



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC NO 144 OF 2021

(FORMELY ELC NO. 411 OF 2016)

THOMAS SHERING.....PLAINTIFF

VERSUS

1. NEREAH MICAH EL SAID.....1ST DEFENDANT

2. GERHARD HEIDUK.....2ND DEFENDANT

3. WOLFGANG GEORG JOHANN.....3RD DEFENDANT

EHGARTNER.....4TH DEFENDANT

4. KENYA POWER AND LIGHTING COMPANY LTD.....5TH DEFENDANT

RULING

1 This case was by order of the Court consolidated with Mombasa ELC Case No. HCCC 442 of 2017. For purposes of the proceedings the lead file has been Kwale ELC 144 of 2021 formerly Mombasa ELC 411 of 2016.

2 This case came up for hearing on 16th March 2022. The witnesses were present in court and both Counsels informed the court that they were ready to proceed with the hearing. Counsel for the Defendant informed the court that they had been served with a huge bundle of documents by the Plaintiff which he termed as an ambush.

3 It was submitted by counsel for the Defendant that on 17th February 2022 the Plaintiff had applied for an adjournment to enable them file further documents in support of their case which they promised to do within 7 days. That the court off the record directed parties to exchange documents and agree. After this the Defendant wrote to the Plaintiff reminding them of the need to exchange the proposed documents but the Plaintiff did not respond.

4 The Defendant objected to the production of the documents on the grounds that; -

1) The Plaintiff had produced a bundle of documents in HCCC 411 of 2016 and further list of documents. The case came up for hearing in 2019 and they did not inform the court that they would file additional documents. That even at the point when the court ordered consolidation the Plaintiff did not seek leave to file further documents.

2) The documents being introduced were available as at December 2018 and ought to have been filed by then.

3) Items No. 7 and 10 of the bundle related to the Defendants banking activities and personal communication respectively which were illegally obtained and also infringed on the Defendants privacy contrary to Articles 31 of the Constitution and should be expunged.

4) That the documents had come too late to enable verification by the defendants which also exhibited the casual manner in which the Plaintiffs were treating the case.

5 In response Ms. Mukoya Counsel for the Defendant submitted that one of the prayers during the consolidation was for leave to file further

documents. That she was not aware of any legal requirement for parties to agree on what they should rely on to champion their cases before the court. That Counsel's objection was on lateness of service and not the content of the documents. She submitted that as counsel she only produced what is supplied by her clients. The documents were filed on 9th March 2022 and that she ensured that the same were promptly served upon the Defendants on 10th March 2022 by 1.30pm which was sufficient time for the Defendant to review the same and even apply to file further documents if they found it necessary to do so. That the document No. 7 which was a document examination report was prepared pursuant to Notice to Produce dated 10th July 2018 filed in HCC 411 of 2016 and responded to vide affidavit sworn on 10th August 2018. It was necessary to substantiate further on the agreement between the Plaintiff and the Defendant. Further that the document examiners report responded to paragraphs 4, 6 and 14 of the Amended Statement of Defence filed on 10th August 2018. Counsel contended that the communication involved the Plaintiff who had intimate relationship with the Defendant. It is the Plaintiff's case that all the defendants were aware of the Plaintiff's interest and the documents were meant to respond to the issue of innocent purchaser for value without notice. In addition, it was urged that Counsel for the defendant had not alluded to any prejudice that would be occasioned. This court was urged to dismiss the application.

6 In rejoinder Mr. Abidha Counsel for the Defendant submitted that the Plaintiff ought to have set down the matter for mention for further direction of the court since the Defendants had not agreed on the documents. That no reasons had been put forward for the delay in filing the documents. The defendants were being ambushed yet it was incumbent upon parties to disclose in good time the documents to be relied upon in their case. The fact that parties were living together did not oust the right to privacy and reiterated that the documents were illegally obtained. Further that the Deputy Registrar issued directions on 1st February 2018 that the agreement should be dealt with at the time of the trial which directions were confirmed by Justice Omollo. It was pointed that the documents were offensive and late in time.

ANALYSIS AND DETERMINATION

7 From the objections raised I have formulated two issues for determination; -

- 1) Whether the documents aforementioned should not be admitted for having been filed out of time and without leave.
- 2) Whether 'Communication between parties at time of sale' should be expunged for having been obtained illegally and infringing on the privacy of the Defendants.

8 On 9th March 2022 the Plaintiff filed Plaintiff's List of Documents and Further Plaintiff's List of Witness, dated the same day. This list of documents contained CR 12, Chain of transfer documents, Police records, KPLC bills, Defendants Agreement, Agreement between Plaintiff and 1st Defendant dated 3rd February 2012, Document examination report, Property rates Payment slips, Registration for caution on 2458, 2459 and 2460, Communication between parties at time of sale, Utility and maintenance receipts and photographs. The documents were numbered 1 to 12 in the order listed herein and from the names the documents were in bundles thus forming a huge bundle as described by the Defendant during his objection. Indeed, the entire bundle runs from pages 1 to 230.

9 I will first deal with the issue whether the documents aforementioned should not be admitted for having been filed out of time and without leave. This objection touches on all the documents contained in the Plaintiff's lists of documents. Indeed, from the submissions of the Plaintiff no explanation was tendered for the delay in filing the list of documents herein. This is an old matter commenced by way of Plaint dated 22nd December 2016 filed on 23rd December 2016. Together with the Plaint and as required under the Civil Procedure Rules the Plaintiff filed List of Documents and list of witness both dated 22nd December 2016. This list of documents contained Transfer dated 30th January 2012, Agreement dated 3rd February 2012, Official Search, Certificate of lease, Utility bills, Photos making a total of 6 documents. Ordinarily it would have been expected that for the suit to have been fixed for hearing on 16th March 2022 pretrial procedures had been closed and that all parties had complied with case management protocols. Be that as it may the Plaintiff filed the list of documents herein which also necessitated the filing of the supplementary list of witnesses. There being already a list of documents filed at inception of the suit then it is expected that this would be a further list of documents on the part of the Plaintiff and which indeed requires leave of the court. On the issue of leave the Plaintiff's response was that leave was duly sought within the application for consolidation. I have looked at the application dated 26th February 2019, prayer 4 requests that upon consolidation parties be granted 30 days leave within which to comply with order 11. During highlighting of submissions in respect of the said application Ms. Mukoya in her final statement urged the court to allow the application and prayed that upon consolidation the Plaintiff be allowed 14 days to comply with order 11 of the Civil Procedure Rules. The Court delivered its ruling on 7th July 2020 which I read and I note that the court did not pronounce itself on the Plaintiff's request to comply with Order 11 herein.

10 The record also shows that this matter was fixed for pretrial directions several times before the Deputy Registrar and the matter was finally placed before Justice Omollo on 22nd October 2018 to make directions on production of documents. The judge then directed that production of documents would be dealt with during the hearing of main suit. Therefore, as at the time of the application for consolidation pre-trial had closed. However, on 17/2/22 Ms. Mukoya in seeking adjournment of the hearing of the main suit pointed out that the matter was not ready for hearing since pretrial were not concluded as she had an expert report. Defence counsel insisted that pretrial had been closed. This court adjourned the matter for the reason that the wrong file in respect of the consolidation had been brought to court from Mombasa. I did not record anything on the expert report but recalled that indeed off the record this court asked the parties to exchange the same and agree. It was then expected that if the parties did not agree then the party disagreeing would raise the requisite objection and I therefore proceed on the assumption that this is the objection.

11 The Document Examination Report states that it is 'to ascertain whether the signature pointed by black arrow on exhibit marked A1 was made by the same author when compared with known Signatures pointed by black arrows on exhibits marked B1 -B29'. Exhibit A1 is an Agreement Between Nereah Michael Said and Thomas Schiering dated 3rd February 2021 in the Plaintiff's list of documents (see page 143). The said agreement is referred to in Paragraph 12 of the Plaint however its existence is denied by the Defendant in paragraph 14 of the Amended Statement of Defence and where the Defendant further alludes that they shall demand that the original copy of the alleged agreement be subjected to document examination to confirm its authenticity. The Notice to produce was requisitioned by the Defendant on

2nd July, 2018 and among the documents required to be produced is ‘the original copy of the said agreement. I note that it was duly responded to vide the affidavit in response sworn on the 10th August 2018 by the Plaintiff where it is deposed that the original was destroyed in a fire. Infact I must state that from my perusal of this file this specific document has elicited a lot of acrimony between the parties. In my view based on these facts and pleadings the Document examination report finds its basis herefrom and cannot be wished away, it is very relevant to the determination of the issues in contest.

12 Having said all the above and having looked at the documents in the list of documents this court would not be inclined to expunge any documents for want of leave or for reason that they were filed late in time. This would not serve justice. I take this position for I would find no basis to expunge documents which would enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit from a more informed point of view and for the just determination of the controversy between the parties. Moreover, I see no prejudice that will be occasioned since Counsel for the Defendant would still be accorded opportunity to cross examine the Plaintiff on its veracity or even the maker as they may deem it necessary. In this regard I have also been guided and persuaded by the holding in **Susan Wairimu Ndegwa v James Gichere Ndegwa [2018] eKLR** where **L.N Waithaka J** held that; -

14. ...as the defendant failed to file his documents within the time given, this court has a fundamental duty to do justice between the parties. It is in turn, fundamental to that duty, that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter and rely on every document that will assist their case and also assist the court arrive at a more informed decision. Being of the view that expunging the documents from the court record may be prejudicial to the defendant and that no prejudice will be suffered by the plaintiff, I find there is sufficient reason to reinstate the defendant documents into the court record (plaintiff will get an opportunity to cross-examine the defendants on those documents and if need be recall her witnesses).

13 I will then move to the issue of admissibility of the correspondence referred to as Communication between parties at time of sale’. The objection is on the basis that the same were illegally obtained and infringe on the Defendants right to privacy as accorded by article 31 of the Constitution which states as hereunder; -

31. Privacy. Every person has the right to privacy, which includes the right not to have— (a) their person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.’

The communication is contained in items 191- 210 of the bundle or plaintiffs list of documents dated 9th March 2022. A look at the first set of communication (see page 191 -200) reveals emails exchanged between the 3rd Defendant one of the purchaser of the subdivision plot No. 2460 and the 1st Defendant who was the vendor. These revolve around the purchase of the said property, procedures followed in Kenya compared to procedure in Germany and completion of the 80% balance of the purchase price and the furniture in the houses. I have come across emails copied to and sent by lxworld.miller@gmail.com which from my perusal of the court file is an email address belonging to the Plaintiff who is also referred to as Martin/Thomas in some of the communication. There is also Paula who is the vendors lawyer responding to the 3rd defendants concerns/queries on the transaction and emails sent to her by the Plaintiffs on the transaction. Upto this point on the set of the email communication I do not see any illegality as alleged in the procurement of the documents by the Plaintiff, he is in copy and has also participated in the communication all of which relate to the purchase of the subdivisions. I also find the documents relevant to the extend that they touch on the transaction herein. I see no prejudice to be occasioned to the Defendants they will have occasion to test the same in cross examination and their final submissions.

14 The next set of documents within item 10 in the list (see page 201 – 210) are SMS (short messaging services) between the Plaintiff and the 1st defendant which cover the period 12/11/2015 to 1st December 2016 and therefore clearly cannot be said to be illegally obtained. From a keen look at them is a mixture of messages on the sale transaction but there also some exchanges that are personal conversations some of which are not pleasant and do not appear to have any value to the issues but only embarrass both the parties who have a right to privacy. These entire set of documents containing the SMS message I’m inclined to expunge from the record. Let the parties focus on the real issues.

15 The upshot of the above is that the objection is partly sustained to the extent that the document containing the Short Messaging Services or SMS between the Plaintiff and the Defendant are hereby expunged from the list of documents. The rest of the documents in the list of documents shall be deemed as duly filed and admitted.

Delivered and Dated at Kwale this 21st Day of April, 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mukoya.....for the Plaintiff

Mr. Abidha.....for the Defendant

Mr. Denis Mwakina.....Court Assistant.