



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL SUIT NO. 10 OF 2007

JOSEPH MUTUURA MUGAMBI.....PLAINTIFF

VERSUS

RUTERE MWIRIA & 20 OTHERS.....DEFENDANTS

AND

JOHN MUNENE MUTURA.....APPLICANT

RULING

1. This matter came up for hearing on 25.3.2019 when defence counsel indicated that they intended to call 8 witnesses orally as the defence was denied a chance to tender evidence or to put in statements vide the court's ruling of 11.4.2018.
2. This application was opposed by plaintiff's counsel who averred that under order 7 rule 5 of the Civil procedure Rules, a defendant is required to attach their statements of witnesses and documents they intend to rely on. Plaintiff avers that the rule is coached in mandatory terms. It is averred that defendants filed their defence including the amended defence with counterclaim (on 26.9.2014) without complying with the aforementioned rule.
3. It is also averred that the counterclaim was filed contrary to provisions of order 4 rule (1) (5) of the Civil Procedure Code which requires that where there is a counter claim, an affidavit verifying the correctness of the pleadings be filed. It was stated that what was availed is an amended verifying affidavit signed by 1st defendant and there is no written authority by the co-defendants.
4. It is further argued for the plaintiff that the provisions of order 4 and 7 of Civil Procedure Rules came to be in order to cure some mischief. In particular, it was envisaged that there would be no trial by ambush.
5. It is averred that to allow defendants to give their evidence would amount to killing the provisions of order 7 rule 5.
6. The rejoinder made by defence is that it is the court which ordered that defendants would testify but they would not produce their documents and that this order was made on 11.4.2018.
7. It was also argued that defendants had difficulties in obtaining some documents which were in various institutions and some were with the plaintiff. It is also averred that judicial service to society should not be pegged on technicalities and that judicial service is a fact finding mission.
8. I have weighed all the issues herein and I have keenly gone through the record. Nowhere in the proceedings of 11.4.2018 including the ruling delivered on that day did this court order defence to tender their evidence without documents as is alleged by defence.
9. As to whether the defendants would be allowed to testify or not, I pronounced myself on this issue in the ruling of 27.9.2017. For clarity, I find it necessary to recapture some of the content therein;

“I am of the view that the orders given on 27.7.2015 were a warning to defence, that the case would proceed notwithstanding their non-compliance I find that if defendants, 6 of them were to be allowed to testify, it would amount to trial by ambush.....My conclusion is that only witnesses whose statements were filed as at 27.7.2015 would be allowed to testify and only documents filed by this date will be produced.....”

10. The ruling was clear and I will not purport to determine the issue all over again. The upshot of my findings is that the defendants and their witnesses shall not be allowed to tender evidence. Having said so, I will not go into the issue as to whether their pleadings, are properly

on record or not.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 15TH MAY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mutungu for defendant

Makena holding brief for Murango Mwenda for plaintiff

Plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE