



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC. CASE NO. 729 OF 2017

FREDRICK LAIBUNI MAILUTHA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....1ST DEFENDANT

SUSAN LANET.....2ND DEFENDANT

DANIEL KANCHORI.....3RD DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 14th January, 2021 brought pursuant to Sections 1A, 1B, 3A of the Civil Procedure Act; Order 1B and 51 of the Civil Procedure Rules; Section 146 of the Evidence Act and Article 159 (2) (d) of the Constitution. The Plaintiff seeks the following orders:

1. Spent
2. That this Honourable Court be pleased to grant leave to the Plaintiff to reopen the Plaintiff's case.
3. That this Honourable Court be pleased to grant leave to the Plaintiff to adduce additional evidence limited to the production of the documents listed in the Plaintiff's annexed Further List of Documents
4. That the Plaintiff's annexed Further List of Documents be deemed as duly filed upon payment of the requisite court fees.
5. That the costs of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavits of ITIJE MAILUTHA who is a son and legal representative of the Plaintiff and JULIUS MIGOS OGAMBA, the Plaintiff's Advocate. In the affidavit of ITIJE MAILUTHA, he confirms testifying in court on 26th November, 2019 wherein the Plaintiff's case was closed but Defence case is yet to commence. He explains that while conducting pretrial on 13th January, 2021, he realized that some of the documents he had submitted to his advocates which he intended to rely on in support of the Plaintiff's case had not been included in the Plaintiff's List of Documents filed jointly with the Plaintiff on 16th January, 2015. Further, that the said documents were not consequently produced or tendered in evidence when he testified on 26th November, 2019. He avers that the said documents were inadvertently omitted from the List of Documents. He contends that he is desirous of relying on the said documents and seeks an order to reopen the Plaintiff's case. Further, that merely because the relevant documents were not served during the pre trial conference and discovery period cannot prevent the court from allowing additional evidence to be taken on record and to allow it to be challenged in accordance with the law. He states that the additional evidence he wishes to tender on behalf of the Plaintiff is relevant and material. Further, that an injustice will be occasioned if the said evidence is not admitted as it demonstrates inter alia the Plaintiff's compliance with the provisions of the Physical Planning Act in respect to the suit land. He reiterates that the Defendants will not suffer any prejudice or injustice if the orders sought are granted as Defence case has not commenced and they will have an opportunity to cross examine or adduce evidence in rebuttal. Further, they will have a right to file a rejoinder witness statement and or any additional witness statements.

In the affidavit of JULIUS MIGOS OGAMBA, he reiterates the averments made by ITIJE MAILUTHA the 1st Deponent herein and explains that failure to include the documents in the Plaintiff's List of Documents was inadvertent. Further, the aforesaid omission had not been detected by the Advocates who previously handled the matter. He contends that the said documents are relevant and material to this case. He avers that an innocent Litigant should not be penalized for the mistakes and omission of Counsel.

The Defendants opposed the application and filed a replying affidavit sworn by FRANCIS SAKUDA, the 1st Defendant's County Secretary

where he explains the proceedings in this matter. He contends that the Applicant had numerous opportunities to produce the evidence during the many mentions and pre trial conferences but failed to do so. He insists the Plaintiff was heard and he closed their case on 26th November, 2019. Further, that during the hearing of the matter, they should have noticed that there were documents that were left out and the advocate would have stood down the witness and sought leave to file those documents. He contends that there was much time to have discovered the omission if any from the time the matter was filed to when they closed their matter and one year later when the Defence case was scheduled to be heard. He avers that the new evidence which is sought to be introduced is an afterthought which is coming late in the day and will prejudice the Defendant's case if it is admitted. He states that parties ought to disclose their case at an early stage to avoid ambush, delay and increase of costs.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 14th January, 2021 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Plaintiff should be granted leave to reopen his case and file additional evidence.

The Plaintiff in his submissions reiterated his claim as per the contents of the two supporting affidavits. He insisted that the replying affidavit as filed offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules. Further, no authority is annexed to prove the deponent has authority of the 2nd Defendant, who has been sued in person. He submits that the 1st and 2nd Defendants have not quoted any law or rule which prohibits the reopening of a civil case and none exists. Further, the Defendants herein have not demonstrated what prejudice they are likely to suffer if the case is reopened and new evidence admitted. He insists the Defendants have not argued that the additional evidence that the Plaintiff seeks to introduce would not affect the probable outcome of the case. To support his argument, he has relied on the following decisions: **Pinnacle Projects Limited V Presbyterian Church of East Africa, Ngong Parish & Another (2019) eKLR; Republic V Zacharia Kahuthi & Another (Sued as Trustees and on behalf of and as officials of the Kenya Evangelical Lutheran Church); Johanness Kutuk Ole Meliyio & 2 Others (Interested Parties) ex parte Benjamin Kamala & Another (2020) eKLR; Charles Antony Ondiek & 3 Others V Thomas Odhiambo Nyonje & 6 Others (2019) eKLR; Jakana & Another V Msabimana (Civil Suit No. 423 of 2015) (2017) UGHCLD 62 and an Article Titled **Reopening a Proceeding to Introduce New or Further Evidence by Rick Hemmingson, Andrea Manning Kroon and Bottom Line Research.****

The 1st and 2nd Defendants in their submissions insist that the general tenor of the Civil Procedure Rules is that parties ought to disclose their case at an early stage to avoid surprise, ambush, delay and increase of cost. They insist the Applicant had numerous opportunities to produce evidence during the many mentions and pre trial conferences but he failed to do so. Further, the Applicant has not explained the lapses since he closed his case in 2019. They reiterate that Article 50 (1) of the Constitution provides that every party deserves a fair hearing which included the right to be supplied with evidence in advance. To buttress their averments, they relied on the following decisions: **Samuel Kiti Lewa V Housing Finance Co. of Kenya Ltd & Another (2015) eKLR; Chairman, Secretary and Treasurer Vs Wotta – House Limited (2018) eKLR; Raila Odinga & 5 Others V IEBC & 3 Others SCK Presidential Petition Nos. 3, 4 and 5 of 2013 (2013) eKLR; and Fatuma Farah Hassan V Issack Mahat Gabow & 2 others (2020) eKLR.**

I will proceed to highlight certain legal provisions governing recalling of witnesses and reopening of cases. 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.'**

While 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.'**

In **Halsbury's Laws of England Volume 13** on discovery, it is stated that:

"The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.

I note in the current scenario, the Plaintiff had closed his case but the Defence case is yet to commence. The Plaintiff's counsel in his supporting affidavit admits that there was an inadvertent error when his former associate Mr. Senteu failed to file the documents sought to be produced and this was discovered when the parties were undertaking pre trial. I have had a chance to peruse the documents sought to be produced by the Plaintiff and I note most of them emanated from the 1st Defendant, relate to the suit land and are relevant and material to this case. I note the 1st and 2nd Defendants in their submissions have relied on various decisions in respect to reopening of one's case and it is evident in the said decisions, reopening of a case is left at the discretion of a judicial officer.

In the case of **Raila Odinga & 5 Others v IEBC and 3 Others (2013) eKLR** the Supreme Court while dealing with an issue of admission of documents outside the stipulated timeliness stated that:

"The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other

party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”

While in the case of **Pinnacle Projects Limited V Presbyterian Church of East Africa, Ngong Parish & Another (2019) eKLR** the Court while dealing with a similar matter as in this instance stated that:’ **It seems to me that a reading of the above cases the principles elaborated upon is that the discretion of the court is not fettered on admission of additional evidence after the trial has commenced and the plaintiff case has been heard fully. When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law. In the instant case although the plaintiff has closed its case and is time for the defendant to answer both of them are on a mission for the quest of administration of justice. There is no greater duty for the court than to deliver substantive justice as provided for under Article 159 2(d) at the end of it all. While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.**

Further, 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.’**

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 relying on the above cited legal provisions while associating myself with the quoted judicial authorities, and in the interest of justice to enable the court make a proper determination of the dispute herein, noting that the Defence case is yet to commence, I find that it would be pertinent to allow the Plaintiff to file the listed documents which relate to the dispute herein. I further find that PW1 should be recalled to produce the said documents. It is trite that mistake to Counsel cannot be visited upon the litigant and since the Plaintiff’s Counsel admitted that his firm inadvertently omitted to file the documents which relate to the dispute herein and this was discovered much later, it is in the interest of justice if the said documents were filed in court. I do not foresee any prejudice the Defendants will suffer if the Plaintiff is allowed to file the further documents which emanated from the office of the 1st Defendant and PW1 is recalled to produce the same. I will grant the Defendants leave to file further witness statements and documents if need be. I note that even though the Plaintiff had closed his case, the matter had not proceeded to judgment and the Constitution at Article 50 and 159 (2) (d); Civil Procedure Rules as well as the Law of Evidence Act made provisions to cater for such situations. As ably put by my brother Justice Ochieng that **‘ Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing.’** To my mind, the Defendants will not suffer any injustice as their case is yet to commence and they will have an opportunity to cross examine or adduce evidence in rebuttal.

It is against the foregoing that I will find the Plaintiff’s Notice of Motion dated the 14th January, 2021 merited and will allow it in the following terms:

- a) That the Plaintiff be and is hereby granted leave to reopen his case and adduce additional evidence limited to the production of the documents listed in the Plaintiff’s annexed Further List of Documents.
- b) That the Plaintiff be and is hereby directed to file and serve the annexed Further List of Documents within fourteen (14) days from the date hereof after which the Defendants are granted leave of fourteen (14) days to file and serve a further List of Documents as well as Witness Statements if need be.
- c) The Costs of this application will abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE