



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NUMBER 1234 OF 2016

DAVID MUTHAMI
MUTHEE.....PLAINTIFF

VERSUS

ESTATE OF JAMES TITUS WAMBUS.....1ST
DEFENDANT

ANDREW MUTUA TITUS2ND
DEFENDANT

(SUE D S THE ADMINISTRATORS

OF

THE ESTATE OF ELIPHAS KIMUGE KIMNYANGO(DECEASED).....3RD
DEFENDANT

CHARLES KIMELI MUGE.....4TH
DEFENDANT

THE HON ATTORNEY GENERAL SUE D

ON BEHALF OF THE CHIEF LAND REGISTRAR.....5TH
DEFENDANT

RULING

The plaintiff, David Muthami Muthee has made an application through his counsel, Mr. Ongengu to be granted leave to call one more witness in addition to those initially provided in his list of witnesses and also to be granted leave to adduce a document that was not initially provided in their list of documents. The reasons for the application are that the same will shed light on the plaintiff’s case. This application has been strenuously opposed by Mr. Isiji for the defendants.

In compliance with the provisions of the Civil Procedure Rules, the plaintiff filed their statements and supporting documents. They also filed their witness statements. Two witnesses were named being, David Muthami Muthee as the plaintiff, and Emmanuel Karisa Kenga. There was no indication that any other witness would be called.

Directions were taken on 29/09/2021 and all parties affirmed readiness to proceed. The matter was listed for hearing on 8/11/2021, the plaintiff tendered their evidence and before closing their case the plaintiff has decided to now call one more witness. The defendants are ready to proceed with their matter the defence witnesses are in court.

Mr. Isiji for the defendants strongly opposed the application to allow one more witness and any document sought to be introduced. He pointed out that in their original list, the plaintiff stated that they would only call two witnesses. He submitted that in the preparation of their case, the defendants were only alive to the original list of witnesses. He averred that no law has been cited to back up the application

Mr Ogengu in response submitted that it will be in the interest of justice to allow the application and that the court needs to do substantive justice to the litigants.

The issue before me is whether or not the plaintiff ought to be allowed to introduce one new witness. It will be noted that prior to the filing of the supplementary list of witnesses and documents, the plaintiffs did not allude to a new witness in this matter because they had already presented their list of witnesses.

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 , Rule 2 and Order 11 of the Civil Procedure Rules.

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.

The same applies to a defendant when filing defence and counterclaim (if any). The relevant provision is Order 3 Rule 2. 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 3 Rule 2 Documents to accompany suit.

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by —

- (a) The affidavit referred to under under Order 4 rule 1(2);*
- (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 including demand letter before action:*

Provided that statement under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

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.

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 2 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 they 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 their evidence and ambush the other party at the hearing.

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.

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.

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 plaintiff to adduce the additional witness.

When the defendants prepared their witness statements and list of documents, they had in mind that all that the plaintiff would call are two witnesses. Before the plaintiff started giving evidence, they never gave any indication that they would wish to call more witnesses in addition to those that they had earlier furnished in their list of witnesses. No reason has been given as to why the plaintiff did not contemplate furnishing this new evidence earlier.

I have to concur with the submissions of Mr. Isiji that the defendants will be greatly prejudiced if I am to allow this application by the Plaintiff. It will be unfair if I allow this application by the plaintiff, at this late stage of the proceedings, this may fundamentally alter the character of the case, to one that the defendants never contemplated when preparing their witness statements. In essence, the trial will end up being unfair and will violate the provisions of Article 50(1) of the Constitution.

For the above reasons, I am inclined to disallow the application by the plaintiff to avail a new witness. The plaintiff will proceed on the basis of the evidence they had proposed to tender when they filed her plaint.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF NOVEMBER, 2021.

MOGENI J.

JUDGE

In presence of:

MR. OGENGUAPPLICANT/PLAINTIFF

MR ISIJIDEFENDANT/RESPONDENT

VINCENT OWOUR.....COURT ASSISTANT