



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 645 OF 1998

ANNE MUTHONI WAMBAA.....PLAINTIFF

- VERSUS -

NAIROBI CITY COUNCIL.....1ST DEFENDANT

MICHAEL K. MAINA.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 24th November 2020 brought under order 18 rule 10, order 51 rule of the Civil Procedure Rules, 2010 and section 146 (4) of the Evidence Act (Cap 80 of the Laws of Kenya).

2. It seeks orders:-

- 1. The plaintiff/applicant be granted leave to reopen its case, recall the plaintiff and produce a supplementary document.**
- 2. The plaintiff/applicant be granted leave to file a supplementary list and bundle of documents and the supplementary list and bundle of documents dated 11th September 2020 be deemed to be properly filed.**
- 3. The costs of this application be in the cause.**

3. The grounds are on the face of the application and are set out in paragraphs (a) to (f).

4. The application is supported by the affidavit sworn by Anne Muthoni Wambaa, the plaintiff/applicant herein sworn on the 24th November 2020.

5. The application is opposed. There are grounds of opposition filed on behalf of the 2nd defendant/respondent dated 7th January 2021.

6. The application was canvassed by way of oral submissions on the 22nd March 2021.

7. I have considered the Notice of Motion and the affidavit in support. I have considered the grounds of opposition and the rival submissions. The issue for determination is whether this application is merited.

8. It is the plaintiff's/applicant's case that in the course of cross examination, counsel for the 2nd defendant/respondent impugned and/or sought to invalidate the plaintiff's Agreement for Lease made on 24th November 1997. That the basis of impugning and/or invalidating the said Agreement was that Mrs. Zipporah Wandera was not the Town Clerk of the 1st defendant at the time of execution of the Agreement for lease.

9. It is further the plaintiff's/applicant's case that she now has a list that clarifies that Mrs. Zipporah Wandera was the Town Clerk at the time of execution of the Agreement for lease in favour of the plaintiff.

10. The 2nd defendant/respondent on the other hand contends that seeking to re-open the case is an attempt to fill up the gaps in the plaintiff's case which is prejudicial to the 2nd defendant. Further that this application has been brought after undue delay. He prays that the application be dismissed with costs.

11. It is not in dispute that the plaintiff/applicant closed her case on 4th February 2020. This application was filed in November 2020, several months later. The delay has not been explained. However, the plaintiff/applicant herein seeks to introduce a list to confirm that Mrs. Zipporah Wandera was the Town Clerk of the 1st defendant at the time of execution of the Agreement for Lease. I find that this is crucial to the plaintiff's case.

12. The 2nd defendant/respondent has not demonstrated what prejudice he will suffer if this list is produced.

I rely on the case of **Samuel Kiti Lewa vs Housing Finance Co. Ltd & Another [2015] eKLR** Kasango J, stated as follows:-

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising, that discretion, the court should ensure that such reopening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence also if such prayer for reopening of the case will be defeated by inordinate and unexplained delay”.

13. It is my view that the agreement for lease is not disputed. The only issue is whether the Town Clerk who signed it at the time was Mrs. Zipporah Wandera. The 2nd defendant/respondent will be at liberty to file other documents/witness statements if need be hence he will suffer no prejudice.

14. I find merit in this application and the same is allowed in the following terms: -

- a. That leave is hereby granted to the plaintiff/applicant to reopen her case, recall the plaintiff and produce a supplementary document.**
- b. That leave is hereby granted to the plaintiff/applicant to file a supplementary list of bundle of documents and that the supplementary list and bundle of documents dated 11th September 2020 be deemed to be duly filed upon payment of the requisite fees.**
- c. That the defendants do file additional documents/witness statements if need be.**
- d. That costs of this application be borne by the plaintiff/applicant.**

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 17TH DAY OF JUNE 2021

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Nganga for the Plaintiff

No appearance for the 1st Defendant

Mr. Omunga for Mr. Ngatia for the 2nd Defendant

Phyllis - Court Assistant