed and considered the application, the supporting affidavit and the replying affidavits and the submissions filed by the parties. The issue for determination is whether the court, having regard to all the attendant circumstances should exercise its discretion to admit in evidence the defendant's supplementary list of documents filed on 29<sup>th</sup> October 2021.

7. The purport and essence of Order 11 of the Civil Procedure Rules 2010 is to ensure that parties have complied with Order 3 Rule 2 in the case of the plaintiff as relates to filing statements of evidence and copies of documents to be relied on, and in the case of the defendant compliance with Order 7 Rule 5 as relates to filing of statement of evidence and copies of documents to be relied on at the trial. During pretrial directions, parties are required to affirm their compliance with the pretrial preparations which includes exchange of witness statements and all documents intended to be relied on during the trial. Once pre trial directions have been taken, a party is precluded from filing any further witness statements and/or documents unless with the leave of the court.

8. The rationale behind Order 11 and the other provisions I have referred to is to prevent trial by ambush and basically make management of trials efficient. Every party to the suit is made aware in advance of the trial, of the case and the evidence they have to face and this assists the court and the parties to focus on the real issues in the suit.

9. In the instant matter it is not contested that as at 29<sup>th</sup> October 2021 when the defendant filed the supplementary list of documents dated 25<sup>th</sup> October 2021 he had not sought and/or obtained the leave to the court to file the further documents or the further witness statement. I have reviewed the documents sought to be introduced and it is evident all the documents were available to the defendant as from 2013. The defendant (now deceased) filed a supplementary list of documents on 20<sup>th</sup> June 2018 which included a copy of the receipt No.1191496 dated 14<sup>th</sup> December 2012 issued by Agricultural Settlement Fund for Kshs.2,443,600/= on account of LR 722/34 Miti Mingi. On the face of this receipt there is endorsement of the makeup of the amount as follows: -

(i)	Cheque No. 017409-----	Shs.900,000/=
(ii)	Cheque No.017410-----	Shs.800,000/=
(iii)	Cheques No.017411-----	Shs.700,000/=
(iv)	Cash -----	Shs.43,600/=
<b>TOTAL -----</b>		<b><u>Shs.2,443,600/=</u></b>

10. The plaintiff did not object to the admission of this receipt in evidence on 20<sup>th</sup> June 2018. Mr. Kahiga advocate for the plaintiff on the date indicated he had no problem with the introduction of the document. This is the same receipt the defendant has indicated as item (1) in the supplementary list. As the document had been introduced without objection by the plaintiff, the document is properly on record and an objection to the admission of the document at this stage would be unjustified. The attached copies of cheques itemized under 3, 4 and 5 were the same cheques referred to in the receipt filed on 20<sup>th</sup> June 2018. They merely explain the makeup of the amount of the receipt. Their production in my view would not in any manner prejudice the plaintiff. I do not think there is any contest that the amount on the receipt was paid. There may however be an issue as to whether the payment was regularly made. In the circumstances I will allow the production of the copies of the cheques to be produced as part of the defendant's documents.

11. However as relates to the documents numbered 2, 6 and 7, I note these were documents that were made and/or issued in 2013 during the pendency of the instant suit and there is no explanation why for instance they were not submitted on 20<sup>th</sup> June 2018 when the defendant (deceased) filed the supplementary list of documents. It is noteworthy that these documents appear to have been issued during the pendency of this suit and when there was a court order barring the defendant from transferring, charging, selling and our disposing of the suit property pending the determination of the suit. Mr.Thomas Ratemo Oira (deceased) undoubtedly was involved in the processing of the title to his name as the receipts earlier referred to were issued in his name, the copy of discharge and transfer were equally issued in his name. He would definitely have been the appropriate person to speak to the documents and in his absence, to admit the said documents would be prejudicial to the plaintiff. The documents had not been discovered during the pre-trial and were not put to the plaintiff when he testified and was cross examined by the said Thomas Ratemo Oira (deceased) who was representing himself. I consequently disallow the production of the following documents and expunge the same from the record: -

**(i) Letter dated 20<sup>th</sup> February 2013 listed under item (2) in the supplementary list of documents;**

**(ii) letter dated 22<sup>nd</sup> January 2013 listed under item (6) in the supplementary list of documents; and**

**(iii) Transfer and the Discharge of charge listed under item (7) in the supplementary list of documents.**

12. Regarding the further witness statement by Japheth Amenya Ratemo dated 25<sup>th</sup> October 2021, I take note that he was substituted to continue with and prosecute the suit as the legal representative of the estate of the deceased defendant. Under Order 24 Rule 4 (2) a person substituted in place of a deceased defendant is allowed to make a defence appropriate to his character. Order 24 Rules 4 (1) & (2) provide as follows:-

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

13. As the said Japheth Amenya Ratemo was substituted in place of the deceased defendant he was entitled to file a further witness statement considering he was the person who was to take the witness stand to give evidence on behalf of the deceased estate. The further witness statement made by him on 25<sup>th</sup> October 2021 filed on 29<sup>th</sup> October 2021 is therefore admissible but the witness will be precluded from making any reference to the documents that have been expunged from the record.

14. The plaintiff/applicant's application dated 18<sup>th</sup> November 2021 having only been partially successful, I order that each party will bear their own costs of the application.

15. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY OF MARCH 2022.**

**J M MUTUNGI**

**JUDGE**