



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO 11 OF 2018**

**BERTHA WANJIRU MWERI.....1<sup>ST</sup> PLAINTIFF**

**EDWARD NDIRANGU MWERI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMUEL NJOROGE MWANGI.....1<sup>ST</sup> DEFENDANT**

**KARANJA KAMONYO.....2<sup>ND</sup> DEFENDANT**

**EPHRAIM KARIUKI MUTURI.....3<sup>RD</sup> DEFENDANT**

**MARY WANGECHI GICHUHL.....4<sup>TH</sup> DEFENDANT**

**AND**

**JAMES MUKURE MWERI.....1<sup>ST</sup> INTERESTED PARTY**

**ERICK KAMWARO MWERI.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. Through an application dated the 7<sup>th</sup> March 2018, the interested parties herein had sought to be enjoined to the proceedings wherein vide a ruling delivered on the 21<sup>st</sup> March 2018, the Court allowed the said application enjoining both the interested parties herein to the proceedings. The Court also issued orders for parties to exchange their pleadings so that the matter could be set down for hearing upon compliance with the provisions of Order 11 of the Civil Procedure Rules.
2. On the 29<sup>th</sup> July 2019, Counsel informed the Court that they had complied with the provisions of Order 11 of the Civil Procedure Rules wherein they sought for a hearing date. The matter was subsequently confirmed ready for hearing and a hearing date set for the 9<sup>th</sup> December 2019.
3. The matter then proceeded for hearing on the scheduled day wherein the Plaintiff testified and closed its case. The Defence then sought for an adjournment to prepare for defence hearing. The defence hearing was adjourned to the 10<sup>th</sup> March 2020 on which day the defence called its first witness, the 1<sup>st</sup> Defendant herein who took to the dock. It was whilst he was giving his testimony that it had been discovered that there had been no witness statements filed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants including the 2<sup>nd</sup> interested parties, wherein their Counsel sought leave to file and serve the said witness statements within 7 days.
4. Counsel for the Plaintiff objected to the said Application for reason that his client had already given evidence minus the said statements wherein it could only be taken that the Defendants did not want to testify. That the purpose of Order 11 of the Civil Procedure Rules was for expeditious disposal of matters. That there was nothing expeditious where one party flaunted the rules of procedure only for Counsel to later apply to be allowed to file their statements.
5. That the matter had been certified ready for hearing by consent of the parties and Counsel could not now be heard to say that he needed time to file his statements as it would be unfair to the Plaintiff who had testified in light of what was on record.

6. They sought for the application to be disallowed as it would cause the re-opening of the matter which will occasion more delay.

7. Counsel for the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Interested Party did not oppose the application for reason that the filing of the said statements and testing of their veracity through the testimony of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants would assist the Court in addressing the real issues in controversy.

8. Counsel for the 4<sup>th</sup> Defendant was also not opposed to the application based on the duty placed on the Court by virtue of Section 1B of the Civil Procedure Act. That it would have been unjust if the oversight of Counsel would be the reason to send away the 1<sup>st</sup> and 3<sup>rd</sup> Defendants from the seat of Justice.

9. That this being a land matter, every party ought to be given an opportunity to be heard. That by the Plaintiff closing its case, it did not mean that the case could not be re-opened so that justice could be done.

#### **Determination.**

10. I have considered the application as submitted by Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendant as well as the rival submissions from Counsel for the Plaintiff and the submissions in support of the application by Counsel for the 2<sup>nd</sup> and 4<sup>th</sup> Defendants. The issue for consideration is if the Defendants should at this stage of the trial be allowed to file their witness statements and a supplementary list of documents after the close of the Plaintiff's case.

11. In *Raila Odinga & 5 Others vs IEBC & 3 Others*, SCK Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR, the Court held as follows:

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

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 or 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 new material is so substantial involving not only a further affidavit but massive additional evidence, so 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.

12. In the present matter, the parties had been given the full opportunity to file their documents before the hearing commenced. When the Plaintiff testified and was cross-examined, there was no indication that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants as well as the 2<sup>nd</sup> interested party had not filed their statements and/or other documents they had intended to rely on. The trial had reached an advanced stage where allowing the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested party to record statements and file documents would amount to allowing them to make up their case at the very end of the trial.

13. In the case of *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, the Court held as follows;

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.*

14. 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 Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested party to file and serve their witness and documents.

15. Indeed Courts have held time and again that the mistake of Counsel ought not to be visited upon a litigant and that the Court should endeavor to assert and preserve a litigant's rights to be heard without placing undue weight on a litigant's Counsel's mistake.

16. It was held in the case of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR that;

Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their Counsel s during pre-trial or in the course of the trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The Civil Procedure Act and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time of disposition. Since the procedural directions are meant to serve substantial justice it follows therefore careful weight should be given to facially legitimate and bonafide reason for any

procedural errors or omission in order to exercise discretion for the interest of justice.

17. However in the present case I must admonish Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested party for lack of diligence and the laissez faire manner in which he handled his clients' matter.

18. I find that indeed the Court ought not to drive the 1<sup>st</sup>, 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested party out of the seat of justice empty handed and more so where the dispute involves land where the Plaintiff seeks for orders of both injunction and eviction against them.

19. I find that although the Plaintiff has opposed the application for valid reasons that their witness had already given evidence minus the statement of the 1<sup>st</sup>, 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested parties and that allowing the application will cause more delay, however he has not informed the Court on how he will be prejudiced which prejudice if any, cannot be reasonably compensated by costs for the delay occasioned.

20. To this end and in the spirit of Article 50 (1) of the Constitution and Section 3A of the Civil Procedure Act, I allow the Application with the following directions.

i. That the statements and/or documents of the 1<sup>st</sup>, 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested parties shall be filed and served within the next 14 days upon delivery of this ruling.

ii. The Plaintiff's case is herein re-opened. He shall have a right to file a rejoinder statement within 14 days upon service, to call or recall the witnesses for further examination in chief, cross-examination or re-examination on matters arising from the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and 2<sup>nd</sup> interested party's statements and fresh evidence introduced thereto.

iii. That leave is herein also granted to the 2<sup>nd</sup>, 4<sup>th</sup> Defendants and 1<sup>st</sup> interested party to file further documents, if need be, within 14 days upon service.

iv. The cost of this Application to abide the outcome of the main suit.

**Dated and delivered at Nyahururu this 6<sup>th</sup> day of May 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**