



**Chabari & 3 others v Muthuri (Environment & Land Case
38 of 2015) [2022] KEELC 2782 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 38 OF 2015**

CK YANO, J

JULY 6, 2022

BETWEEN

SILVANA KIRIMI CHABARI 1ST PLAINTIFF

DOMINICA MUTHONI IBARI 2ND PLAINTIFF

MAGDALENE MWARI MWAJA 3RD PLAINTIFF

MWAROMO MUGIRA M'MUGANIRI 4TH PLAINTIFF

AND

JOHN MUTHURI DEFENDANT

RULING

1. This is a partly heard matter before Hon. L.N Mbugua J. and the plaintiffs had already closed their case. Four witnesses had also testified on the part of the defence before the Honourable judge who was seized of the matter was transferred.
2. Later directions were taken that the proceedings be typed and the matter proceeds from where it had reached.
3. When the matter came up before me on 23rd June 2022 for further hearing, Mr. Mwanzia advocate for the plaintiffs and Mr. Thangicia advocate for the defendant told the court that the defence was to call their last witness. The court then proceeded to take the evidence of D.w 5 who was cross examined and re-examined.
4. The advocate for the defendant then made an oral application praying that the court summons the Land Registrar Meru to come and produce the original documents and other documents relating to the transfer form dated 22nd September, 1976 in respect of the suit property parcel No. Nkuene/ Nkonyi/400 and for summons to issue to one Moses N. Mwithimbu to produce the original



- documents that he relied to prepare a report dated 8th November, 2018 which was an application for Id/Card.
5. The defendant's advocate told the court that the defendant had requested the Land Registrar to supply the said documents but was told that the documents could not be found. Learned counsel for the defendant stated that the said persons should come to court and clear the air on the issues that have arisen in these proceedings over the said documents. The defendant's counsel submitted that this court is a temple of justice and what is sought is for the court to have the privilege of getting the entire evidence to facilitate the ends of justice.
 6. The application was strongly opposed by the advocate for the plaintiff who argued that the application is meant to delay the conclusion of this matter. The learned counsel for the plaintiff pointed out that the parties had filed and exchanged documents and that the plaintiffs had already produced the said documents as exhibits without any objection. He further stated that the plaintiffs and their witnesses as well as the defendant and his witnesses had testified and were cross examined. The plaintiffs' advocate argued that the application is an afterthought and is meant to re-litigate through the back door.
 7. I have considered the application as well as the submissions in support and against. The application is for summons to issue to certain persons to bring the originals of documents, copies of which have already been produced as exhibits in the case.
 8. As already stated, this matter is part heard and the plaintiffs had already closed their case. Some of the defendant's witnesses have already testified and only one witness testified before me.
 9. The application seeks the introduction of new evidence since the defendant now proposes to call two witnesses who were not noted in his list of documents dated 13th October, 2020. The witnesses sought to be summoned are said to be the Land Registrar Meru and one Moses N. Mwithimbu a document examiner.
 10. Order 7 Rule 5 of the [Civil Procedure Rules](#) is relevant in the instance of the matter before me. It is drawn as follows-;

“Document to accompany defence or counter claim.

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 counter claim;
 - 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”
 11. It will be observed from the above that the defence is supposed to be accompanied by a list of witnesses together with their statements and also copies of documents to be relied upon by the defence during trial. There is however an exception with regard to expert witnesses who need not make witness statements, but they must be listed in the list of witnesses to be called. Order 7 rule 5 mirrors the provisions of Order 3 Rule 2 which obligate the plaintiff to also file together with the plaint, the same documents that is the list of witnesses, witness statements excluding expert witnesses and copies of documents.



12. Therefore, the defendant if he intended to call the Land Registrar and the document examiner as witnesses, ought to have filed these together with the defence. There is nowhere in the defendants list and further list which were filed alongside the defence which indicates that the Land Registrar or Mr. Moses N Mwithimbu would be called as witnesses. It follows therefore that when the plaintiff's gave evidence, and when they called their witnesses, they had no idea that those witnesses were going to be called by the defendant.
13. The essence of having the rule that parties table their evidence in advance, is to ensure a fair trial. I have perused the court record in this case. This is a matter that was filed in court in the year 2012. The case has therefore been pending before court for the last ten years. It has been transferred to the lower courts and re-transferred to this court.
14. I must also point out that from the record, parties appeared before court for pre-trial directions way back on 14th May 2013 when their advocates informed the court that the parties had fully complied with the provisions of Order 11 and requested for and were granted a hearing date. The parties had also applied for and were granted leave to amend their pleadings. As already stated, the plaintiff's and their witnesses have testified and even produced copies of the documents in question as P exhibit No. 16. The defendant did not object to the production of the said documents at the time and neither did he even request for the makers to come and produce the originals as now sought.
15. I am of the view that the application herein is an afterthought tactfully calculated to fill some gaps in evidence. I am therefore of the view that the court should be extremely slow and cautious before allowing such an application which seeks to call witnesses that were not earlier disclosed as provided for by the rules. It is my take that the court should incline towards denying such application since it is an ambush and prejudicial to the other party, in this case the plaintiffs who have even closed their case.
16. It is for the above reasons that I find that the application by the defendant is not made in good faith, is not merited and an afterthought. The same is disallowed.
17. On costs, I make no orders as to costs.
18. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT /VIRTUALLY AT MERU THIS 6TH DAY OF JULY 2022.

In presence of

C.A Mwenda

Thangicia for defendant

Mutegi holding brief for Mwanzia for plaintiffs

JUSTICE C.K YANO

ELC JUDGE

6/7/2022

Page 2 | 2

