



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 79 OF 2014

JOHN KIBOR SERONEY.....1ST PLAINTIFF

JOSEPH KIBOR.....2ND PLAINTIFF

CATHERINE CHELAGAT KIBOR.....3RD PLAINTIFF

SAMWEL KIBET TOO.....4TH PLAINTIFF

VERSUS

STANLEY KIPTORUS CHEMOSY.....1ST DEFENDANT

JACKSON KIPNGETICH KOMEN.....2ND DEFENDANT

JOSEPH SAWENJA WANINGILO.....3RD DEFENDANT

RULING

1. The application dated **10/11/2020** and filed in court on **13/11/2020** has been brought by the plaintiffs under **Order 10 Rule 11** and **Order 18 Rule 10** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act, Cap 21**. The plaintiffs seek the following orders:-

(1) ...spent

(2) ...spent

(3) That this honourable court be pleased to set aside the order closing the defence case made on the 8/10/2020 and re-opens the same.

(4) That the honourable court be pleased to recall the 3rd defendant who had testified on 8/10/2020 in the absence of the plaintiffs' advocate for cross-examination.

(5) That the costs of this application be provided for.

2. The application is supported by the affidavit of the 1st plaintiff sworn on **10/11/2020** with authority from the other plaintiffs. The grounds upon which the application is made are that the plaintiffs' advocate was unable to attend court owing to a medical condition which was not deliberate and an excusable mistake; that the plaintiffs will be prejudiced by the closure of the case without cross-examination of the 3rd defendant and that the matter involves land which is an emotive subject.

The Response

3. I have perused the file record and I have not found any reply to the application.

Submissions

4. The 3rd defendant filed his written submissions on **2/12/2021**. The plaintiffs filed their submissions on **29/11/2020**.

Determination

5. The main issue that arises in the instant application is whether the 3rd defendant who testified on **8/10/2020** should be recalled for cross examination.

6. The applicants rely on **Order 18 Rule 10** of the **Civil Procedure Rules** and **section 146** of the **Evidence Act Cap 80**. They also cite the case of **Esther Wangui Ndegwa V Hellen Wambui Miria and 4 Others [2019] eKLR** and **Phillip Chemwolo & Another Vs Augustine Kubende [1986] eKLR**.

7. **Order 18 Rule 10** of the **Civil Procedure Rules** however when properly construed grants only the court the mandate to recall at any stage of the proceedings any witness who has been examined and examine him as it deems fit.

8. The more appropriate provision to be relied on in the present instance is **Section 146** of the **Evidence Act Cap 80** but it does not also address the situation the plaintiffs find themselves in fully. That provision allows the court to permit a witness to be recalled for either further examination-in-chief or for further cross-examination. It appears to presume that examination-in-chief or cross-examination had occurred by the time the recall order is being made.

9. The reliance on the respective decisions in **Phillip Chemwolo** and **Esther Wangui Ndegwa (supra)** is also amiss as the application is apparently primarily based on the fact that the advocate then representing the plaintiff was unwell and in the absence of any evidence as to what condition he was in he may not be blamed for any blunder yet.

10. However, having perused the application and the submissions filed by the parties I find that the present instance is one where a litigant is seeking to be relieved of a burden borne out of circumstances not of his own making; the plaintiff's case had been closed and the defence case proceeded in his absence and in the absence of his counsel and therefore no cross-examination was done.

11. I find that the application has merit and I grant it in terms of **Prayers Nos. (3) and (4)** thereof. The costs of the application shall be in the cause.

12.. Consequently the 3rd defendant shall present himself on the **9/3/2021** for cross-examination and subsequent re-examination.

13. It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 17th day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.