



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 724 OF 2017

(Formerly MILIMANI ELC CASE NO. 1564 OF 2014)

PRESBYTERIAN FOUNDATION

(A COMPANY LIMITED BY GUARANTEE).....PLAINTIFF

VERSUS

BERNARD OLE MEREU.....1ST DEFENDANT

FRED GITHINJI.....2ND DEFENDANT

SAMUEL NASIB.....3RD DEFENDANT

PETER KARANI.....4TH DEFENDANT

THE CHIEF LAND REGISTRAR.....5TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's oral application seeking to recall PW3 for further examination in chief to produce certain documents as exhibits. The Plaintiff's counsel submitted that it is in the interest of justice if PW3 was recalled and produced the said documents. She contended that the Defendants will not suffer any prejudice if the said documents were produced since they had already been filed on 13th July, 2017 but not marked as exhibits. She relied on Article 159(2) (d) of the Constitution, Section 146 of the Law of Evidence Act, Order 18 rule 10 of the Civil Procedure Rules to support her arguments. She reiterated that failure to mark the documents as exhibits was an omission;

The Defendant's Counsel opposed the application and stated that they did not cross examine on the documents which the Plaintiff failed to produce as exhibits as they did not form part of the court record. He relied on the case of Delta College Services Limited Nairobi HCCC No. 389 of 2008 (2017) eKLR where the Court stated that filing of documents in the Court file without producing them do not form part of the Court record for consideration. He insisted opening the Plaintiff's case when the Defendant has closed their case will indeed prejudice the Defendant. He contended that the rules of adversarial procedure requires a party not only to file but produce their documents. He averred that Article 159 (2) (d) of the Constitution envisages technicality where there was an omission on the party prosecuting the case but only when the ends of justice will be defeated. He claimed the reopening of the case will defeat the Defendant's Defense and Counterclaim. Further, that Order 18 rule 10 of the Civil Procedure Rules provides for a case where the court itself can recall a witness and not the Plaintiff nor the Defendant who failed to produce documents before court.

The Plaintiff's Counsel in rejoinder invited court to exercise its discretion in the interest of justice as the matter before it require all documents to be produced. Further that once the Plaintiff's witness is recalled, the Defendant will be granted an opportunity to cross examine and can reopen their case. She insisted that the rules of adversarial procedure was eased with the amendment of the Civil Procedure Rules 2010 that required all parties to put in all their evidence before court. She reiterated that the Plaintiff is not introducing any new document and concurred with the above cited judicial authority that documents must be produced and marked and that is why she is took an early opportunity to make instant application before judgement.

Analysis and Determination

The only issue for determination is whether PW3 can be recalled to produce the documents filed in court on 13th July, 2017 as Plaintiff's

exhibit. It is not disputed that the documents were already filed in court, which in effect means the Defendant must have heard a chance to peruse them. The Plaintiff has further stated that she does not intend to introduce any fresh materials.

Order 18, rule 10 of the Civil Procedure Rules provides that: **‘The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.’**

Section 146 (4) of the Law of Evidence Act provides that: **‘ The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross – examination and re – examination respectively.’**

I note in the current scenario, the documents had already been filed prior to the hearing and it was an omission on the part of the Plaintiff’s witnesses to produce the same as exhibits. I note that even though both the Plaintiff and the Defendants had already closed their respective cases, the matter had not proceeded to judgment and the Civil Procedure Rules as well as the Law of Evidence Act made provisions to cater for such situations.

Section 19(1) of the Environment and Land Court Act stipulates that 'in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Article 159 (2) (d) of the Constitution states that **‘ in exercising judicial authority, the courts and tribunals shall be guided by the following principles (d) justice shall be administered without undue regard to procedural technicalities.’**

In the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ‘ in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities. ‘**

In relying on the above cited legal provisions and being persuaded by the quoted judicial authority, and in the interest of justice to enable the court make a proper determination of the dispute herein, I find that it would be pertinent for the Plaintiff to recall PW1 to produce the documents that had already been filed in court. I do not foresee any prejudice the Defendant will suffer if PW1 is recalled. Further I direct that the Defendant be and is hereby allowed to reopen its case once PW1 is recalled to produce the documents.

It is against the foregoing that I will allow the Plaintiff’s oral application made on 19th April, 2018.

Dated signed and delivered in open court at Ngong this 4th day of July, 2018.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Mr. Rono holding brief for the counsel for the registrar

Court Assistant Mpye

No appearance for plaintiff.