



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 142 OF 2012**

**DR. PRAWAN KUMAR GUPTA.....PLAINTIFF**

**VERSUS**

**1. ENG ISAAC G. WANJOHI**

**2. RASHID M. KHERI**

**3. OMARN MZARUBA MWISHEE.....DEFENDANTS**

**RULING**

1. The Application for consideration is the 1<sup>st</sup> Defendant's notice of Motion dated 13<sup>th</sup> October, 2019 in which he seeks for extension of time within which he is to file documents to be supplied by the Land Registrar, Kwale and for the documents filed on 17<sup>th</sup> September 2019 to be deemed to have been filed and served on time. The Application is supported by two affidavits sworn by the applicant. The applicant avers inter alia that the said documents were supplied to his advocates sometime in August 2019. That the failure to comply with the order of the court issued on 29<sup>th</sup> April 2019 to file the documents within 14 days was occasioned by the delay in the receipt of the documents from the Land Registrar, Kwale. That no prejudice will be occasioned to the respondents whatsoever, and that it is in the interest of justice that the orders sought are granted.

2. The application is opposed by the 2<sup>nd</sup> Defendant who filed Grounds of Opposition and a replying affidavit. It is the 2<sup>nd</sup> Defendant's contention that no sufficient reason has been shown why the Applicant should be allowed to file further documents which are the same as the ones filed in court in the year 2012, save that the entries in the Green Card in the current Application have been tempered with to reflect the applicant as the registered owner of the suit property.

3. I have considered the Application and the rival submission made. In the case of **Moses Waruri Gatimu –v- Douglas Mwai Machuru & Another (2018) eKLR**, Olao, J stated as follows:

**“The purpose of pre-trial conference provided under Order 11 f the Civil Procedure Rules is to confirm, inter alia, that the parties have exchanged the relevant documents that they will adduce as part of their evidence. The rules however do not bar a party from adducing additional evidence that was not filed earlier. In my view, and guided by the provisions of Article 159 (2) (d) of the Constitution, the court can allow a party to adduce additional documentary evidence particularly where no prejudice will be caused to the other party. Each case must be considered on its own peculiar circumstances taking into account all the factors including the stage at which the trial has reached. In this case, the Plaintiff had not even finished testifying when the objection was raised. It is always in the best interest of justice that parties be allowed to place before the court all the evidence available so long as it is relevant. This is because the main duty of the court is to do justice to the parties. At the same time however, the court must be vigilant and guard against parties who attempt to steal a match on their adversaries in circumstances where such new evidence cannot be adequately rebutted. After all, Article 50 (1) of the Constitution guarantees all persons a fair hearing and there can be no fair hearing if one party is ambushed late in the trial with new evidence.”**

4. In the instant case, the documents sought to be introduced are said to be the same as the ones filed in court in the year 2012. They are therefore not new evidence, save that some entries in the Green Card have been tempered with. The court however, takes note that such discrepancies can be subjected to cross-examination and their authenticity tested. The court further notes that the 2<sup>nd</sup> Defendant who has opposed the Application is yet to give his evidence. In my view, no prejudice will be occasioned him as he can also refer to the documents when he or his witnesses give evidence.

5. Being guided by the provisions of Article 159 (2) (d) of the Constitution and being persuaded by the decision in the above case, it is my

view that the 1<sup>st</sup> Defendant can be allowed to adduce the additional evidence. In my view, no prejudice will be caused to the other parties by the introduction of the documents as they will have an opportunity to cross-examine the witness on the same. There is therefore room for the other parties to test their worth in cross-examination. It is also the opinion of the court that a litigant should not be barred from laying all he has in terms of documents before a court of law in furtherance of his case in a situation where the other side can be compensated by way of costs. Moreover, the reason given for failure to file the documents within the time that was granted by the court has been satisfactorily explained.

6. In the result, I find merit in the Notice of Motion dated 7<sup>th</sup> October 2019 and the same is allowed.

**7. DATED, SIGNED and DELIVERED at MOMBASA this 20<sup>th</sup> day of February 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mutugi holding brief for Mrs Umara for Plaintiff.

Olwande holding brief for Dr. Kuria SC for 1<sup>st</sup> Defendant

Ms. Mwainzi holding for Oddiagga for 2<sup>nd</sup> Defendant & for Siminyu 3<sup>rd</sup> Defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**