



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 14 OF 2019

CYRUS MUCEBU IRUNGU.....PLAINTIFF/RESPONDENT

VERSUS

ALEXANDER MUGAMBI MIRITI.....1ST DEFENDANT/RESPONDENT

MUKURA JAMES CHACHA.....APPLICANT

LUCY WANJERI CHACHA.....APPLICANT

JAMES MWANGI KAMAU.....4TH DEFENDANT/RESPONDENT

TERESIA WANGUI NGANGA.....5TH DEFENDANT/RESPONDENT

GEORGE KANGATA MWANGI6TH DEFENDANT/RESPONDENT

ALLAN PETER KARANJA.....7TH DEFENDANT/RESPONDENT

THE LAND REGISTRAR MURANGA.....8TH DEFENDANT/RESPONDENT

THE HON ATTORNEY GENERAL.....9TH DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 11/2/2021 the 2nd & 3rd Defendants/ Applicants filed and application seeking;
 - a. Spent
 - b. Spent
 - c. That this Honorable Court be pleased to grant the 2nd and 3rd Defendant/ Applicant leave to file further list of documents and witness statements after close of pleadings
 - d. That costs of this application be in the cause.
2. The application is supported by the Affidavit of Mukura James Chacha who deponed that the previous Counsel had inadvertently failed to file crucial documents and statements which are relevant to the case for reasons not known to them. Further that the documents were procured by the present Counsel and the witness statements could not be recorded early due to unavailability of the intended witness. He prays that the mistake of their previous Counsel should not be visited on them.
3. The application is opposed by the Plaintiff/ Respondent on the ground that the application is interalia an abuse of the Court, that the documents contemplated by the Applicant were in their possession and a copy of the green card alluded to by the Applicant formed part of the Plaintiff's documents. It is the Respondent's contention that no cogent reason has been adduced by the Applicant why the documents were not within their reach and what efforts they made to acquire the documents. On the witnesses, the Respondent contends that the Applicants have not demonstrated why no witness statement were filed yet the witnesses are from Maragua, Muranga.
4. Parties argued the application before me and reiterated the contents of their applications and responses. The issues for determination are;

- a. Whether stay orders can issue?
- b. Whether leave should be granted?
- c. Who will bear the cost?

Whether stay orders can issue

5. The matter had been fixed for hearing on the 15/03/2021 but the same could not proceed in light of the instant application. By default there was stay of proceedings pending determination of the application, the prayer is therefore spent.

Whether leave should be granted

6. Order 11, Rule 7(1) (c) provides inter alia;

(1) At least thirty days before the hearing date of the suit, a Trial Conference shall be convened by the court for the following purposes—

- (a) Planning of trial time;
- (b) Exploring the most expeditious way to introduce evidence and define issues;
- (c) Granting leave to amend pleadings within a specific period not exceeding fourteen days;

7. A Plaintiff when filing suit must ensure compliance with Order 3 Rule 2 of the Civil Procedure Rules which provides that a suit must be accompanied by:

- (a) The affidavit referred to under Order 4 Rule 1 (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.

8. The Defendant on the other hand must comply with Order 7 Rule 5 which provides

- (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.

9. In essence therefore, parties to a suit need to ensure that they have filed all the documents and witness statements they need to buttress their cases. Pretrial Conference enables parties to avoid trial by ambush and if done well accords fair hearing to all the parties. The Court has discretion to allow parties to file documents notwithstanding close of pleadings and parties must seek leave thereof.

10. The Applicant contends that failure to file the documents in the first instance was occasioned by their previous Counsel. The Applicant relied on the case of **Samuel Mathenge Ndiritu vs. Martha Wangare Wanjira & Another [2017] eKLR** where the Court found that mistakes of Counsel should not be visited on a party as to cause the case not to be heard on merits.

11. I am satisfied that the Applicants' conduct of seeking new Counsel portrayed them as persons who are in charge of their case. Unfortunately, no evidence has been tendered to show why the previous Counsel failed to file the documents despite being in custody of the documents. The Court for the interest of justice and to determine the case on merits finds that the mistake if any should not be visited on the Applicants. (See **Phillip Chemwolo & Another –VS- Augustine Kubede [1982-88] KLR 103**).

12. The Applicants further grounded the application on the averments that the documents were not within their reach as well as the witnesses. A position the Respondent avers that it has not been fully demonstrated to Court.

13. The Supreme Court sitting on an election petition in **Raila Odinga and 5 Others vs. Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR when analyzing on discretion to allow or disallow additional documents stated: -**

“The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and

extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence...is such as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

14. The documents sought to be produced by the Applicants seeks to demonstrate how title passed to them and it is important that court is informed. A perusal of the witness statement shows how the Applicants became aware of the suit property, all these issues are important for the just determination of the case.

15. The Respondent has not demonstrated how the application if allowed will prejudice him. The Respondent has already testified but the plaintiff's case has not been closed yet. The documents sought to be produced by Applicants introduces no new evidence but are meant to support the Applicants case. The Applicants' deponds that the witnesses were not available before and to demonstrate their availability have signed the intended statement.

16. In the interest of justice and noting that no prejudice will be visited to the Respondent save that which can be compensated through costs, I am inclined to grant the leave sought.

17. In the end the application is granted.

18. The costs shall be in favour of the Respondent/Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26TH DAY OF MAY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndegwa for the Plaintiff

1st Defendant: Absent

Ndungu for the 2nd & 3rd Defendants: Absent

4th Defendant: Judgement in default

5th Defendant: Absent

6th Defendant: Absent

7th Defendant: Absent

8th & 9th Defendants: AG Absent

Kuiyaki/Alex: Court Assistants