



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 26B OF 2015

(Formerly Nyeri HCC MISC. APPL. No. 66 of 2012)

SUSAN WAIRIMU NDEGWA.....PLAINTIFF/RESPONDENT

-VERSUS-

JAMES GICHERE NDEGWA.....DEFENDANT/APPLICANT

RULING

Introduction

1. On 25th May, 2017 this court expunged the defendants lists of documents filed on 4th July, 2016 from the court record on the ground that they were filed after the plaintiff's case had been closed and without leave of the court.

2. The order for expunging the documents from the court record was made following an oral application by counsel for the plaintiff, **Mr. Karweru**

3. Although the defendant/applicant's counsel had no objection to the application for expunging the said documents from the court's record, on 31st July, 2017 he filed the application dated **20th June, 2017** through which he seeks the following orders:-

(i) Review, uplifting and/or setting aside the order of this court made on 25th May, 2017 expunging the defendant's list of documents from the court record;

(ii) Admission into evidence the defendant's list of documents, issues, list of witnesses and witness statements filed on 4th July, 2016 and on 28th September, 2016 and served on the plaintiff's advocate on 4th July 2016. In addition to admission of those documents, the defendant/applicant prays for leave to file a supplementary list of documents.

(iii) In alternative to prayer (i) and (ii) above, the defendant/applicant urges the court to declare all the previous proceedings in this suit a nullity for none compliance with order 11 of the Civil Procedure Rules (CPR) and the parties be ordered to comply with Order 11 of the CPR before the case is heard *de novo*.

(iv) Costs of the application.

4. The application is premised on the grounds that the defendant's advocate filed his notice of appointment on 28th September, 2015 and a list of witnesses and statements on 18th November, 2015; that he perused the court file and found that the plaintiff's evidence had been heard without compliance with **Rule 11** of the CPR; that when the matter came up for mention for directions on 19th November, 2015 he applied for the case to be heard *de novo* but directions were not given because the plaintiff advocate was not in court then; that the defendant was given leave to file his documents and the matter fixed for directions; that on 4th July 2016, he filed his list of documents and served them upon the plaintiff's counsel.

5. When the matter came up for directions, directions were given to effect that the case proceeds from the stage it had reached. It is counsels view, that the order given on 25th May, 2017 expunging the defendant's documents from the court's record was given per incurium as the defendant had already been given leave to file the expunged documents.

6. He deposes that the expunged documents are the defendant's prime evidence; that the defendant seeks review orders in order to be able to

produce documents in evidence; that the plaintiff be at liberty to recall his witnesses and the case commences afresh upon nullification of all previous proceedings.

7. The application is supported by the affidavit of the defendant's advocate, V.E Muguku Advocate, in which the grounds on its face are reiterated.

8. In reply and opposition to the application, the plaintiff through the replying affidavit she swore on 21st September, 2017 deposes that the matter is part heard (defendant gave his evidence on 3rd November, 2016); that at the time of hearing, the defendant was fully represented by advocate; that directions with regard to discovery/pretrial were taken and that she conducted her case well aware of what the defendant was to offer.

9. Terming the application an abuse of court process, she contends that it is a fishing expedition as it seeks to re-open her case which she closed.

10. According to the plaintiff, the application should be denied because her witnesses are old and have grown weak and senile and hearing of the suit *de novo* will be prejudicial to her in terms of costs and corrective memory.

Analysis and determination

11. As pointed out above, the defendant seeks review, lifting or setting aside of the order issued on 25th May, 2017 on among other ground that it was issued per incurium the order issued on 19th November, 2015 granting the defendant leave to file his list of documents.

12. I have reviewed the proceedings in this matter with a view of determining whether the order sought to be reviewed, lifted and or set aside was made per incurium as contended by the defendant.

13. The court record shows that on 19th November, 2015 this court did grant the defendant leave to file his list of documents within 14 days. Although the applicant eventually filed his documents on 4th July 2016, he did so 7 months late and did not seek leave to extend the time earlier given by the court.

14. Under the circumstances, whereas the order issued on 25th May, 2017 is not per incurium the order issued on 19th November, 2015 as the defendant failed to file his documents within the time given, this court has a fundamental duty to do justice between the parties. It is in turn, fundamental to that duty, that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter and rely on every document that will assist their case and also assist the court arrive at a more informed decision. Being of the view that expunging the documents from the court record may be prejudicial to the defendant and that no prejudice will be suffered by the plaintiff, I find there is sufficient reason to reinstate the defendant documents into the court record (plaintiff will get an opportunity to cross-examine the defendants on those documents and if need be recall her witnesses).

15. The upshot of the foregoing is that the motion dated 20th June, 2017 is allowed to the extent contemplated herein above, that is to say:-

(i) The order of this court made on 25th May 2017 expunging the defendant's list of documents is hereby reviewed and set aside;

(ii) The defendants list of documents, issues, list of witnesses, witness statements filed in court on 4th July, 2016 and on 28th September, 2016 respectively and served upon the plaintiff's advocates shall be deemed to be properly in the court record and admissible in evidence upon proof that they meet the test for admissibility in evidence;

(iii) Costs of the application are awarded to the plaintiff/respondent.

Dated, signed and delivered in open court at Nyeri this 2nd day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff/respondent

Mr. Karanja h/b for Mr. Muguku for the defendant/applicant

Court assistant - Esther