



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 383 OF 2009

KABU MUMBA & 11 OTHERS.....PLAINTIFFS

VERSUS

PWANI JEZOZHUM CO.LTD & 6 OTHERS.....DEFENDANTS

RULING

(Application to substitute a deceased witness; application opposed; suit being one of adverse possession and defendant had filed a replying affidavit of one of its directors; the said director being chronically ill when the application to substitute him made and being disclosed that he is now deceased; no substance in the objection as there is no other way the defendant can present its case if the witness is not substituted; complaint that the witness is introducing new evidence and new documents; assessment of the same demonstrate that there is nothing new being introduced by the defendant; application allowed)

1. The application before me is that dated 7 August 2019 filed by the respondent to this Originating Summons (who for ease of reference and to avoid confusion with the applicant in the Originating Summons, I will refer to as the defendant). The defendant seeks the following orders :-

(i) *That the court order of 12 February 2019 be varied and other defendants be granted leave to file a statement in the matter.*

(ii) *That the defendant do file a list and bundle of further documents.*

(iii) *That the defendants (sic) statement, list and bundle of further documents dated 23 July 2019 be admitted and be deemed to be properly filed.*

(iv) *That the costs of this application be provided for.*

2. The application is opposed by the applicants in the Originating Summons (who I will refer to as the plaintiffs).

3. To put matters into context, this suit was commenced through an Originating Summons filed on 5 November 2009. The plaintiffs claim to be entitled to ownership of the land parcel No. 830/II/MN measuring 350 acres, by way of adverse possession. The defendant resisted this claim and there was filed a Replying Affidavit of Newton Kogi Kiburi on 28 July 2010. There are also some interested parties in the suit who filed their own affidavits.

4. The matter was destined to proceed by way of viva voce evidence and the court gave directions for parties to file the documents and witness statements that they will rely on. The plaintiffs did avail their witnesses and closed their case on 12 February 2019. On that day Mr. Mwaniki, learned counsel for the defendant, applied for adjournment for the reason that his main witness was chronically ill and he did state that he will need to substitute him. I assume that this is the said Newton Kogi Kiburi. He also wished to call the Land Registrar as his witness to testify on the titles in issue. The application was allowed with the court stating that the defendant is at liberty to substitute but the new witness will adopt the statement already filed. The court also allowed the defendant to call the Land Registrar as a witness. The matter was then adjourned to 25 July 2019 for defence hearing. On that day, the defendant called Nimrod Hellon Onyango as its first witness but even before he could testify, Mr. Hayanga, learned counsel for the plaintiffs objected to him giving evidence other than adopting the witness statement on record of the previous witness. Apparently, Mr. Onyango had prepared his own witness statement and a bundle of documents and it is this that Mr. Hayanga had a problem with. The court then directed Mr. Mwaniki to file a formal application and that is how this application was filed.

5. In the supporting affidavit, Mr. Onyango has deposed that there is nothing strange about his witness statement and the documents he intends to produce for these flow from the replying affidavit that Mr. Kiburi had earlier filed.

6. The plaintiffs filed grounds of opposition in the following fashion :-

(i) That the application is an abuse of the Court's process and ought to be struck out.

(ii) That in this case, the plaintiffs' case ended on 19 November 2018 and that it was upon the defendant to bring their witnesses during the course of the proceedings.

(iii) That the plaintiffs' witnesses were subjected to severe cross-examination and when the case ended the defence agreed and consented to the next hearing when the defendant was to bring their witnesses.

(iv) That this application is an abuse of the Court's process in that we made appearance and the plaintiffs were ready to go on and when the case came for hearing the defendant was not ready to proceed again noting that they wanted to bring a new witness.

(v) That this is unprocedural asking the court to undo what it has done. This is abuse of the Court process and this request must be refused.

7. When the application came up for hearing, Mr. Mwaniki mentioned from the bar that the director sought to be substituted died on 30 September 2019 and I believe he was referring to Mr. Kiburi. He referred to the grounds of opposition which he termed as very sketchy and argued that from the same, one may not know what document is being objected to.

8. Mr. Hayanga for the plaintiffs objected to both the substitution and the introduction of a bundle of documents. He submitted that the plaintiffs have already closed their case based on the affidavits that the defendant had filed. He submitted that they will therefore be prejudiced. He further submitted that allowing new documents would be unfair to the plaintiffs.

9. I have considered the matter. I must say that I was a bit surprised by the line of submissions by Mr. Hayanga because these are nowhere in the Grounds of Opposition. Be that as it may, it was already pointed out that the defendant's witness was chronically ill and could not testify and thus the defendant needed to substitute him. It is now disclosed that he has died and I have no reason to disbelieve that. How will the defendant defend its case if it is not allowed to substitute the witness who is now deceased? The only way that the defendant can present its case is through a substitution of the deceased witness. If that is not allowed then technically the defendant will be shut out from presenting its case which will lead to an injustice. I see no reason why I should not allow the substitution of the defence witness and this is allowed.

10. There is the other complaint that new documents and/or evidence is being introduced. I have gone through the witness statement of Mr. Onyango and compared it with what Mr. Kiburi had deposed. There is not much difference in the two and the line of defence is the same. The documents Mr. Onyango seeks to rely on are also more or less the same documents that Mr. Kiburi had annexed to his affidavit. If there is a few which were not in the affidavit, I still do not see any prejudice to the plaintiffs because they take the same line of defence and they are not an ambush to the plaintiffs.

11. I see no reason to deny the defendant to call Mr. Onyango, and see no reason to deny Mr. Onyango testifying on the basis of his witness statement and bundle of documents.

12. The application is therefore allowed.

13. I make no orders as to costs.

14. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of January 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Hayanga for the plaintiffs.

Ms. Arika holding brief for Mr. Mwaniki for the defendant.

Court Assistant; David Koitamet.