



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 103 OF 2008

MANSUKHALAL JESANG MARU.....PLAINTIFF/RESPONDENT

VERSUS

FRANK WAFULA.....DEFENDANT/APPLICANT

RULING

A. Introduction

1. Before me is a Notice of Motion dated **05/12/2019**. By it, the Applicant who is the Defendant herein sought leave of the Court to have a bundle of documents and list of witnesses filed on **14/11/2019** deemed duly filed and form part of the court record. The Motion was brought under **Section 1A, 1B, 3, 3A** and **22** of the **Civil Procedure Act**, and what the Applicant referred to as **“any other express provisions of the Constitution and the law.”** The specific orders that the Applicant sought were as follows:- (sic)

(i) That this honourable Court be pleased to grant the Applicant Leave that the Defendant’s further list of documents and Annexed bundle of documents, and list of witnesses filed on 14 November, 2019 be deemed as properly filed and thus part of the record.

(ii) Costs of the Application do abide the outcome of the main suit.

2. It is worth of note that the Application was brought before this Court following the Orders which were issued on **28/11/2019**. This followed an averment by the Defendant when the matter came up for hearing on that date that he mistook the Court’s orders of **7/11/2019** that he files a further list of documents and witnesses. Both orders of **7/11/2019** and **28/11/2019** form part of the history below.

B. History

3. Before embarking on the merits or demerits of the Application, it is important to give a brief picture of how this matter has progressed since its filing in Court. This would inform the entire reasoning of the Court in this Application. The suit was filed on **27/11/2008**. Upon summons being served, the Defendant entered appearance on **5/1/2009**. He thereafter appointed Ms. Chepkwony & Co. Advocates to act for him. That he did on **23/1/2009**. His Advocates filed a Defence on the same date. On **1/2/2015**, the Plaintiff appointed the firm of Ms. Nyamu and Company Advocates to act alongside the firm of Ms. Kiarie and Company Advocates who had been acting for him since the inception of the suit. The said firm filed its Notice of Appointment on **2/2/2015**. On **7/6/2016**, the Applicant, through his counsel, filed an Application dated **2/6/2016** seeking an amendment to the Defence. The same was allowed on **28/9/2016**. Through the amendment, the Defendant introduced a Counterclaim. The amended Defence and Counterclaim were filed on **11/10/2016**.

4. The record shows that there was not much activity on the file, except a number of mentions for one reason or other, until **4/7/2018** when it was mentioned again and on that day, the following orders were made, in presence of both counsel who were in court then:-

“By consent, hearing on 8/10/2018. Any exchange of documents to be done within 14 days. The Defendant will only have seven days from today to file documents or statements.”

5. On **8/10/2018**, counsel for the Defendant applied for adjournment on account of the fact that the Defendant wanted to file a new list of documents since he had been served with some soon before the hearing. The Court granted the adjournment to **23/10/2018**. On that date the Defendant now Applicant, through counsel, sought an adjournment which was denied. Therefore, the Plaintiff and a witness testified. Then the Defendant sought another adjournment to apply to set aside the proceedings. Later, the Plaintiff’s case was closed. The Defendant then sought an adjournment to engage another counsel. The Court granted it. While doing so, the court made the following orders:

“I exercise my discretion and give the Defendant 7 days to prepare his defence. No further documents or statements will be filed, the Plaintiff having closed his case. The suit will proceed on the basis of the filed documents on 30/10/2018.”

6. On **29/10/2018** the Defendant, through counsel known as **Ms. Analo**, made an Application seeking to set aside the orders of **23/10/2018**. Ruling thereon was fixed for **31/10/2018**. On that date, the court delivered its ruling declining to set aside the order of **23/10/2018** and the proceedings thereto. However, it gave the Defendant "... liberty to apply orally to recall the Plaintiff and his witness to cross examine them after which he will promptly give evidence and call his witnesses in this suit if he so chooses."

7. On **14/11/2018** when the suit came up for further hearing, the Defendant once again sought an adjournment to have the typed proceedings of the file in order to prepare for the cross-examination of the Plaintiff and witness. In granting an adjournment of the matter, the court declined the request to have the proceedings typed as that would have taken a long time. By the orders of the said date, the Court ordered: "I grant the application to recall the Plaintiff's witnesses for cross-examination. For the purpose of this recall, I hereby order that the Plaintiff's case is hereby re-opened. Hearing date to be fixed here in court." A hearing date of **28/11/2018** was taken. On **28/11/2018** the Defendant appeared in person in court and sought an adjournment again on account of the fact that his Advocate was unwell. It was opposed. On that day, the two witnesses of the Plaintiff who had been recalled were present in court for cross-examination. The court granted the adjournment, with an order of costs to be paid by the Defendant.

8. On **11/2/2019** when the matter came up for further hearing the Defendant once again sought an adjournment on account of having engaged another Advocate recently. The Court granted him an adjournment, with an order for costs to be paid to the Plaintiff. On **21/3/2019** when the matter came up for further hearing, the Advocate for the Defendant cross-examined PW1 (the surveyor). But after that, counsel for the Defendant sought an adjournment again that he was not in a position to cross-examine PW2 because he did not have sufficient instructions and that he (Defendant) wished to file new documents to rely on. The Application was opposed. The Court once again granted the adjournment although it found out that the reason for adjournment was strange. The matter was adjourned to **28/3/2019**. Costs were ordered to be paid by the Defendant before the next hearing date. On that day, the **28/3/2019**, the Defendant filed an application dated the same day and the matter could therefore not proceed.

9. The Application sought for an order of setting aside the Court's order of payment of **Kshs. 20,000/=** by the Defendant as costs to the Plaintiff following the adjournment of **21/3/2019**. The Court fixed the application for hearing on **9/4/2019**. The Court dismissed the Application and the Defendant sought leave to file a Notice of Appeal against the ruling. It was granted, and an adjournment granted on that account. Another hearing date was granted. To date nothing has been said of the Intended Appeal that was to be preferred against the said ruling. The history of adjournments for one reason or other continues. Since I have captured the salient dates and orders that are relevant to the Application before me now, I will not bother to reproduce further history of the proceedings than that which I have. To do so would make this ruling unnecessarily long. But two more steps, one recent and the other old, are worth mentioning below.

10. When this suit came up for Ruling on **7/11/2019** on an Application dated **18/9/2019** seeking to seeking stay of proceedings pending an alleged Appeal preferred by the Defendant, the Court set out the history of the matter in the Ruling before dismissing the Application. Then, the Applicant sought leave to file a similar Application in the Court of Appeal. Leave was granted. Additionally, the Applicant was also granted leave to apply for leave to make an Application for leave to file further documents. Rather than making the Application, the Defendant/Applicant filed the list of documents that are in issue in the instant Application. Then, on **28/11/2019** when the matter came for further hearing, the Applicant surprised the court with the fact that he wished to cross-examine the Plaintiff using the documents which according to the record were improperly filed. On that account the Court directed that the present Application be filed.

11. After filing the Application, the Court, on **9/12/2019**, very many other steps which include other interlocutory Applications have been made. At one time, on **19/2/2020**, the Court observed that this matter had delayed owing to its history, "*particularly the numerous delays occasioned by the Defendant in the past...*" Then, on **9/2/2021** counsel for the Applicant moved the Court to close the Plaintiff's case. After the Applicant herein indicated to Court that he had two Applications pending before Court. These were the instant one and one dated **25/1/2021** in which the Defendant sought recusal of the Honourable Judge. The Court directed that it rules first on the latter Application. By its ruling delivered on **9/6/2021**, the Application was dismissed with costs. that the court directed that the pending

12. When the instant (the one dated **5/12/2019**) Application herein came up for mention before me on **29/9/2019** for purposes of confirming that parties had complied with the orders of my brother Hon. Njoroge J for filing of written submissions on the Application so that it be disposed of by that form, the Defendant startled me by his submissions that my brother judge had ordered Mr. Nyamu Advocate to stop representing the Plaintiff. He opposed Mr. Nyamu's being on record. He referred me to some previous orders which never existed on the file. When I pointed out to him that no such orders existed, he agreed to this Application proceeding for ruling. However, in the meantime, he filed on **1st October, 2021**, an Application dated **30/9/2021**. The Application seeks the removal of Mr. Nyamu Advocate from the record. The Application is still pending and is for mention on **21/10/2021** when the ruling herein is being delivered.

13. That is the tired history of this matter. With that, when the matter was mentioned to confirm compliance with the order for filing written submissions, the Applicant indicated to court that he would not be filing written submissions on the Application. But Mr. Kiarie Advocate filed submissions on behalf of the Plaintiff/Respondent on **4/10/2021**.

C. The Application

14. The Application dated is based on the grounds that the Applicant has moved the Court in good faith; the court has unfettered discretion to grant the prayers sought; the court closed the Plaintiff's case on **23/08/2018** and reopened the same on **14/11/2018**; the Applicant has a Counterclaim alleging fraud which may implicate the Plaintiff; that **Kitale CID Inquiry File No. 1 of 2019** was opened to investigate the Plaintiff's fraudulent acquisition of the title in question hence the need to produce the findings in the file; there is no ambush by the Defendant on the Plaintiff and (Plaintiff) will have opportunity to cross examine the witnesses herein; the documents and list of witnesses will facilitate the quick disposal of this suit; a Notice of appeal in this court; the title is tainted with illegality and the Counterclaim raises weighty arguable constitutional issues; the Defendant is not aware of having forcefully entered the land **Kitale Municipality Block 12/26**; that a party should be given opportunity to bring evidence before court; that the documents form new and compelling independent expert evidence that would persuade the Court for its reliance; that the Applicant stands irreparable loss if the of his land if the Application is not allowed; and that natural justice calls for fair hearing of a party.

15. The application is supported by the affidavit sworn by **Frank Wafula** - the **Defendant/ Applicant**. It is sworn on the **5/12/2019**. A

perusal of the entire affidavit reveals that it largely echoes the contents of the grounds in support of the application. To the Affidavit are annexed a number of documents marked as Annexure FW1. The Annexure is a list titled "Defendant's Further List of Documents". The List has copies of ten (10) documents. Of these, by the dates on them, copies Nos. 5, 6, 7, 8, and 10 seem to have been in possession of the Defendant prior to the hearing dates when the Plaintiff and his witness testified. The rest seem to have been authored in 2019. They are basically the Defendant's letter to the office of the DCI, letters on the said parcel of land by the said DCI and a survey Report and receipt from the survey office.

16. The application is opposed. The Respondent, **Mansukhalal Jesang Maru**, filed a Replying Affidavit that he swore on the **06/1/2020**. His response is that the application is belated and afterthought; it is a backdoor attempt to circumvent the orders of **23/10/2018** which is still subsisting; that the Plaintiff has testified already; the Application is misconceived and bad in law; that on **4/7/2018** the Defendant was given **7 days** to file documents which he did not comply with; and that the Plaintiff will be greatly prejudiced since he will not have opportunity to counter the documents or even testify on them.

D. Determination

17. The Court has carefully read through the Application, the affidavit in support and in opposition, the submissions thereto by the Respondent. The deeming of an act by party that I find that the only issue for determination is: ***Whether the Applicant has met the threshold for the exercise of discretion in his favour.***

18. The intended outcome of the instant Application ultimately touches on the production and proof of documentary evidence in this matter. These are governed by **Parts III, IV, V and VI** and **Section 48** of the **Evidence Act, Chapter 80 Laws of Kenya**. The procedure thereof is beefed up by **Orders 3 Rule 2, Order 7 Rule 2 and Order 11**, and **Order 16 Rules 6 and 7** of the **Civil Procedure Rules** and the **2014 Practice Directions on Proceedings in the Environment and Land Courts**, and on **Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts** (Legal Notice No. **5178**) (hereinafter referred to as the **ELC Rules**).

19. The present Application does not seek orders that touch on the entire law on production of documentary evidence. Production and proof of documentary evidence, together with any presumptions thereon is limited to the trial process when a suit has been set down for hearing. That means that the parties shall have passed the stages contemplated in **Order 3 Rule 2, Order 7 Rule 5 and Order 11** of the **Civil Procedure Rules**. However, in this Court's the passage of a suit of that stage does not bar exceptions thereto regarding the failure of a party to comply with the provisions since the said provisions do not stipulate the consequences of such failure. Actually, the Rules do not mention anything regarding to complete failure to file documents and statements while filing either the Plaintiff or Defence and/or Counterclaim. At the same time, the Rules do not provide for the action the Court should take when a party files some documents and leaves out others and then seeks the exercise of the court's discretion regarding the omitted or new list of documents and or witnesses. The latter is the case in regard to the Application before me.

20. This gap in the law therefore leaves it to the wisdom and discretion of the Court to weigh the interests of justice and deem the failure, lateness or inaction a light mistake that the adverse party may be compensated by way of an appropriate order such as costs or a grave one which cannot be acceptable to the Court. The discretion has to be exercised on a case by case basis. However, it can only be rightly exercised along the frame of the parties' constitutional right to fair trial as provided for under **Article 50(1)**. In my view, while exercising the discretion the Court must bear in mind that all the circumstances of the case before it are weighed against the need to do justice to all the parties by giving each of them a level plane for conducting a fair trial. This is the best safeguard against prejudice, injury and injustice occurring to one or other of the parties.

21. Therefore, with the above 'unction' in the mind of this court, in respect to the present Application, the relevant Rules are **Order 3 Rule 2, Order 7 Rule 5 and Order 11** in regard to the list and the copies of documents sought to be deemed properly filed. With regard to the other aspect of the Application which seeks to deem the list of witnesses filed in court on **7/11/2019** as duly filed, the relevant law is specifically **Order 3 Rule 2, Order 7 Rule 5 and Order 11** of the **Civil Procedure Rules**. **Order 3 Rule 2** envisages a situation where the Plaintiff is required to file his list of documents and documents themselves together with the list of witnesses and their statements when filing the Plaintiff. For a Defendant the sister Rule comes into play. I will reproduce the relevant Rule hereinbelow:

Order 7 Rule 5: Documents to accompany defence or counterclaim.

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

I remind the parties herein and all and sundry that I have noted the silence by the Rules Committee as to the consequence of failure to comply with the Rule. Also, there is no provision that permits a party to file documents after the Plaintiff or Defendant has not complied with the Rules. In addition, **Rule 28** of the **ELC Rules** provides that:

“In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference:

(d) The issuance of summons for witnesses to attend court to testify and/or produce documents, and for the filing of Witness Statements in respect of such witnesses.

(e) The issuance of an Order requiring the filing of more comprehensive Witnesses Statements;

(f) The issuance of an Order that the parties agree and narrow down issues for trial.

(g) Taking of all objections to the production of specific documents, where notice has been issued to the other party, thereafter, objections on the production of any document shall not be entertained at the main hearing;

(h) The issuance of Directions that a matter shall be determined through filed witness statement(s) and bundle of documents;”

22. What appears to me to be the proper interpretation of the relevant part of the Rule that I have reproduced is that even where a situation calls for a party to be permitted to file additional documents or detailed statements, that happens only at the *Pretrial Conference* when directions are being given by the Judge and leave is granted therefor. It is not open for a party to come to court afterwards for leave to file additional documents. What the Rule imports is that by the time parties indicate at the pre-trial conference that they are ready for hearing, and do not require additional documents or witnesses for that matter, they have assessed their case and known that it is up to date and tight enough to be sustained with the evidence already presented to both the Court and the other side.

23. To otherwise keep bringing in new evidence or witnesses as and when the matter comes to court, and at any stage, amounts to conducting a trial by instalments. It is akin to a party keeping peeping into a smokescreen and when they see clearly the adverse party’s case and realise that that case is an iron curtain, they go back to the drawing board in order to bring into their aid x-rays and scan machines to use to go through the curtain. This is not only trial by ambush but an unfair trial. It amounts to stealing a match over the other party. Litigation should not be a do or die game. It is all about truth and justice. Moreover, there was a reason why the rules of practice and procedure were put in place. The mischief that **Orders 3(2) and 7(5) of the Civil Procedure Rules** and **28 of the ELC Rules** sought to remove was the cases where parties lay in wait to ambush the other side thereby occasioning unfair trials.

24. While in my view there is discretion given to the Court regarding the best course of action in such circumstances, many factors come into play. First, as stated above, **Article 50(1) of the 2010 Constitution** sets in regarding protection of the parties’ fundamental right of fair trial. It serves to remind the parties in this case that this right is one of those that, under **Article 25(c) of the 2010 Constitution**, should not be limited.

25. Justice Munyao has held, in *Johana Kipkemei Too v Hellen Tum [2014] eKLR* as follows:

“This however is 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 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. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document,…”

26. I cannot agree more with my brother judge. There are situations which can call for additional documents and even witness statements to be filed after the Pre-trial Conference. But these only occur in exceptional circumstances. The circumstances should be those ones which are basically beyond the control of the parties, those which with due diligence and action the party could not have in his or her possession the document that is sought to be added.

27. The exceptional circumstances should be sufficiently and satisfactorily explained to the court so that it forms a determination whether or not the reasons being advanced warrant an exception to the general rule. Such circumstances can be for instance, where a key witness had recorded a statement which was filed in court and in the court of the trial he passes away before testifying. In such a case the party who wished to call him to testify may be permitted to file (an) additional witness statement(s). Or the circumstances would be like those where a ship which was carrying the documents to be filed sank in the high seas and for many years could not be accessed but by God’s grace it is washed ashore after many years and the documents are found intact way after the Pre-trial Conference or even after some witnesses have testified. The party who wished to rely on them can move the court for their late filing and admission.

28. What the example above shows is that the circumstances should be almost miraculous. Essentially I am saying here that the bar at which the court gets convinced that there is need of filing and relying on an additional document or witness statement should be very high, higher than the fifty-fifty chance. This is because by the time the parties are having the pre-trial conference, they shall have weighed their case and become satisfied that all is ready for the ship of trial to unhook from the anchor and sail. Ordinarily it should not be disturbed sailing unless there is a Tsunami or hurricane. Permit me to give an illustration of why the bar should be higher than the usual standard and how high that should be. This may make all other people who are not lawyers to understand what the Court is trying to emphasizing.

29. Litigation process could be likened to sea or air travel. Here, I will liken the doors closing as the Pre-trial Conference in a trial. When a ship is being made ready to sail and the captain and crew check whether or not the cargo and passengers have been loaded and boarded respectively. At the door, they look at the documents of each and for each as they board. Before then, there is always a signal or warning that the doors are about to close and anyone running late should hurry. When they are either satisfied that all are on board or the time has come for the vessel to sail, doors close, the anchor is let loose and the ship starts to sail from the port to the high seas. Once that has happened, it

becomes virtually impossible for a late passenger or other person to stop the ship, unless there are exceptional circumstances, for instance, that the passenger has the only oxygen containers for use in the whole ship and there are Covid-19 patients who require oxygen support and hence they will die if that does not get loaded.

30. Alternatively, litigation may be likened to air travel. When one plans to travel and reaches the airport in time, he or she will check on the notifications on the board the time her flight will take off. As time nears he/she will be notified, “doors closing in thirty, fifteen or five minutes,” and “doors closing”. By that time all check-in baggage should have been loaded. If by any chance there arrives at the door a passenger panting and with baggage and he explains his lateness well he may be let to board and his baggage loaded late. After that, the airport doors will close, the airplane doors will then close, the air bridge will be removed, passengers will take their seats and tighten their belts ready for take-off and the plane will start taxing on the runway. Supposing at that point another passenger shows up with baggage at the airport doors? This is akin to where the Plaintiff and his witnesses have testified and then a Defendant applies to court to introduce new documents and witnesses. It will be difficult to stop that airplane for the passenger to board. There have to be exceptional circumstances, and (for emphasis) they must be rare ones, that would make the captain slow down the vessel to accommodate the late passenger.

31. Litigation should not be likened to the many existing local public travels which we often experience by hearing shouts all the time “*beba beba*” (“board board”) and those travel vessels go forth and back to pick all and sundry late arrivals at the bus stages with their baggage. It ends up unnerving, causing delays, obstructions, overlapping, heartaches, stress and even road accidents. Litigation should be organized and done according to the rules, if they exist.

32. It is clear from the record that the Application was brought after the Plaintiff and his witness had testified. Moreover, not only were the documents that are sought to be ‘sanctified’ filed short of the 15 clear days before the Pre-Trial Conference as provided for in the Rules, but they were presented way after the hearing had taken off. The documents and list of witnesses sought to be deemed properly filed were introduced by the Applicant after the Plaintiff’s case had been closed or put differently, the Plaintiff had rested his case.

33. The Applicant argues that the Plaintiff will have opportunity to cross-examine the defence witnesses on the documents. With due respect I disagree with the Applicant here. Cross-Examination is not an end in itself: it is not the ultimate aim of any litigation. The entire trial process is vital to every litigant.

34. Again, the Applicant argues that that he has moved the Court in good faith. I find none. The Applicant had some of the documents in his possession ever since the trial started and he never bothered to file them before trial. Also, he of the ones he would say were authored in 2019, the Court notes that the Applicant went to the DCI offices while this matter was pending in court and especially after the Plaintiff had testified. With due respect, the matter was *sub-judice* and calling on other agencies to interfere with the court process as that point is nothing but ill-motive. I have said much about the Applicant’s actions of ambush on the Applicant argues that is not aware of having forcefully entered the land **Kitale Municipality Block 12/26**. That is not a matter for the Applicant to determine but the Court through evidence. That the Applicant stands irreparable loss of his land if the Application is not allowed is neither here nor there at the present stage. What the Court will do in the end result of the trial is to find who between the Plaintiff and the Defendant has proven his case on a balance of probabilities. No one has decided that by the Application not succeeding the die is cast on the Defendant. Moreover, this is not an application for injunction or stay of execution. In any event the Respondent will suffer great prejudice if the Application is allowed and the Defendant permitted to introduce documents and statements the Plaintiff did not at have before giving testimony.

35. This court is guided by the Supreme Court decision of ***Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3, 4 and 5 of 2013 (2013) eKLR***. Their Lordships considered the prejudice that would be occasioned to the adverse parties and thereby declined to allow additional evidence filed outside the contemplation of the rules. Similarly, in ***Johana Kipkemei Too v Hellen Tum [2014] eKLR***, my brother Justice Munyao declined an application by the Defendant for leave to furnish a supplementary list of witnesses and documents after the plaintiffs had testified and closed their case. I am persuaded by that authority that this is the correct position. Also, in ***Alois Oceano D’sumba v Rajnikant Narshi Shah & another [2017] eKLR***, whose facts regarding the stage of the proceedings, her Ladyship Justice Njoki Mwangi, in considering the import of **Order 7 Rule 5** of the Civil Procedure Rules, was of the “... *view that this court would be perpetrating injustice and would prejudice the plaintiff’s case if it was to allow the defendant to rely on the documents filed...*” after the Plaintiff had testified and closed his case. This reasoning also persuades me to agree with the Respondent herein that there would be great injustice to the Plaintiff if I allowed the instant Application.

36. Additionally, even assuming that the Applicant would be entitled to file additional documents at any stage of the proceedings and rely on them, natural justice asks him one question: where were you with these documents for over 11 years? Aside from the documents on the list that were authored in **2019**, what explanation does the Applicant offer about the ones which have been in his possession since **2008** when this matter was filed? He has not offered any. It is this court’s view that if the Defendant had in his possession these documents all along and did not bother to move the court to produce them at any point, and worse use or show them to the Plaintiff and his witness during their oral testimony, it can only be said that he withheld them for reasons that he wanted to strengthen a weak case by planning to testify on them alone. This is not an *ex-parte* hearing. Even where it happens to be so, a party in such a trial should sufficiently prove his case, that is to say, to the required standard in order to have a judgment in his favour.

37. This Court will not lose sight of the Overriding Objective of the Court as given under **Section 3** of the **Environment and Land Court Act** which is “... *to facilitate the just, expeditious, proportionate and accessible resolution of disputes...*”, and the provisions of **Section 1A (1)** of the **Civil Procedure Act** which is couched in the same words as **Section 3** of the **ELC Act**, and **Section 1B** of the **Civil Procedure Act** which obligates this court of further the overriding objective stated before.

38. Litigation ought to be speedily. Such applications as the present one serve to negate the overriding objective of the Court. This Court is duty-bound to do otherwise than indirectly sought by the Applicant, given the history of this matter as given before. Moreover, the Court is alive to the fact that it is the Applicant who is on or in occupation the suit land. It is hoped by this Court that that is not the reason why he would want to prolong the litigation over the same parcel of land for as long as this earth thrives in injustice.

39. Lastly, I agree with the Respondent’s submissions that the Application is a backdoor way of circumventing the orders of the Court that were given on **23/10/2018**. On that date, the Court rendered itself thus: “*No further documents or statements will be filed, the Plaintiff having*

closed his case. The suit will proceed on the basis of the filed documents on 30/10/2018.” The Applicant neither Appealed from nor applied to set aside or review the Order. It still persists and binds the parties. The better step could have been for the Applicant to apply to review the said order, while justifying the reasons for failure to file the documents and witness statements on time or earlier.

40. The upshot is that the Application dated 5/12/2019 is devoid of merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 21st day of October, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.