



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 300 OF 2015

SAMUEL CHEGE KAMUNGE (suing as the representative of the estate of

Ruth Wanjiru Kamunge (Deceased)PLAINTIFF

VERSUS

JOSPHAT CHEGE

T/A JOSGEMU SURVEYORS ENTERPRISES1ST DEFENDANT

MARY NJERI MUGO2ND DEFENDANT

JAMES WACHIURI WAIGWA.....3RD DEFENDANT

PAUL MWAURA KAMAU.....4TH DEFENDANT

PURITY WANJIRU5TH DEFENDANT

DAVIES KIIRU NDUNGU.....6TH DEFENDANT

JOSGEMU ENTERPRISES LIMITED.....7TH DEFENDANT

THE LAND REGISTRAR NAIVASHA8TH DEFENDANT

THE HON. ATTORNEY GENERAL.....9TH DEFENDANT

RULING

1. By Amended Notice of Motion dated 10th June 2021, the 6th defendant seeks the following orders:

1. *That this honourable court be pleased to allow the 6th defendant/applicant to re-open his case and call additional evidence by the Land Registrar, Naivasha Land Registry to produce the registers and parcel files in respect of title numbers Kijabe/Kijabe Block 1/12640 and Kijabe/Kijabe Block 1/12641.*

1a. *Alternatively, the applicant be recalled and produce certified copies of the Green Cards in respect of title numbers:-*

i. *Title Number Kijabe/Kijabe Block 1/12640*

ii. *Title Number Kijabe/Kijabe Block 1/12641*

2. *That the costs of the application be provided for.*

2. The application is supported by affidavits sworn by the 6th defendant. He deposed that when he closed his case on 10th March 2021, he did not have copies of transfer form, receipts in respect of registration fees and stamp duty, application for consent of the Land Control Board as well as consent of Land Control Board, all of which were in the parcel file held by the 8th defendant. He added that he also procured a copy of the green card after closing his case and that he did not initially call the 8th defendant since he believed that the 8th defendant would

testify.

3. The plaintiff responded to the application through grounds of opposition in which he contended that the application was filed late after parties had closed their cases and filed submissions, that the witness sought to be called is already a party to the suit, that the delay was deliberate, that the documents were always available yet no effort was made to obtain them and that re-opening of the case would be prejudicial to the plaintiff who had testified and closed his case.

4. The application was canvassed by way of written submissions. The 6th defendant submitted that under **Section 146** of the **Evidence Act** and **Order 18 Rule 10** of the **Civil Procedure Rules** the court can recall a witness. He submitted further that the production of the green cards held by the 8th defendant would show that he was the registered owner and the other parties would not be prejudiced in any way. That at the trial on 10th March 2021, after the 6th defendant closed his case, counsel for the 8th defendant also closed his case without producing any evidence and so he had no opportunity to apply to court for summoning of the 8th defendant. Citing the case of **Raindrops Limited v County Government of Kilifi [2020] eKLR**, he argued that the court has unfettered discretion to permit re-opening.

5. The plaintiff in his submissions argued that the trial closed on 10th March 2021 and the parties directed to file submissions and a mention was given for 3rd June 2021. That the present application was filed 2 months and 23 days later without any sufficient reason given. He submitted further that the conduct of the 6th defendant would be prejudicial to the plaintiff as he had already closed his case on 10th March 2020 and had addressed all issues raised in evidence and cross examination of the 6th defendant and on law in the written submissions.

6. He further submitted that the 8th defendant is a party to the suit and opted not to tender any evidence when he had the opportunity to do so and wondered whether the application is an afterthought by the 8th defendant using the 6th defendant. That the applicant has not alleged that he encountered difficulties in obtaining the documents he now intends to produce and has not demonstrated any efforts to obtain and produce the documents earlier. Relying on the cases of **Odoyo Osodo v Rael Obara Ojuok & 4 others [2017] eKLR** and **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR**, the plaintiff urged the court to dismiss the application with costs and to set a date for delivery of judgment.

7. I have carefully considered the application, the affidavits, the grounds of opposition and the submissions. Under **Section 146 (4)** of the **Evidence Act**, the court may permit a witness to be recalled and if it does so, the parties have a right of further cross-examination and re-examination. Similarly, **Order 18 rule 10** of the **Civil Procedure Rules** empower the court at any stage of the proceedings to recall any witness who has been examined.

8. The general principles when considering an application such as the one now before me are that the court has discretion in the matter. Needless to state, such discretion must be exercised judiciously while taking care that justice is done without occasioning prejudice to the opposite party. If it is apparent that re-opening of a case is sought with a view to fill gaps in evidence, it should generally be declined, more so if it is sought after both sides have closed their cases. Since the applicant is seeking equitable relief, inordinate and unexplained delay will generally result in the application failing. See **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another** (supra).

9. So as to contextualize the present application, I will give a brief history of the litigation herein. This suit was filed on 22nd October 2015. The 6th defendant was listed from the onset as a defendant. Among other reliefs, the plaintiff sought cancellation of titles for Kijabe/Kijabe Block 1/12620, 12630, 12640 and 12641 on allegations of fraud. Simultaneously with the plaint, the plaintiff filed an application seeking to restrain the 2nd to 6th defendants from transferring or dealing with the said properties. As expected, the allegations of defective title and fraud were among the pillars of that application.

10. The 6th defendant entered appearance on 27th November 2015 and filed defence on 11th December 2015. He denied fraud and asserted that he purchased parcel numbers Kijabe/Kijabe Block 1/12640 and 12641 after due diligence and following due process. He also filed a list of witnesses and a list of documents on 9th March 2018 in which he listed himself as the sole witness and titles as well as certificates of official search in respect of the two parcels, bankers' cheque and sale agreement dated 31st May 2014 as the documents he would rely on at trial.

11. Hearing of the suit ultimately commenced on 23rd May 2019, a date which was fixed in open court in the presence of counsel for the 6th defendant. The plaintiff's case was closed on 29th October 2019. Defence hearing started on 9th March 2020, upon counsel for the 6th defendant indicating that he was ready to proceed. The 6th defendant testified on 10th March 2021 and closed his case. Thereafter, the 8th and 9th defendants also closed their case on the said date, without offering any evidence.

12. Directions were then given for the filing and exchange of submissions and the matter was scheduled for mention on 3rd June 2021 for purposes of scheduling date of delivery of judgment. The plaintiff filed his final submissions on 23rd April 2021 while the Attorney General filed final submissions on behalf of the 8th and 9th defendants on 11th May 2021.

13. Shortly before the mention to take date of judgment, the 6th defendant filed the present application on 26th May 2021, later replacing it with Amended Notice of Motion dated 10th June 2021. The 3rd to 6th defendants, who are all represented by the same firm of advocates, filed their submissions in respect of the suit on 27th May 2021.

14. The applicant claims that when he closed his case on 10th March 2021, he did not have copies of transfer form, receipts in respect of registration fees and stamp duty, application for consent of the Land Control Board as well as consent of Land Control Board, all of which he further claims were in the parcel file held by the 8th defendant. As noted earlier, the applicant filed statement of defence in which he asserted that he purchased parcel numbers Kijabe/Kijabe Block 1/12640 and 12641 after due diligence and following due process. He has not

explained his failure to include in his initial list of documents, the documents he now seeks to introduce. It cannot be enough to simply declare that he did not have the documents while at the same time maintain that due process was followed. In any case, he did not annex copies of the transfer form, receipts in respect of registration fees and stamp duty, application for consent of the Land Control Board as well as consent of Land Control Board to his supporting affidavit.

15. I note from the copies of green cards annexed to the supporting affidavit that they are dated 19th May 2021, over one year and four months after the plaintiff had closed his case, over two months after parties had been ordered to file and exchange final submissions and almost a month after the plaintiff had filed his final submissions. No valid explanation has been tendered to justify the delay. It must be remembered that the allegations of defective title and fraud were raised by the plaintiff from inception of the suit. A diligent defendant would have amply and timeously fashioned his pleadings and evidence to meet those claims. In terms of **Order 7 Rule 5** of the **Civil Procedure Rules**, the specified time for a defendant to file his list of witnesses, list of documents and copies of his documents is the time of filing his defence. Any day later than that is delay for which an explanation must be given. I find the delay herein to be both inordinate and unexplained.

16. Another reason advanced by the applicant is that he did not initially call the 8th defendant since he believed that the 8th defendant would testify. I find that argument to be an afterthought. Logically, the 6th defendant was to testify before the 8th defendant. There would be no basis for him to peg his case on some hope that the 8th defendant would come to his aid after he closes his case. If at all there was a genuine expectation, the applicant would have raised the issue in court on 10th March 2021 instead of filing an application over two months later.

17. All in all, I agree with the plaintiff that he would be prejudiced if re-opening is allowed at this stage. It seems to me that the present application is a belated attempt by the 6th defendant to patch up gaps in his case. Whereas the mission of the court is to do justice, it must be recalled that justice is the end product of an orderly process. The cogs in that process include lodging a claim, the defendant responding to it, parties transparently disclosing to each other the full scope of their cases and evidence, trial based on the disclosed evidence and ultimately judgment being rendered by the court. Procedural chaos is oftentimes a harbinger of injustice. The applicant has not persuaded me that allowing the present application will aid the course of justice in the matter.

18. In the result, Amended Notice of Motion dated 10th June 2021 is dismissed with costs to the plaintiff. Since parties had filed their final submissions, I will now proceed to prepare judgment.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF OCTOBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED THROUGH MICROSOFT TEAMS VIDEO LINK IN THE PRESENCE OF:

NO APPEARANCE FOR THE PLAINTIFF

NO APPEARANCE FOR THE 1ST AND 7TH DEFENDANT

MR MUTONYI FOR THE 3RD TO 6TH DEFENDANTS

MS WANJERI HOLDING BRIEF FOR MR ONDIEKI FOR THE 8TH AND 9TH DEFENDANTS

COURT ASSISTANT: E. JUMA