



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 210 OF 2016

JAMES KIMATHI MUTHUI (Suing as legal representative of the estate of

EUTYCHUS MUTHUI (Deceased).....PLAINTIFF

VERSUS

NTIBUKA M'MBURUGU M'IBURI.....1ST DEFENDANT

CONSOLATA M'MBURUGU.....2ND DEFENDANT

LAWRENCE MBURUGU..... 3RD DEFENDANT

RULING

1. Through an application dated 21.3.2019 the plaintiff prays the court to set aside the orders given on 29.1.2019 closing his case the matter be reopened and he be allowed to produce additional documents.
2. The application is supported by his affidavit sworn on 25.3.2019. The reasons given are that vital documents were in in mistakenly omitted and since they were not in his possession at the time. The said documents are; a mutation form, green card and a notification of sale from Quickline Auctioneers attached and marked as **JK 1, 2 and 3** respectively in the supporting affidavit.
3. The application is opposed through a replying affidavit sworn by the 1st defendant on behalf of the other defendants. It is stated the plaintiff had 2 years to prepare his case and the alleged documents were not listed in the list of documents filed on 2.11.2016. Secondly defendants maintain the said documents are dated 19.1.1989 and 21.1.2000 respectively long before the suit was filed on 2.11.2016 hence he ought to have filed them if he thought they were vital.
4. Thirdly they state there was inordinate delay in obtaining the green card which was certified two days after the close of the plaintiff's case hence this an afterthought and in any event, it belongs to a different parcel from the suit land.
5. Fourth is the applicant had an experienced counsel, did not make any reference to any of the alleged documents at the close of his case and hence any re-opening shall prejudice the respondents for it is an attempt to fill in lacunas as pointed out during cross-examination.
6. Fifth is that the application in an abuse of court process, lacks merits and does not meet the test of re-opening a case.
7. The applicant by written submissions dated 3.10.2019, relies on ***Raila Odinga & 5 Others –vs- IEBC & 3 Others [2013] eKLR*** on the principles to consider in the admission or rejection of additional evidence namely relevance, materiality facts in issue, admissibility and the strength of evidence sought to be introduced.
8. Secondly it is submitted the mere fact the documents were not served during pretrial conference and discovery period should not prevent the court from allowing the application.
9. Thirdly the applicant relies in **Article 159 2 (2)** of the **Constitution** on wider and substantive justice and Section 46 of the **Evidence Act** for recall of witnesses.
10. Further it is submitted the documents will shed light on the issues in the matter given the defendants' paragraph 4 of the statement of defenses and counterclaim touches the documents on how Eutyachus Mutwiri acquired the suit land No. 1573 as a subdivision of the original Parcel No. 474 into 1573 and 1574.
11. The applicant relies on ***Joseph Ndungu Kamau –vs- John Njihia [2017] eKLR*** and ***Pinnacle Projects Ltd-v- Presbyterian Church of***

12. On the other hand by written submissions dated 30.9.2019 the defendants relies on Michael *Kiplagat Cheruiyot-vs- Joseph Kipkoech Korir [2019] eKLR* and *David Kipkosgei Kimeli –vs- Titus Barmasai [2017] eKLR*.

13. Again, it is submitted the application is brought about to fill in gaps raised by the defendant's contrary to **Sections 1A, 1B and 3A, 3B and 2 (b)** of the **Constitution** as to prejudice, delay, integrity of the court process and for being brought too late in the day.

PLEADINGS

14. The plaintiff brought a case against the defendants on 2.11.2016 over **Parcel No. Nyaki/Kithoka/1573** belonging to Muthui allegedly on trespass, encroachment and or illegal developments. He sought for eviction and permanent injunction against entry, building or interference thereof. He attached a list of documents dated 23.12.2016 being copy of a register, letters of grant and a demand letter and other documents to be produced by leave of the court.

15. Similarly, the plaintiff sought for temporary orders of injunction vide an application dated 20.10.2016 through which were issued.

16. The defendants filed a defence and counterclaim dated 6.12.2016 claiming the title held by the deceased was illegal and or fraudulently acquired. They counterclaimed for adverse possession over **Parcel No. Nyaki/Kithoka/1573**.

17. The reply to defence and defence to counterclaim dated 23.7.2017, was filed stating the claim was not time barred, wa letters of administration were granted, alleged there was encroachment soon after the deceased passed on, the claim for fraud was being brought too late and averred the property had been used to secure bank loans with no objections from the defendants.

18. Parties complied with **Order 11** with the plaintiff filing a case summary dated 24.4.2018, issues for determination, and pretrial questionnaires.

19. Similarly the defendants filed issues for determination dated 11.5.2018, case summary and list of witnesses and witness statements dated 30.4.2018 and lastly a list of documents dated 24.6.2019 being a copy of register for **Parcel No. 1573**, photographs and copy of register for **Parcel No. 474**.

20. Hearing commenced on 29.1.2019 when PW1 testified closed his case and the defendants sought for a scene visit which was allowed.

21. What turns out as the issue for determination is whether the applicant has made out a case for the re-opening of the suit and the filing of additional documents.

22. There is no dispute that the plaintiff's case is as per pleadings set out above and to which upon service the defendants filed a defence and counterclaim and the plaintiff filed a reply to defence and defence to counterclaim, subsequent to which parties complied with **Order 11** and set down the matter for hearing.

23. Further there is no dispute the plaintiff was extensively cross-examined by the defendants based on the pleadings thereof. The plaintiff now states there are additional documents which were not in his possession at the time the suit was filed and heard.

24. He plaintiff has not demonstrated the difficulties he had procuring the additional documents prior to the filing of the suit and or soon thereafter. Further the plaintiff has not and did not disclose at the pretrial conference if he needed any and or had requested for the supply of the aforesaid documents from the land registrar.

25. The supporting does not show the nexus between those document's and the suit land. The plaintiff's witness statement did not refer to those documents. The only attempt to draw the relationship is in the written submission at page 3, the second and last paragraph which cannot by any stretch of imagination amount to a pleading.

26. The searches were sought for two days after the plaintiff' closed his case. The only inference is that the same was an afterthought and is a veiled attempt to fill gaps arising out of cross-examination. This cannot in my mind be termed as mere additional evidence which was not within the capacity to procure by the plaintiff.

27. Secondly, the application was brought close to 3 months after the plaintiff closed his case and an order for a scene visit made.

28. The court must also consider whether the said documents are of any relevance to the instant case and hence if it would be in the interest of justice to allow their production notwithstanding the inconvenience and or prejudice it might occasion to the defendants if the court were to allow it. This is due to the fact that the defence case has not commenced. Parties have only taken a step through an order of the court upon request, to visit the scene and whose report has not been filed in court.

29. The defendant's defence and a counterclaim introduces the aspect of **Parcel No. 474** and attached a search for **Parcel No. 1573** indicating it was a subdivision of **Parcel No. 474**.

30. Given that the documents propose to be introduced will allow both parties to address the issues in contention the application has merits.

31. In the circumstances obtaining, I shall allow the filing of the three additional documents. The defendant shall be at liberty to file any

additional documents regarding the three documents and cross-examine the plaintiff further.

32. Compliance to be made within 7 days and the matter to proceed for hearing within 45 days.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Orimbo for plaintiff

Murango Mwenda for defendants

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE