



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 29 OF 2019**

**ABDI NOOR UMAR.....PLAINTIFF**

**VERSUS**

**ADAN MAMO ELEMA AND 22 OTHERS.....DEFENDANTS**

**RULING**

1. This matter was coming up for hearing on 26.1.2021 when counsel for defendant made two applications triggering this ruling. The first application was for the court to issue summons to the former Deputy Governor of Isiolo County, one his Excellency Mohammed Gulei, the C.E.C Committee executive member of Lands Isiolo County government, the District Land Registrar and District surveyor, both of Isiolo County. It was averred that the said witnesses are crucial, hence important for cross-examination on the subject matter.
2. The second application was for the court to visit the scene of the suit property so that the court can properly appraise itself on the facts on the ground.
3. Counsel for the defendant added that the issues in the applications are captured in their defence statement, and he urged the court to give directions in respect of the aforementioned applications before the hearing of the plaintiff's case.
4. The applications were strenuously opposed by counsel for the plaintiff who averred that the statement of defence referred to by defence counsel is the one dated 18.12.2020, which was filed in court on 12.1.2021. That the said defence is totally a new defence, it is not an amended defence and that it is independent of the one dated 12.5.2014 drawn by the firm of Mukira Mbaya advocates and is also independent of the one drawn by the firm of Ashioya advocates dated 28.11.2019.
5. It was further stated that the court should note that there are already 3 defence statements yet the plaint is intact, that defendants are faceless and that at the time of filing the defence dated 28.11.2019, the court directed defendants to file an authority to act where each defendant has signed. What was however filed was a mere defence statement. The filing of the defence on 12.1.2021 has been termed as an abuse of the process of this court.
6. It is further averred that the defence have not complied with the directions of 4.11.2020 as they were supposed to file their bundle of documents by 2.12.2020. Reference was made to this court's ruling of 21.5.2020 where the court urged the parties to abandon any maneuvers to derail the suit through applications and preliminary objections, noting that the matter was filed in year 2013 and has been in court for the last 8 years.
7. Counsel for plaintiff requested for costs in case the matter was to be adjourned.
8. In his rejoinder, counsel for defendant averred that the ruling of 21.5.2020 has been overtaken by subsequent rulings, that when they were served with a bundle of documents by the plaintiff, the pleadings had not closed. *This is because the documents filed in support of the plaint do not speak to the plaint.* This necessitated the defendants to respond to each and every document which does not speak to the plaint. It was further stated that plaintiff's side could have sought leave to have the plaint amended but they have squandered that chance.
9. It was further averred that counsel for defendant was afflicted with Covid 19 ailment and that is why he was unable to comply with court's directions and that this issue was communicated to the court and the counsel for the plaintiff.
10. It was also stated that in the interest of justice, it was either the interested party be a party or their officers be called upon as crucial witnesses.
11. It was further stated that a scene visit would even be in the interest of plaintiffs.

12. Counsel for defendant averred that they should not be condemned to pay costs as they were ready to proceed with the case on that day of 26.1.2021.

13. Counsel for plaintiff contended that new issues had been raised in the rejoinder by counsel for defendant. It was stated that plaintiff's pleadings are adequate and they don't intend to amend the same. That plaintiff is at liberty to file documents in support of their claim and if the other side is not comfortable with the said documents, they will be at liberty to conduct cross examination on the same, hence defence counsel should not state which documents do not speak to the plaintiff.

14. It was also stated the court doesn't know who defendants are, that the statements of witnesses availed to plaintiff's side are not signed and are also not dated and that they are only 8 and not 23 statements.

15. It is further stated that nowhere in the directions of 4.11.2020 did the court direct the defence side to file a new statement of defence and new documents in support of their case.

### **Determination**

16. Although the application made by defence counsel on 26.1.2021 related to two issues that is summons to witnesses and scene visit, other issues did crop up touching on the late filing of documents by defence, the filing of a pleading (defence statement) without leave of court as well as the issue of costs. Ultimately the case could not take off on 26.1.2021 and the court will determine the issue of costs in this ruling.

17. I have considered all the issues raised herein and I find that the rationale of scheduling this matter for hearing on three consecutive days from 26<sup>th</sup> to 28<sup>th</sup> of January 2021 was because of the pretrial hearing conducted by the court on 4.11.2020. It was envisaged that good progress would be made in expediting the prosecution of this matter.

18. On the issue of pleadings, Mr. Ashioya had addressed the court as follows on 4.11.2020:

***“We filed our statement of defence dated 28.11.2019 filed on 29.11.2019. No other pleading”.***

That being the case, the defence is estopped from claiming that they had to file another statement of defence because ***“the documents of the plaintiff don't speak to the plaintiff”.***

19. On the issue of the validity of the defence of 29.11.2019, that the defendants have not availed authorities, the issue can be canvassed during the trial or final submissions. For now, the defence is allowed to proceed with their case based on that particular pleading of 29.11.2019, as it is the one which was mentioned during the pre-trial session.

20. On the issue of filing documents out of time, counsel for defendant admits that he filed the documents late because he was ailing with Covid 19. However when the counsel for defendant stood up to address the court on 26.1.2021 to make some applications, the issue of filing documents out of time was not one of the issues he required the court to determine. The issue of documents was only pointed out by counsel for plaintiffs.

21. The directions made on 4.11.2020 in reference to defence documents were as follows;

***“The defendants to compile their paginated bundle containing pleadings, statements of witnesses and documents within 21 days, by 2.12.2020, failure to which such other documents shall be disregarded by the court.”***

22. The above directive is a self-executing order of the court. It cannot be varied through a letter to the court or the opposing party. It was incumbent upon counsel for defendants to move the court appropriately in order to obtain another court order to vary the directions given on 4.11.2020. The order of 4.11.2020 still stands and hence documents filed outside the given timelines stand as expunged.

23. The purpose of compiling a paginated bundle was to facilitate expeditious and smooth case management and was not meant to bring forth new pleadings or documents.

24. On the issue of summons to the 4 witnesses, I find that defence proposes to cross examine the said witnesses. That the defence desires the interested party to either be a party or their witnesses be called as witnesses herein. However, a case belongs to the parties. The interested party is no longer a party to this suit and they had not been brought on board by the defence. If the defence desires to call them as their witnesses, so be it. To this end, the defence may make an application to bring the mentioned persons as additional witnesses for defence. Only then will the court deal with the issue of summons to the said witnesses. As at now, the trial is yet to take off and when it does, the court will certainly start with plaintiff's case hence the issue of summoning the said witnesses does not arise at this stage.

25. On the issue of scene visit, I find that this court conducted a pre-trial comprehensively on 4.11.2020. Nothing was mentioned about a scene visit. I decline to allow that application.

26. I am dismayed by the manner of applications springing up in this matter which are having the effect of derailing the suit. In particular, I wish to remind the parties of the overriding objective set out under **Section 1A (3)** of the Civil Procedure Act where it is stated that :

***“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the***

Court”.

27. **Section 3 (A) of the Civil Procedure Act** further provides that:

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.***

28. The non-compliance of the court’s orders of 4.11.2020 by the defence and the disregard of this issue when counsel for defendant stood up to make his applications on 26.1.2021 is a clear manifestation that the defence is in violation of the aforementioned provisions of law.

29. As pointed out by counsel for the plaintiff, this matter has marked time in the corridors of justice for the last 8 years. One of the cardinal principles in our Constitution is **“the expeditious delivery of justice”** –see **Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17<sup>th</sup> century maxim of **“Justice delayed is justice denied”**. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred.

30. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print policy **“Sustaining Judiciary Transformation - (SJT)”** where speedy delivery of justice was one of the key strategic area of concern.

31. Against this background, this court remains conscious of its constitutional mandate to dispense justice expeditiously.

32. In the case of **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**, the court stated thus regarding judicial time;

***“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”***

33. In line with the Constitutional mandate to have speedy trials, this court conducted the pretrial conference on 4.11.2020 with a clear understanding that the trial would kick off continuously for three days as from 26.1.2021. That did not happen because of the applications made by defence counsel. It is not fathomable that the defence counsel claims they cannot be condemned to pay costs as they were ready to proceed, yet they opted to make these applications on the date of the hearing.

34. **All in all, I find that the defence side occasioned the adjournment on 26.1.2021. They are condemned to pay court adjournment fees as well as plaintiff’s advocate costs and plaintiffs’ witnesses costs for that day. The two applications made by the defence are hereby dismissed save that the one touching on summons to witnesses can be revisited at the defence stage of the hearing.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 17<sup>TH</sup> DAY OF MARCH, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 26.2.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**