



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NUMBER 213 OF 2015

**KENNETH KAMOCHE NJOROGE (suing as the personal representative
of the estate of LOISE NYAMBURA NJOROGE.....APPLICANT**

VS

GEORGE MWANIKI RUGU.....1ST RESPONDENT

LAND REGISTRAR.....2ND RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. For determination are two oral applications made on 19/01/2022 by the counsel for the 1st Respondent/defendant and counsel for the 4th, 5th and 6th respondents/defendants. The orders sought are;

- 1) **That an order be issued recalling DW1 for cross examination on the basis of the Documents as filed in the list of documents by 2nd and 3rd respondents/defendants.**
- 2) **That an Order be issued for filing of a supplementary list of documents by the 4th Respondent/Defendant and recalling of the 4th Respondent/ Defendant**

2. The oral application by counsel of the 1st respondent/defendant was premised on the following grounds;

- 1) **That 1st respondent/defendant was aware of the documents filed by the 2nd and 3rd respondents/defendants since the list of documents and the documents were not served on the 1st respondent/defendant nor the counsel for the 1st respondent/defendant by 2/12/2021, when the matter proceeded with DW1 testifying.**
- 2) **That the case was given a further Hearing date of 19/01/2022.**
- 3) **It is important that the respondent/defendant be recalled for purposes of re-examination and cross-examination in view of the documents filed by 2nd and 3rd respondents/defendants.**
- 4) **That it is in the interest of justice that this oral Application be allowed.**

3. Counsel for the plaintiff and counsel for the 2nd and 3rd respondents/defendants confirmed that they had the documents but the same had not been served on the 1st respondent/defendant. The Counsel for the applicant/plaintiff did not therefore object to the application to recall the 1st respondent/defendant. Neither did the counsel for the 4th respondent/defendant. The counsels urged the court to grant the orders sought.

4. The second oral application was made by counsel for the 4th, 5th and 6th respondents/defendants seeking for the following order:

1) That an Order be issued for filing of a supplementary list of documents by the 4th respondent/defendant and recalling of the 4th respondent/defendant.

5. The oral application by counsel of the 4th respondent/defendant was premised on the following grounds;

1) That on 2/12/2021, the matter proceeded with DW4 testifying.

2) That the case was given a further Hearing date of 19/01/2022.

3) That however, it has since been discovered that there are documents relating to the transaction of the suit property owned by the 4th respondent/defendant and the subdivision done the 1st respondent/defendant on which they seek leave to adduce evidence and file a supplementary list of documents

4) 4. That they seek therefore to recall the 4th respondent/defendant for purposes of cross-examination

5) That it is in the interest of justice that the Application be allowed.

6. The applicant/plaintiff opposed the oral application made by the counsel for the 4th respondent/defendant on the following grounds;

1) That the application intends to introduce new documentary evidence that ought to have been produced during the hearing of the applicant/plaintiff's case.

2) That the applicant/plaintiff has already had opportunity to testify and produce all relevant documents they intended to rely in his case.

7. The counsels appearing for the parties made oral submissions. The applicant/plaintiff's counsel in opposing the application noted that this is a 2015 matter and therefore the counsel for the 4th defendant cannot go looking for other evidence to produce before the court. He contended that the 4th respondent/defendant has had over 6 years to collect the evidence and therefore he objected to the filing of supplementary evidence.

8. I have considered the oral submissions for both applications. For the first application I perused the file and noted that the documents by the 2nd and 3rd respondent/defendants were not served on the 1st respondent/defendant and therefore the counsel had no way of knowing that those were documents that the counsel would rely on at the hearing. This was confirmed by the applicant/plaintiff at the hearing on 19/01/2022. Although counsel Ms. Cheseina for the 2nd and 3rd respondent/defendant raised a ground that these documents are already part of the documents filed, I looked through the pleadings filed by both parties but did not find any of them in the file either. The counsel for the 1st respondent/defendant has explained that the information came to his knowledge when the counsel for the 2nd and 3rd respondent/defendant stated that she served the documents via email but they had no record of the same having been received by the 1st respondent/defendant. Meaning that the 1st respondent/defendant had not received six (6) of the documents relied on by Ms. Cheseina counsel for the 2nd and 3rd respondent.

9. The 1st respondent/defendant has explicitly explained that he did not know the existence of these documents until after he closed his case as on 2/12/2022. In the circumstances, I do not find that the 1st respondent/defendant moved the court late since he made this oral application soon after the testimony of the DW4. Therefore the 1st respondent/defendant will have opportunity of being recalled to challenge the veracity of those documents if deemed necessary and I do not see any prejudice the plaintiff is likely to suffer that cannot be remedied.

10. Consequently, I find merit in the 1st respondent/defendant's oral application dated 19/01/2022.

11. As to the oral application of the 4th defendant for filing of supplementary documents, the issue before me is whether or not the defendant ought to be allowed to introduce supplementary documents at this stage of the proceedings. It will be noted that prior to this application, the applicant/plaintiff had already presented their witnesses and closed their case. The 4th defendant had also testified and has been cross-examined.

12. The Civil Procedure Rules of 2010 require parties to furnish their evidence in advance before the commencement of the trial. These provisions are found in Order 3, Order 7 and Order 11 of the Civil Procedure Rules.

13. Under Order 3 Rule 2, when filing suit, one needs also to file a Verifying Affidavit, list of witnesses, statements of witnesses (excluding expert witnesses), and copies of documents to be relied upon at the trial. There is a proviso that the written statements may with the leave of the court be availed at least 15 days prior to the Trial Conference envisaged under Order 11 of the Civil Procedure Rules.

14. The same applies to a defendant when filing defence and counterclaim (if any). The relevant provision is Order 7 Rule 5. I think that it is best that I set it out in full, for it is the provision that ought to apply to the application herein. The same is drawn as follows:-

Order 7 Rule 5 Documents to accompany defence or counterclaim.

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.

15. It will be seen from the above that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.

16. There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.

17. The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of ***Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR***, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.

18. This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.

19. The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by the defendant to adduce the additional witnesses and documents.

20. When the applicant/plaintiffs testified and tendered their evidence, they had in mind that all that the defendant would call was one witness and that the 4th respondent/defendant would not be rely on one engagement document. The document sought to be introduced was not in their contemplation. They were never cross-examined on it. They never thought fit to mention it, assuming that they knew of its existence. Before the defendant started giving evidence, she never gave any indication that after listening to the applicant/plaintiff's evidence, she would wish to add supplementary evidence. It is after her cross-examination that she has now sought to introduce new evidence. No reason has been given as to why the 4th respondent/defendant did not contemplate furnishing this new evidence earlier.

21. I have to concur with the submissions of counsel Mr Mugambi that the 4th respondent/defendant has had six (6) years to produce this evidence and now it is too late for the court to allow this application by the 4th respondent/defendant. The applicant/plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the applicant/plaintiffs, if I am to allow the 4th defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the applicant plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50(1) of the Constitution.

22. For the above reasons, I am inclined to disallow the application by the 4th defendant to avail supplementary evidence. The 4th /respondent defendant will proceed on the basis of the evidence she had proposed to tender when she filed her defence.

23. Given the foregoing:

1. I find merit in the 1st respondent/defendant's application and allow the recalling of the 1st respondent/defendant to be cross-examined only on the six documents that were never served to him by the 2nd respondent/defendant.

2. Secondly on the application by the 4th respondent/defendant I find no merit in the application and therefore disallow it.

3. Cost to be in the cause.

It is so ordered.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY 2022.

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MOGENI J

JUDGE

In the Presence of;

Ms Mutinda holding brief for Mr. Laichena for the Plaintiff

Mr. Mbichire for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

No appearance for the Interested Party.
V. Owuor – Court Assistant