



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 23 OF 2014

DAVID KAMUNYA KINGORI.....1ST PLAINTIFF

MARGARET WANJIRU.....2ND PLAINTIFF

VERSUS

WAMBUI NDERITU.....1ST DEFENDANT

MARY NYAGUTHII KINGORI.....2ND DEFENDANT

GRACE MUKAMI KIAMA.....3RD DEFENDANT

JANE WANGUI KAIRU.....4TH DEFENDANT

ELINA MUTHONI GACHERU.....5TH DEFENDANT

RULING

1. This suit was filed on **6/2/2014**. The 2nd defendant filed an admission on **17/3/2014**. The 1st, 3rd, 4th and 5th defendants filed their notice of appointment and defence on **11/3/2014**. Subsequently the plaint was amended on **25/1/2016**. The suit came up before court for various purposes including the hearing of applications between the time of filing and **7/3/2019** when the hearing of the plaintiff's case commenced. The plaintiff called one witness and closed his case on that date. The defence hearing was scheduled for **8/4/2019**. The court record does not show what happened on **8/4/2019** but it appears that the matter was rescheduled for **28/4/2019** when Mr. Kiarie for the plaintiffs and Mr. Wambura for the 1st, 3rd, 4th and 5th defendants appeared and he promptly informed the court that he had filed an application dated **24/4/2019**.

2. The application, dated **24/4/2019** and filed on **25/4/2019**, seeks an order that the further hearing of this suit be "set aside" and that the defendants be allowed to file further documents and further statements in the suit.

3. The application is brought under the provisions of **Order 51 Rule 1(1) Civil Procedure Rules and Civil Procedure Act Cap. 21 ss.1A, 1B (1) (a)** and it is supported by the 5th defendant's sworn affidavit also dated **24/4/2019**. In that affidavit she depones that the 2nd plaintiff migrated to Uganda before **1963** and became a citizen of that country but met her demise in **2016**; that the 1st plaintiff concealed the fact of her death; that the competence of her case is doubtful; that the 1st plaintiff's testimony left gaps and his

testimony also included matters not contained in his statement and that there are other documents at the lands office in Bungoma and the Police Department which the defendants need to avail. The affidavit refers to a copy of a police record purportedly exhibited in the affidavit “EM1” but no such document is attached to that affidavit.

4. The 1st plaintiff filed replying affidavit on **6/5/2019**. He deponed that the 2nd plaintiff died in Uganda but avers that the 2nd defendant’s demise occurred on **14/6/2017** and that he had not communicated that fact to his advocate; that the cause of action survives her death; that as the surviving plaintiff he can prosecute the suit without substituting her; that it is too late for the defendants to introduce new documents in view of the closure of the plaintiffs case on 7/3/2019; that the nature of intended further documents is in any event undisclosed and no copies have been attached to the application for consideration by the court and that no plausible reason has been advanced by the applicants as to why the intended documents have never been filed. Lastly the 1st plaintiff objects to the non-disclosure in the application as to the real identity of the persons who should file further statements and the nature and content of the intended statements. He avers that if the order allowing further statements by undisclosed witnesses is allowed in this old case, he would be prejudiced and prays that the parties do proceed with the defence hearing.

5. I have considered the application at hand. No documentary evidence is attached to the application to support the statements in that application. No identification of the possible witnesses who are intended to give their statements has been done.

6. In my view no plausible reasons are given in the application as to why the defendants failed to file and serve their documents before the hearing of the plaintiff’s case commenced.

7. I find that the plaintiff’s case is already closed and this suit, having been pending for five years, it is not proper to allow an application whose effect will be to roll back time to the pre-hearing period where parties would need to have plaintiff’s case re-opened and exchange statements and documents once more.

8. I have noted that the application is brought under **Sections 1A, 1B (1) (a) of the Civil Procedure Act Cap 21** the Laws of Kenya. **Section 1A** of that Act provides that “the overriding objective” of that Act and the rules made there under is to facilitate the just expeditious proportionate and affordable resolution of the civil disputes governed by the Act. **Subsection (2)** of that Section provides that “this court may in the exercise of its powers under the Act seek to give effect to the “overriding objective” above. Parties are not left out. Under **Subsection (3)** a party to the civil proceeding or an advocate to such a party is under a duty to assist the court to further overriding objective of the Act and to participate of the processes of the court and to comply with the directions and orders of the court.

9. **Section 1A (1) (a)** provides for the purposes of furthering the overriding objective the court shall handle all matters presented before it for the purpose of attaining the just determination of the proceedings.

10. In considering the application at hand, this court attention is riveted upon the applicants’ conduct in the matter. It is unimaginable that the applicants would approach the court with bare statements made in a supporting affidavit without any documentary evidence to support those statements and hope to obtain the orders sought. Secondly this court is not impressed by the applicants’ conduct of not exhibiting the identity of the witnesses who were intended to file the proposed statements and also demonstrate how the contents of those statements may affect the course of this suit, including whether plaintiff may be compelled to re-open his case in order to call evidence that would counter that in those statements. As things stand both the court and the plaintiff are in the dark as to what documentary evidence or oral evidence the defendants may wish to call at the defence hearing. The application does not speak to the spirit of expeditious disposal of suits envisaged by the law cited by the applicant.

11. Beyond **Section 1B (1) (a)** cited by the applicants, **Section 1B (1) (b), (c) and (d)** emphasize on the court’s duty to attain efficient disposal of suits efficient use of available judicial administrative resources and the timely disposal of the proceedings at a cost affordable by the parties.

12. Upon an examination of the applicants' application dated 24/4/2019 it is clear that granting the order sought would militate against this court's endeavors to bring this litigation to an end in a timely manner, at an expense affordable to the parties or efficiently. It would work against the wording tenor and spirit of the entire **Section 1B** of the Civil Procedure Rules in that the plaintiff would be kept waiting, guessing what other evidence the defendants intend to bring to court and exert considerable strain anxiety and expense.

13. The court is not bound to protect a party from the consequences of their own missteps, lack of diligence and negligent non-compliance with the rules when it will prejudice the other party as would happen in this case in respect of the plaintiff if the application at hand were allowed.

14. For the above reasons I find that the application dated **24/4/2019** has no merit and the same is dismissed with costs.

Dated, signed and delivered at Kitale on this 8th day of July, 2019.

MWANGI NJOROGE

JUDGE

8/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Mufutu for Kiarie for Respondent

N/A for Applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

8/7/2019