



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 31 OF 2015**

**JAMES MUIGAI THUNGU.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF TRANS-NZOIA.....1<sup>ST</sup> DEFENDANT**

**COUNTY EXECUTIVE OFFICER, LAND, HOUSING & URBAN DEVELOPMENT.....2<sup>ND</sup> DEFENDANT**

**PHYSICAL PLANNER, TRANS-NZOIA COUNTY.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a Ruling on an application made orally by the defence counsel in court this morning. The application was made when the matter came up for defence hearing. Before that time the matter had been called out in the morning and placed aside to **10.30 am** on account of the defence which, through counsel, indicated that it was ready for the defence hearing.

2. The substance of the application is that the defendants have a witness in court, one Mr. Munialo, who wishes to amend his witness statement so that it is in tandem with the position of the County Government, and also that the County Government wishes to introduce another witness who had not recorded his statement hence the Defendants want to record that witness' statement, file and then rely on it in evidence. Counsel for the defence refers to the unnamed witness as an expert witness in the area of land. He states further that the said witness works in the County Government Office of the Department of Lands.

3. The learned counsel for the Defendants stated that the application is made in good faith. He then indicated that costs are an appropriate remedy in the circumstances. He stated further, upon the application being opposed, that the Plaintiff should not worry if he knew that his case is good. He implored the court to rely on **Sections 3A, 1A and 1B** of the **Civil Procedure Act** to make the ends of justice to be met by allowing the adjournment and the request to have the additional evidence given. He then urged the court to look at the overriding objective of the court under the Civil Procedure Act and consider the fact that the alleged witness is only an expert or technical one and that the defence had not adjourned the matter before.

4. The application was opposed. Counsel submitted in opposition that this is an old matter that has been pending for defence hearing for long since **4/3/2020** when the plaintiff's case was closed. He reiterated further that the defence was filed on **19/5/2015** together with a list of witnesses and documents to be relied on. He noted that the plaintiff had testified and conducted his case relying on the defence and witness statements filed by the defence hence to permit the defence to put in others would greatly prejudice his case. He argued that he will not have opportunity to interrogate them. Furthermore, he stated, it is over **6 years** from the time the matter was confirmed for hearing and the defendants have had time to prepare their case, and the application has been brought too late in the day. Lastly, he submitted that the application was an afterthought, counsel having informed the court in the morning that they were ready to proceed.

5. I have considered the application and the submissions by both counsel. I have also considered the relevant law. I find that it is true that the advocate for the defendants indicated in the morning that he was ready to proceed with the defence hearing. He asked the court to place the matter aside up to **11.30 am**. I also find that it is not true that the defence has never caused an adjournment in this matter. They should not play a saint when their robe is tainted, (perhaps to mislead the court). For instance, on **26/2/2018** an adjournment was successfully made by them and they were ordered to pay costs. On **30/7/2019**, Prof. Sifuna applied for adjournment and the same was granted. These are but some instances that show that the defendants are not as clean in regard to adjourning this matter as they state.

6. Turning to issue of the defendants' desire or request to have a further witness and an amendment to the statement filed by Mr. Munialo, the court notes that, first, contrary to the submissions by Prof. Sifuna that, since Mr. Gacathi has not pointed to the court the provisions of law he relies on in opposing the application, that submission is thus based on emotion, the Court is enjoined to look at the law regarding the conduct of matters. It does so irrespective of what parties submit to it in regard to law: the Court is deemed to know the law. What the court takes from parties as they conduct their matters are facts and they relate both issues before it and the law.

7. In the instant case the law relating to filing of a defence, and counterclaim for that matter and all the documents that accompany it is the **Civil Procedure Rules, Order 7 Rule 5** thereof. It obligates parties to file witness statements, the list of witnesses and both the list of documents and copies thereto together with the defence. If that is not done so, then it should be done at least **15 days** before pre-trial directions, as stipulated under **Rule 28** of the **Environment and Land Court Practice Directions** (the **Mutungua Rules** of 2013). See **Gazette Notice No. 5178**.

8. The Plaintiff's counsel did not have to remind the Court of these rules in order to make his submissions tenable. Again, the Court will not close its eyes to the law and rule against a party unfairly for reason of failure to cite the law in support of his argument. These are some of the technicalities that **Article 159(2) (d)** of the **Constitution of Kenya 2010** came in to cure.

9. It is true that **Section 3A, 1A** and **1B** oblige the court to use its inherent power to do the ends of justice to parties. I agree with counsel for the defence on that point. But the question is: what is the justice need in the present case? Should the law be used in such a manner as to cause an injustice to the other side? In the present matter, the plaintiff has testified and closed his case. The defence wants to introduce new evidence in form of a further witness statement by the witness, one Mr. Munialo, and another unnamed one after the Plaintiff has closed his case. Will the Plaintiff have an opportunity to test that further evidence and give evidence to rebut it in the circumstances? This court finds that what is available to the Plaintiff if this were to be the case is only opportunity for cross-examination. Is an opportunity to cross-examine a witness the only and best chance for a party to have a fair trial of his matter as enshrined in the 2010 Constitution under **Article 50 (1)**? No. For a fair trial to occur, a party ought to be given evidence the adverse party relies on in advance of the trial so that he can sufficiently prepare for it. In the instant case the Plaintiff's case is closed. To avail fresh evidence by way of further witness statements after that has taken place will greatly prejudice the Plaintiff and render the trial unfair to him. Each party had opportunity to avail to each party evidence before the matter proceeded to hearing so that there would be fair play and level ground for both.

10. When the defence participated in the pre-trial directions and indicated that it was ready for trial it knew that all the evidence in form of witnesses to be called or what was to be stated by them was ready and available to the other side. The horse bolted and is now deep in the race. It cannot be returned to the stable without harm.

11. For these reasons the application for amendment of Mr. Munialo's witness statement, and the introduction of another witness, who is in the first place unnamed, is unmerited. It is hereby dismissed with costs.

12. In the interest of justice, and because of the fact that the time today is far spent: it is late afternoon, Mr. Munialo is given time to prepare to testify at the next hearing date.

It is so ordered.

**Dated, signed and delivered at Kitale on this 16<sup>th</sup> day of November, 2021.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

In presence of:

**Mr. Gacathi for plaintiff**

**Prof. Sifuna for defendants**