



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO. 7 OF 2018

FATUMA FARAH HASSAN.....PLAINTIFF

VERSUS

ISSACK MAHAT GABOW.....1ST DEFENDANT

ALI KASSIM QANSOI.....2ND DEFENDANT

MANDERA COUNTY GOVERNMENT.....3RD DEFENDANT

RULING

1. What is before me is the Notice of Motion dated 18/6/2019 brought under Order 18 Rule 10,51 Rule 1,13 & 14 CPR and Sections 1A, 1B and 3A CPA. The Applicant is seeking the following orders;

i. Spent.

ii. Spent.

iii. That this Honourable court do grant an order to recall the Plaintiff's witness Bashir Farah Hassan and give further evidence.

iv. That costs of this application be provided for.

2. That application is supported by the affidavit of the Plaintiff and grounds shown on the face of the said application. The supporting affidavit is further supported by numerous annexures thereto. The said application is opposed by the 1st and 2nd Respondents who filed separate replying affidavits.

APPLICANT'S CASE

3. The Applicant stated that on 26/3/2019, he testified but did not have in his possession all the documents as the originals were misplaced and only managed to trace them recently. He stated that it is only fair and in the interest of fair administrative justice that he be recalled to produce the same. The Applicant has annexed seven (7) receipts issued by the defunct of Mandera town council and the County Government of Mandera marked "Bfit 1" which he intends to produce in his evidence if this application is allowed.

1ST RESPONDENT'S CASE

4. The 1st Respondent opposed the said application and stated that the Plaintiff's witness testified on 26/3/2019 on the basis of documents that were available. He stated that recalling the witness to testify again and to produce documents will be prejudicial to him as the documents the witness seeks to produce could have been manufactured purely for this case. He stated that there is no valid reason why the alleged documents were never produced when the witness testified on 26/3/2019.

2ND RESPONDENT'S CASE

5. The 2nd Respondent on his part also opposed the application stating that the documents which the Applicant seeks to be recalled to produce are the very same documents contained in a list of documents which the Plaintiff served upon him. He stated that the application is

frivolous, vexatious and abuse of the court process and should be dismissed with costs.

LEGAL ANALYSIS

6. I have considered with anxious care the affidavit evidence both in support and in opposition to this application. I have also taken into consideration the submissions by the counsels and the applicable law. Order 18 Rule 10 CPR allows the court to recall any witness at any stage of the proceedings and Section 146 of the Evidence Act (Chapter 80 Laws of Kenya) provides that the court may permit a witness to be recalled either for further evidence in-chief or for further cross examination and if it does so, the parties have the right of further cross-examination and re-examination respectively. In this case, the applicant has stated that when he gave evidence in court on 26th March, 2019, he produced some copies of documents as the originals were at the time either misplaced or lost in Mandera and it is only recently that the said documents were traced.

7. The issue for determination in this application is when and under what circumstances in the course of the trial a party may introduce documents to support his or her case. The general tenor of the Civil Procedure Rules is that parties ought to disclose their case at an early stage to avoid surprise, ambush, delay and increase of costs. The rules require the Plaintiff to file a verifying affidavit, list of witnesses, statements of witnesses and copies of documents to be relied upon at the trial under Order 3 Rule 2 of the Rules.

8. A similar requirement is imposed upon a defendant when filing his/her defence and/or counterclaim under Order 7 Rule 6 of the Rules. Before the pre-trial conference, written statements may be filed and served with the leave of the court at least 15 days prior to the pre-trial conference under Order 11 of the Rules. After the pre-trial conference, the matter is set down for hearing.

9. It is expected that at the pre-trial conference stage, all the parties will have made full disclosure so that either party knows the case that they will face at the trial. Even after the pre-trial conference, Order 18 Rule 10 CPR and Section 146 of the Evidence Act still gives the courts a wide discretion to allow the parties to call further witnesses or produce further documents. However, this power is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the Constitution. However, a fair trial does not exist in a vacuum, but is governed by rules which ensure that each party is given an opportunity to present or defend his case fairly. That in my view informed the drafters of the Constitution in Article 159 (2) (b) which provides that justice shall be administered without undue regard to technicalities. Those Constitutional imperatives are further supplemented by the overriding objective under Section 1A, 1B and 3A of the Civil Procedure Rules Chapter 21 Laws of Kenya.

10. When this case came up for hearing on 26/3/2019, the Plaintiff did not indicate that there were some documents which he was unable to trace for purposes of production. He did not even sought an adjournment to enable him look for the same. In the case of **Raila Odinga & 5 Others –Vs-IEBC & 3Others SCK Presidential Petition No. 3, 4 and 5 of 2013 (2013) eKLR** the Supreme Court had to consider whether to allow additional evidence filed outside the contemplation of the rules and held as follows:

“The parties have a duty to ensure they comply with their respective time-lines, and the court must adhere to its own. There must be a fair and level playing field so that party or the court loses the time that he/she, it is entitled to, or inadvertences which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it then the court ought to be considerate taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavit and/or admission of additional evidence.”

11. While considering a similar application, Hon. Mr. Sila Munyao J. in the case of **Johanna Kipkemei Too –Vs- Hellen Tum (2014) eKLR** held as follows:

“.....when the Plaintiffs testified and tendered their evidence, they had in mind that all that the Defendant would call two witnesses and that the Defendant would not be relying on any engagement document. The document sought to be introduced was not in their contemplation. They were never cross-examined on it. They never thought fit to mention it, assuming they knew of its existence. Before the Defendant started giving evidence, she never gave any indication that after listening to the Plaintiff’s evidence, she would wish to call more witnesses in addition to those that she had earlier finished in her list of witnesses. She also never gave any indication that she would be relying on the subject document. When the Defendant testified, she never alluded to the documents sought to be introduced. Indeed she never mentioned that there was ever an engagement document signed. It is after her cross-examination that she has now sought to introduce new evidence. No reason has been given as to why the Defendant did not contemplate furnishing this new evidence earlier....”

12. I agree with the reasoning by the learned Judge. As I mentioned elsewhere in this judgment, the Plaintiff testified on 26/3/2019 and he never alluded that there were some documents that he had misplaced or lost. The new evidence which is sought to be introduced in my view is an afterthought which is coming too late in the day and would be prejudicial to the opposite party if the same were to be admitted.

13. In the upshot, I am inclined to disallow the application by the Plaintiff to adduce additional evidence. The Plaintiff will proceed on the basis of the evidence he had earlier tendered and the documents produced.

14. Consequently, the Notice of Motion dated 18th June, 2019 be and is hereby dismissed with costs to abide the event. It is so ordered.

Read, delivered and signed in the Open Court this 31st day of January, 2020.

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E. C Cheron (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Nyipolo holding brief Lakicha for the Plaintiff.

2. Mr. Nyandieka holding brief Odhiambo for 1st Defendant.

3. Ali kassim Qansoi – 2nd Respondent

4. Fardowsa- Court Assistant.