



**Golden Lion Estate Company Limited v Onunga & 6 others (Environment & Land  
Case 792 of 2015) [2022] KEELC 13523 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13523 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 792 OF 2015  
JA MOGENI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**GOLDEN LION ESTATE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**JAMES ONUNGA ..... 1<sup>ST</sup> DEFENDANT  
FRANK LOGISTICS LIMITED ..... 2<sup>ND</sup> DEFENDANT  
ASHKOK KUMAR SOOD ..... 3<sup>RD</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT  
PHILLIPS INTERNATIONAL LIMITED ..... 6<sup>TH</sup> DEFENDANT  
CREDIT BANK LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This suit was commenced by way of a plaint dated August 17, 2015 and which is amended *vide* the amended plaint dated November 11, 2021. The dispute in the matter is over the ownership of the land parcel LR No 1/835 (original 225/5) and LR 1/381 [IR No 200711] which is claimed by both the plaintiff and the 2<sup>nd</sup> defendant. The 4<sup>th</sup> and 5<sup>th</sup> defendants are the Chief Land Registrar and the Attorney General respectively.
2. Mr. Mwangi Gabriel, advocate for the plaintiff has made an oral application seeking to have the plaintiff to be allowed to call Registrar of Lands as witness to produce a document which he alleges was made by the Registrar stating that this will enable him propagate the plaintiff's case better. The reason for the application is that there is need to establish the owner of the suit parcel since both the plaintiff and the 2<sup>nd</sup> defendant claim ownership of the suit property.



3. Mr Were Advocate for 2<sup>nd</sup> defendant and Mr Mugisha for the 6<sup>th</sup> and 7<sup>th</sup> defendants oppose the application as it appears the plaintiff is prosecuting his case on emerging issues. They have been before this court several times and that the plaintiff was given 14 days to file documents and that there has been no indication by the plaintiff that more witnesses will be called. The preliminaries that were required to be done were done. The plaintiff has lined only one witness.
4. The question of the necessity and importance of pre- trial has been explained in *Halsbury's Laws of England* Volume 13 where it was stated that the function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation. Witness statements are to be filed with the pleading so as not to ambush the other party. However, the court has a discretion to allow a party to file a further list of witnesses even after trial has commenced so long as it will not delay the hearing of the matter and that the other party will not be prejudiced.
5. I have considered the oral application and the oral submissions and do find that even as a court we would want to know how one parcel is alleged to have two titles and each being claimed to be the authentic one. I note that the Chief Land Registrar is actually a party in this matter. The office is listed as 4<sup>th</sup> defendant. Land being an extremely emotive subject in this part of our world it is prudent that if there is anyone who can unravel for Kenyans why we have multiple land ownership documents to the same parcel of land this gesture should be welcomed.
6. In the case at hand it is not just anyone it is the Land Registrar who is being summoned to simply take the stand and testify to whether they authored the document at page 39 of the plaintiff's bundle and explain to this court what is contained in that document in relation to the suit property. I note that there is need to consider all available evidence before making a just determination.
7. I have considered the rival oral submissions. The *Civil Procedure Rules*, 2010, require that the plaintiff, when filing the plaint, to also prepare and file his list of witnesses, witness statements, and the documents that he will rely on at trial. The said provision is drawn as follows:-

2. Documents to accompany suit [order 3, rule 2.]

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

- a. the affidavit referred to under order 4 rule1(2);
- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses excluding expert witnesses; and
- d. copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under order 11.



8. The same rule requires on his part, the defendant, should file alongside his statement of defence, his list of witnesses, witness statements and documents that he will rely on at trial.
9. Order 7 rule 5 addresses the issue of the documents that should accompany the defence or counter claims and states that the defence and counterclaim filed under rule 1 and 2 shall be accompanied by—
  - a. an affidavit under order 4 rule 1(2) where there is a counterclaim;
  - b. a list of witnesses to be called at the trial;
  - c. written statements signed by the witnesses except expert witnesses; and
  - d. copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.

10. When you read the above orders and rules, it follows that strictly speaking, parties are supposed to avail their evidence in advance, before the commencement of trial. The purpose of these provisions is to prevent a litigant from continuing with the suit, without the knowledge of what evidence the other party intends to bring, and are aimed at preventing trial by ambush. However, these are trial directions in subsidiary legislation and it should not be forgotten that under article 159(2)(d) of the Constitution, court is enjoined to ensure that justice is not sacrificed at the altar of procedural technicalities. The court does indeed have discretion in the interests of justice, to allow a party to rely on documents or statements which had not been discovered before. At the end of the day, the court has to weigh where the scales of justice tilt. Generally, though, the more advanced the litigation, the more difficult it may be for the court to allow a party to introduce documents and new witnesses to the suit. I explained this in my decision in the case of Kenneth Kamoche Njoroge (suing as the personal representative of the estate of Loise Nyambura Njoroge) vs George Mwaniki Rugu and 5 Others ELC No 213 of 2015 where I denied the 1<sup>st</sup> defendant leave to introduce new evidence at the defence stage.
11. The circumstances in the instant case are different, the plaintiff has not closed his case meaning that whatever evidence he will tender, the defendants will have an opportunity to rebut during defence hearing. This situation was the same one that the court was confronted with in the case of Marclus Kiranga Nimrod & Another vs Nussy Kutbii Justus & Another, in Kerugoya ELC Case No 737 of 2013. In the said case, three witnesses had testified for the plaintiff and the plaintiff applied to introduce new evidence including a sale agreement which she had not referred to in her evidence. Olao J, permitted the introduction of the new evidence, his reasoning being that the defendants will have a chance to rebut the evidence at the defence stage.
12. For good order and management of cases I am usually very reluctant to allow introduction of new evidence or due to the obvious procedural framework on management cases provided by order 11 of the Civil Procedure Rules, but I think it is only fair to allow each party an opportunity to fully ventilate their case, if for no other reason, but so that the whole truth is revealed. There will indeed be some prejudice occasioned to the defendants, but I do not think that it is the sort of prejudice which cannot be cured by being allowed time to also file any additional statements and documents, in light of the calling of the Chief Registrar to produce a document which is already on record. The document is already produced the only additional step being taken is to summon the Land Registrar to produce it and to be cross-examined on the content. The litigation herein is not so far advanced as only one witness has testified.
13. I note that the defendants will not be prejudiced because they were aware of this document and it's only the maker being called to produce the same. I will therefore allow the plaintiff's application to



have the Land Registrar summoned to produce the document filed by the plaintiff and be subjected to cross-examination on the evidence relating to the document.

14. Given the foregoing, I further direct as follows:

- a. The witness statement to be filed within 14 days from the date hereof.
- b. The defendants are at liberty to file any witness statement and document relating to the document to be produced.
- c. I will award the defendants today's costs to be paid before the next hearing.
- d. The matter to continue as a part heard on October 25, 2022.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 28TH DAY OF SEPTEMBER 2022.**

.....

**MOGENI J**

**JUDGE**

**IN THE VIRTUAL PRESENCE OF:**

Mr Mwangi for the Plaintiff

Mr Mugisha for 6th – 7th Defendant/Respondents

None appearance for 1st, 2nd, 3rd 4th and 5th Defendants

Vincent Owuor: Court Assistant

.....

**MOGENI J**

**JUDGE**

