



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. E145 OF 2021

MARY MAINA NANDEKA (*suing as the Legal Representative of the estate of the late*
GEORGE NZUIKO).....**PLAINTIFF**

=VERSUS=

MONICAH MWENGA MANTHI

JOHN MUKULYA MANTH

AARON MUTHIANI MANTHI

(sued in their capacity as the Legal Representatives of the estate of the late

GIDEON MANTHI NZYUKO).....**1ST DEFENDANT**

JOHN MUKULYA MANTHI.....**2ND DEFENDANT**

RULING

1. This ruling is in respect to an objection raised by **Mr. Amuga**, counsel for the Plaintiff, against the production of three documents listed as; Sale agreement dated 29th September 2017, Rescission agreement dated 14th November 2018 and Sale agreement dated 22nd December 2018. The said documents appeared in both the 1st and 2nd Defendants' list of documents.

2. Counsel submitted that the documents were not admissible by virtue of non compliance to **Section 19 of the Stamp Duty Act** since the said documents are chargeable for stamp duty and they was no evidence of the same having been paid.

3. The objection was opposed by **Mr. Nthiwa**, counsel for the 1st Defendant who submitted that the objection was made in bad faith and that compliance to Stamp Duty Act can always be made at any time before judgment is delivered. Counsel argued that it is not mandatory for payment of stamp duty for sale agreements and that what matters is for the court to consider the contractual agreement that existed between the parties. It was also submitted that the court is empowered not to block any evidence that would assist in arriving at a fair and just determination of the dispute between the parties.

4. **Counsel Nthiwa** contended that if the documents are not produced then there would be no claim before court for determination. Counsel also pointed out that the Plaintiff had equally produced documents which were not stamped and no objection was raised. Counsel concluded his submissions by also stating that the Plaintiff's Counsel never raised the said issue during pre-trial and as such he is estopped from raising the issue during the hearing of the 1st Defendant's testimony.

Analysis and determination:

5. I have considered the objection raised and the rival arguments presented on both sides and the issue for determination before this court is whether the objection raised by counsel for the Plaintiff in respect of the production of the documents is merited.

6. **Article 159 (2)** of the **Constitution of Kenya 2010** provides as follows:

“In exercising Judicial authority, the courts and tribunals shall be guided by the following principles

a) ...

b) *Justice shall not be delayed*

c) ...

d) *Justice shall not be administered without undue regard to procedural technicalities; and*

e) *The purposes and principles of this Constitution shall be protected and promoted”.*

7. **Article 50 of the Constitution** protects every person’s right to both procedural and substantive justice; while Article 48 of the Constitution protects every person’s right to access to justice.

8. **Section 3 of the Environment and Land Court Act, No. 19 of 2011** provides that the main purpose of the Act is to enable the Environment and Land Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes. Further, **Section 19(2)** of the said Act provides that this court shall be bound by the procedure stipulated in the Civil Procedure Act.

9. The **Civil Procedure Act** provides that the Act together with the Rules thereunder are focused on facilitating the Just, expeditious, proportionate and affordable resolution of Civil disputes.

10. **Order 11 of the Civil Procedure Rules** provides for case management and conference as a tool to facilitate the just, expeditious, proportionate and affordable resolution of Civil cases, **Order 11 Rule 3** provides as follows; -

3. (1) the purposes of a case management conference shall be to-

a) *Promote the expeditious disposal of cases;*

b) *Afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;*

c) *Afford the parties an opportunity to settle the case;*

d) *Determine any other matter relating to the management, hearing or disposal of the case;*

e) *Deal with pre-trial application at first instance or formulate a timetable to deal with them as the court may deem fit; and*

f) *Identify the issues for determination.*

11. The Practice Directions on proceedings of the ELC court contained in **Gazette Notice No. 5178 dated 25th July, 2014** provide for the overriding objective of proceedings in this court. **Direction 1** provides as follows: -

“In the exercise of its authority and jurisdiction, the Environmental and Land Court shall at all stages of any trial be guided by Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act No. 19, 2011 so as to facilitate;

a) *Just,*

b) *Expeditious,*

c) *Proportionate; and*

d) *Accessible resolution of disputes,*

Direction 28 provides as follows: -

“In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference;

g. Taking of all objections to the production of specific documents, where notice has been issued to the other party thereafter, objections in the production of any document shall not be entertained at the main hearing;

12. The totality of the above provisions is that this court as well as the parties appearing before it together with their counsel, should at all times in the lifespan of any case they handle or are involved in, as the case may be, be guided by the overriding objective, which essentially seeks to meet the ends of justice through the just, expeditious, proportionate, affordable and accessible resolution of disputes. Therefore, the law expects both the court and the litigants together with their counsel to embrace case management as a tool towards achieving the efficient administration of justice.

13. Part of what is expected of parties and or their counsel in the case management process during pretrial conferences is to indicate to court whether they object to the production of any documents intended to be produced by the other parties, **ELC Practice direction 28 (g)** provides that if no objection to production of documents is raised during pretrial conference then no objection on the production of any document shall be entertained at the main hearing.

14. While a party is entirely within their rights to object to the production of any document, that demand must be made at the pretrial stage and not during the main hearing of the suit. **Direction 28(g) of the Practice Directions** acts as a reflux valve to facilitate progress and avoid stagnation in resolution of disputes. Judicial resources and more specifically judicial time is finite, in view of the enormous demand for access to justice. Hence every party and or advocate who appears before court is obligated to assist the court to further the overriding objective by complying with what needs to be done at the appropriate time.

15. In the case of *Methuselar Keyah Lubembe vs Albina Kipkemoi [2019] eKLR*, the court stated as follows, in paragraphs 8 and 9; -

“... case conference under Order 11 is a good tool for managing court files and demands time from the Judicial Officer in conduct as well as the parties or advocates to understand the file sufficiently well so that every effort and endeavor is made to save every minute by agreeing on basic and mundane issues like the number or witnesses to be called, the need for cross examination of witnesses, any questions regarding admissibility of a document and how to have the filed documents produced. This is important so that prospects of objection upon objections which many times derail progress are avoided. It is also at the period of the case conference that parties make disclosures and discoveries towards achieving fair trial devoid of ambush.

“When done correctly the prospects of subsequent interlocutory applications like for amendments can wholly be arrested and dealt with before hand. It is at process that all players in Civil Litigation have no otherwise but to internalize and approach with seriousness deserved because when properly undertaken a very huge step is taken towards expeditious disposal of the matter”

16. The Court of Appeal had also an opportunity to pronounce itself on the issue of non-compliance of documents with **Section 19(2) of the Stamp Duty Act. In the Court of Appeal case of Abok James Odera T/A A/J Odera Associates vs John Patrick Machira T/A Muchira & Co. Advocates, Civil Appeal No. 161 of 1999**, where the court held that: -

“... but such non-compliance is not however fatal to the enforcement of the said agreement. The court is enjoined under Section 19(3) (a) (b) and (c) not to reject such an agreement in totality but to receive it and either assess the stamp duty itself and direct it be paid”.

17. I am therefore bound by the Court of Appeal finding that such non-compliance is not fatal to the enforcement of the said agreement. The Plaintiff's counsel having failed to raise his objections on the production of those documents during the pretrial conference is estopped from raising the said objection at the hearing of this suit.

18. In the premises, I find that the Plaintiff's objection is not merited and I proceed to dismiss the same. The costs of the objection shall be in the cause.

DATED, SIGNED AND DELIVERED BY ELECTRONIC MAIL AT NAIROBI THIS 10TH DAY OF MARCH 2022.

E. K. WABWOTO

JUDGE