



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. 147 OF 2018

VIRGINIA KATHAMBIMAINGI.....PLAINTIFF

VERSUS

1. NICHOLAS MWATIKA

2. COOPERATIVE BANK OF KENYA LTD

3. COMMISSIONER OF LANDS.....DEFENDANT

R U L I N G

1. This ruling is in respect of an objection raised by Ms Muteti, counsel for the 1st Defendant, against the Plaintiff's production of documents listed as numbers 15, 16, 17 and 18 attached to the Plaintiffs list of documents and produced as exhibits in this matter.

2. Counsel submitted that the Plaintiff was not the author of the said documents and that the same were not addressed to the Plaintiff and therefore the Plaintiff could not produce them as exhibits. She contended that rules of evidence demand that it is only the maker of a document who has capacity to produce such document. She stated that although she attended the *pre-trial conference*, she never raised the issue of production of documents because she presumed that the rules of evidence require that documents be produced by the makers thereof.

3. The objection was opposed by Mr. Aunga, counsel for the Plaintiff who submitted that the objection was made in bad faith and that the same had been brought too late in the day. Counsel argued that the 1st Respondent's counsel participated in the *pretrial* which she confirmed in her submissions and that *pretrial conferences* are not academic exercises, but that the same is meant to ensure there is no ambush on either party and aimed at aiding unnecessary adjournments at the time of trial.

The Plaintiff's counsel submitted further that the purposes of the *pretrial conference* was for any counsel to raise issues concerning production of documents, witnesses to be called and expert witnesses and related matters. That counsel for the 1st Defendant was well aware of this position but chose not to raise any objection and instead raised the objection during trial.

4. It was contended for the Plaintiff that this being a land matter, this court ought to consider all the evidence presented by the parties so as to reach a just conclusion. Counsel stated further that at the commencement of the trial, counsel for the 1st Defendant conceded to the production of all the documents and indeed all the documents were produced as exhibits in his matter. He wondered why Ms Muteti was changing goal posts just because he referred to specific documents in the course of the hearing.

5. In a rejoinder, Ms Muteti argued that indeed she appeared before the Deputy Registrar of this court for *pretrial conference* and conceded that the appearance was not an academic exercise. She averred that even so, appearing before this court is not an academic exercise and that this court should not ignore rules of evidence just because the matter should be determined expeditiously. Counsel argued that the court should look at the documents before determining whether those documents are genuine, and that the genuineness of a document can only be ascertained when the same is produced by its author, who has authority to verify its legality genuineness and correctness. She urged the court to mark the documents and wait the authors thereof to produce them.

ANALYSIS AND DETERMINATION:

6. I have considered the objection raised and the rival arguments presented on both sides. I note that when the Plaintiff who is PW1, testified in chief, she adopted her witness statements as her evidence in chief. Thereafter she produced her documents, which are on record as exhibits in this matter in the chronological order in which they are listed. At that point, there was no objection from Ms Muteti for their production as exhibits in this matter, which meant that at the time counsel was raising her objection, the impugned documents had already been produced as exhibits in this matter. Therefore, the issue for determination before this court is whether the objection raised by counsel

for the 1st Defendant in respect of the production of plaintiff's exhibits 15, 16, 17 and 18 is merited.

7. Kenya's Constitution of 2010 with its tenets on expeditious justice and disregard of undue technicalities has brought into sharp focus, the challenge of case backlog in Kenya's Judicial System. At the heart of the right to access to justice is a call for just, expeditious proportionate and affordable resolution of disputes. The legal maxim of "Justice delayed is justice denied" is what our Constitution, the Environment and Land Court Act No. 19 of 2011, the Civil Procedure Act, the Civil Procedure Rules and the Practice directions for this court in Gazette Notice Number 5178 has sought to address by availing statutory, administrative and other tools to ensure that parties who come before the courts to seek justice, can access effective remedies timeously and at an affordable cost.

8. **Article 159 (2)** of the *Constitution of Kenya 2010* provides as follows: -

"In exercising Judicial authority, the courts and tribunals shall be guided by the following principles

- a) ...
- b) ***Justice shall not be delayed***
- c) ...
- d) ***Justice shall not be administered without undue regard to procedural technicalities; and***
- e) ***The purposes and principles of this Constitution shall be protected and promoted"***.

Article 50 of the Constitution protects every person's right to both procedural and substantive justice; while Article 48 of the Constitution protects every person's right to access to justice.

Section 3 of the Environment and Land Court Act, No. 19 of 2011 provides that the main purpose of the Act is to enable the Environment and Land Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes. Further, Section 19(2) of the said Act provides that this court shall be bound by the procedure stipulated in the Civil Procedure Act.

9. The **Civil Procedure Act** provides that the Act together with the Rules thereunder are focused on facilitating the Just, expeditious, proportionate and affordable resolution of Civil disputes. Sections 1A and 1B of the Civil Procedure Act Provides as follows:-

1A (1) *the overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the act.*

2. *The Court shall, in the exercise of its power under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1),*

3. *A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.*

1B (1) For the purpose of furthering the overriding objectives specified in section 1A, the court shall handle all matters presented before it for the purposes of attaining the following aims: -

- a) The just determination of the proceedings
- b) The efficient disposal of the business of the court;
- c) The efficient use of the available judicial and administrative resources;
- d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
- e) The use of suitable technology

10. Order 11 of the Civil Procedure Rules provides for case management

and conference as a tool to facilitate the just, expeditious, proportionate and affordable resolution of Civil cases, Order 11 Rule 3 provides as follows; -

3. (1) the purposes of a case management conference shall be to-

- a) Promote the expeditious disposal of cases;

- b) Afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;
- c) Afford the parties an opportunity to settle the case;
- d) Determine any other matter relating to the management, hearing or disposal of the case;
- e) Deal with pre-trial application at first instance or formulate a timetable to deal with them as the court may deem fit; and
- f) Identify the issues for determination.

11. The Practice Directions on proceedings in this court contained in Gazette Notice No. 5278 dated 25th July, 2015 provide for the overriding objective of proceedings in this court. Direction 1 provides as follows:-

“In the exercise of its authority and jurisdiction, the Environmental and Land Court shall at all stages of any trial be guided by Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act No. 19, 2011 so as to facilitate;

- a) Just,***
- b) Expeditious,***
- c) Proportionate; and***
- d) Accessible resolution of disputes,***

Direction 28 provides as follows: -

“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;

- a. The issuance of appropriate orders and directions to ensure parties comply and take pretrial conferences seriously, as they constitute a vital stage in the overall case management and the efficient administration of justice.***
- b. The issuance of an order striking out pleadings or imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines.***
- c. The issuance of directions on the number of conferences to be held before trial.***
- d. The issuance of summons for witnesses to attend court to testify and/or produce documents and for filing of witness statements in respect of such witnesses***
- e. The issuance of an order requiring the filing of more comprehensive witness statements;***
- f. The issuance of an order that the parties argue 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 in 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 statements, and bundle of documents;***
- i. Alternatively, the issuance of directions to determine and fix the number of witnesses to testify at the trial;***
- j. The issuance of an order that the matter to be referred for arbitration or make such other orders for mediation and negotiation (as may be appropriate in the circumstances of the case) to ensure the expeditious disposal of the matter.***
- k. Where appropriate, the issuance of conservatory orders or maintenance of status quo until a matter is fully and finally determined.***
- l. The Judge shall have the discretion to give any further orders and/or directions as the ends of justice may require”.***

12. The totality of the above provisions is that this court as well as the parties appearing before it together with their counsel, should at all times in the lifespan of any case they handle or are involved in, as the case may be, be guided by the overriding objective, which essentially seeks to meet the ends of justice through the just, expeditious, proportionate, affordable and accessible resolution of disputes. Therefore, the law expects both the court and the litigants together with their counsel to embrace case management as a tool towards achieving the efficient

administration of justice.

13. Part of what is expected of parties and or their counsel in the case management process during pretrial conferences is to indicate to court whether they object to the production of any documents intended to be produced by the other parties direction 28 (g) provides that if no objection to production of documents is raised during pretrial conference then no objection on the production of any document shall be entertained at the main hearing.

14. In the instant case, counsel for the 1st Defendant argued that she did not see the need to raise objections on production of the Plaintiff's document based on her presumption that the rules of evidence demand that a document must be produced by its maker. In my considered view, this position is now obsolete. While a party is entirely within their rights to demand that any document be produced by its maker, that demand must be made at the pretrial stage and not during the main hearing of the suit. Direction 28(g) of the Practice Direction acts as a reflux valve to facilitate progress and avoid stagnation in resolution of disputes. Judicial resources and more specifically judicial time is finite, in view of the enormous demand for access to justice. Hence every party and or advocate who appears before court is obligated to assist the court to further the overriding objective by complying with what needs to be done at the appropriate time.

15. In the case of *Methuselar Keyah Lubembe vs Albina Kipkemoi [2019] eKLR*, the court stated as follows, in paragraphs 8 and 9; -

***“9... case conference under Order 11 is a good tool for managing court files and demands time from the Judicial Officer in conduct as well as the parties or advocates to understand the file sufficiently well so that every effort and endeavor is made to save every minute by agreeing on basic and mundane issues like the number or witnesses to be called, the need for cross examination of witnesses, any questions regarding admissibility of a document and how to have the filed documents produced. This is important so that prospects of objection upon objections which many times derail progress are avoided. It is also at the period of the case conference that parties make disclosures and discoveries towards achieving fair trial devoid of ambush.*”**

“When done correctly the prospects of subsequent interlocutory applications like for amendments can wholly be arrested and dealt with before hand. It is at process that all players in Civil Litigation have no otherwise but to internalize and approach with seriousness deserved because when properly undertaken a very huge step is taken towards expeditious disposal of the matter”

16. The 1st Defendant's counsel having failed to raise her objections on the production of the Plaintiff's exhibits numbers 15, 16, 17, and 18, during the pretrial conference is estopped from raising the objections at the hearing of this suit. Her argument that disallowing her objections will amount to sacrificing justice at the alter of expediency does not arise; because the provisions of the Constitution, the Environment and Land Court Act, the Civil Procedure Act and the Rules thereunder together with this court's Practice Directions have inbuilt mechanisms to ensure justice, fairness, expediency, affordability and proportionality are achieved all in one package.

17. In the premises, I find that the 1st Defendant's objection to the production of the plaintiffs' exhibits 15, 16, 17 and 18 lacks merit and I proceed to dismiss the same with costs to the Plaintiff.

Ruling Dated, Signed and Delivered Virtually at Machakos this 14th day of December 2021.

A. NYUKURI

JUDGE