REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 157 OF 2014

FRANCIS RAPHAEL AMBEKO NYAGAMBI.....APPLICANT

VERSUS

ANJELINE MORAA AMUKOYE.....RESPONDENT

R U L I N G

1. The application before me for determination is a Notice of Motion dated 10/1/2018 brought under Section 3A of Civil Procedure Act (cap 21) and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant **– FRANCIS RAPHAEL AMBEKO NYAGAMBI -** is the Plaintiff in the case herein and the Respondent **– ANJELINE MORAA AMUKOYE -** is the Defendant. The application has two prayers, which are as follows:

(1) The Plaintiff/Applicant be granted leave to call a witness despite having intimated to court that he had closed his case.

(2) That costs of this application be provided for.

2. The grounds advanced in support of the application are on the face of the application. It is stated that the suit revolves around fraudulent transfer of the Applicant's land to the Respondent, that the Applicant has managed to trace the original owner of land parcel No. SOUTH TESO/ANGOROMO/1907 who sold the land to him, and that the Respondent stands to suffer no prejudice. The supporting affidavit shows that the person intended to be called, one Mr. Washington Wafula Obwogo, had already made a statement earlier on.

3. The application was opposed vide grounds of opposition dated 22/1/2018 filed on 25/1/2018. According to the Respondent, the order sought is not merited and is not provided for in law. It was alleged too that the Respondent will be prejudiced if the order is granted.

4. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 5/3/2018. Counsel for Applicant submitted that the person who sold the land to the Applicant is available. He submitted too that the Applicant stands to suffer no prejudice.

5. The Respondent's submissions were filed on the same day as those of the Applicant. It was reiterated that what is sought is not provided for in law. The court was referred to the case of **JOHANA KIPKEMEI TOO Vs HELLEN TUM [2014] eKLR** where the presiding judge (Sila J) declined to allow an application requesting to allow a witness to testify on the side of the Plaintiff where the case had already been closed. In that case, the presiding judge emphasised the need to ensure that trial by ambush is not encouraged. According to Respondent's counsel, the Applicant's case is closed. Reopening it exposes the Respondent to prejudice as the Plaintiff is possibly trying to seal loopholes exposed during cross-examination.

6. I have considered the application, the response made, rival submissions, and all the proceedings relating to trial generally. The court heard the matter and the Applicant, as Plaintiff, closed his case. The Respondent, as Defendant, is yet to testify. I have had a look at the decided case (supra) referred to by the Respondent. It is clear that the Respondent selectively highlighted the part that favours his position. It needs however to be pointed out that it is in the same case that the presiding judge observed as follows:

> **"This is however 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 for 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".**

7. It is clear therefore that even going by the very authority availed by the Respondent, it is not an iron-clad position in law that the court can never allow a party to avail additional evidence. The presiding judge here seemed to be urging for flexibility so that the interests of justice can be served. In the case before him, circumstances clearly dictated that he disallow the application. And that is what he did. In the case,

the Plaintiff's case had been closed and some defence evidence had also been taken. It seemed to be a case where the Plaintiff had noticed the direction the defence had taken and was therefore keen to prop-up his case.

8. In the present case, the situation is different. The defence has not yet given evidence. And the intended witness had filed his statement earlier. It is not convincing therefore that the Respondent will suffer prejudice. The Defendant will have ample time to controvert the evidence intended to be given. Given the stage at which the application herein was made and the circumstances prevailing, this is a deserving case where the application should be allowed.

9. And I need to point out something else: As I write this ruling, I have before me a matter – ELC No. 153/2014 – in which the very counsel in this application, Mr. Bogonko, closed the Plaintiff's case on 15/5/2018.After the court had marked the Plaintiff's case closed, counsel rose shortly afterwards to request that the Plaintiff's case be re-opened in order that another witness could be called. The court readily allowed this and counsel on the other side did not object. Now this matter is exactly like that one and Bogonko would rather that the Applicant is disallowed to avail additional evidence.

10. In the circumstances of this case, let Bogonko be happy when the court does to others what it has already done for him. The application herein is therefore allowed but the Applicant will pay its costs.

Dated, signed and delivered at Busia this 4th day of October, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: .....

Respondent: .....

Counsel of Applicant: .....

Counsel of Respondent: .....