



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 86 OF 2013

SYLVIA MARIA HALLAL-WEISS..... PLAINTIFF

VS

RASHID ABDALLA MWAMZUNGU.....1ST DEFENDANT

REANATE WOLF WIEN.....2ND DEFENDANT

REGISTRAR OF LANDS (KWALE COUNTY).....3RD DEFENDANT

RULING

(Application seeking orders to direct the police to avail to the plaintiff a forensic report and for the plaintiff to be allowed to rely on it in evidence; application coming after the plaintiff had closed her case; rules of procedure prescribing that evidence needs to be presented in advance; no indication of whether this report exists, and why the plaintiff could not ask for it earlier; court not persuaded to exercise its discretion in favour of the plaintiff; application dismissed)

1. The application before me is that dated 30 January 2020 filed by the plaintiff. The principal order sought is in prayer (2) of the application which seeks the following :-

(ii) With the leave of the court the honourable Judge be pleased to issue an order directing the OCS Diani Police Station to provide the applicant with a copy of the forensic signature examiner's report which is in his possession to enable the same be filed in this matter which will also assist the court to arrive in making a true and just decision in this matter.

2. The application is opposed.

3. To put matters into context, this suit was commenced through a plaint that was filed on 6 May 2013, and which was later amended. At the time that the suit was filed, the applicant was represented by counsel, but she is now acting in person. The original plaint was against two persons, namely Rashid Abdalla Mwamzungu and Reanate Wolf Wien, the 1st and 2nd defendants respectively. The plaintiff pleaded that she orally agreed with the 2nd defendant, who she states was her friend, to purchase the land parcel Kwale/Ukunda/4512. She contends that she solely paid the purchase price which was 6000 Euros, and registered the land in her name and that of the 2nd defendant in equal shares. She pleaded that she subsequently, single handedly, financed the development of a residential house on the land at the cost of 40,000 Euros. They lived together with the 2nd defendant in the house but she later moved out after the 2nd defendant married the 1st defendant. She has pleaded that it was agreed that she would be refunded her 50% share of the suit property. It is pleaded that the defendants requested her to convey her 50% share to the 1st defendant to hold it in trust, and to enable the defendants use the title to secure a loan, which would enable them run a business and refund the plaintiff her 50% share. She demanded her share which was neglected. In her suit she inter alia wants a declaration of ownership of a 50% share in the suit land. The original plaint was later amended to include the Land Registrar, Kwale as the 3rd defendant. The amended plaint adds that the property was fraudulently transferred to the 1st defendant with the connivance of the 3rd defendant.

4. The matter proceeded for hearing on 23 January 2018 when the plaintiff gave her evidence in chief. She was cross-examined on 3 October 2018 and she closed her case. The case was then adjourned for defence hearing as it was said that the 1st and 2nd defendants are in Austria and could not be able to attend court. Before the case could proceed for defence hearing, this application was filed.

5. The application is supported by the affidavit of the applicant. She has averred inter alia that her amended plaint cites fraud and that the matter was reported to Diani Police Station vide OB NO. 27/27/2016. She has stated that her List of Documents cites "with the leave of the court any other documents could be produced". She has deposed that it will be prudent for this court to allow the forensic signature

examiner's report to also be filed in this matter, following the allegations made, and that the report will shed more light in the case.

6. The application is opposed by the 1st and 2nd defendants who have filed Grounds of Opposition. Inter alia, it is averred that the case went through pre-trial after which the plaintiff testified and closed her case. It is urged that she is now estopped from asking to be assisted in acquisition of new evidence.

7. Both the plaintiff and counsel for the 1st and 2nd defendants filed written submissions, which I have considered.

8. What I understand the plaintiff to be asking for in this application is an order to be provided with a forensic report, which she alleges to be with the police, and for leave to use it in evidence. I have some problems with the orders sought. First, I have no evidence of an existence of a forensic report. I do not want to issue orders in vain. Secondly, the case went through pre-trial without such a document being disclosed. It is not in the plaintiff's list of documents and it was never referred to in her evidence. The plaintiff closed her case without making any reference to such a document, and in fact, if it were not that the defendants were not present, the whole case by now would have closed.

9. The Civil Procedure Rules, 2010, prescribe that evidence be presented in advance before trial commences. Indeed, on the part of the plaintiff, under Order 3 Rule 2, it is a requirement that documents and witness statements be filed together with the plaint. With the leave of court, such documents must in any event, be availed at least 15 days prior to the pre-trial conference as noted in the proviso to Order 3 Rule 2. The Court certainly does have discretion to allow the late production of additional evidence but such discretion must be exercised judiciously. For one, good reason must be provided as to why such document was not made available early in the trial.

10. In the case at hand, I am not persuaded to exercise my discretion in favour of the plaintiff, for as I have indicated, I do not know if such document exists, and I would not wish to exercise my discretion on something that I have not set my eyes on. If at all such document exists, it has not been disclosed by the plaintiff when this document was prepared, and why it could not be listed, or requested for, or made available, earlier in the proceedings, before the plaintiff testified and closed her case. There are simply too many gaps in the application of the plaintiff to move me to exercise my discretion in her favour.

11. I really do not see the point of saying much for I am not persuaded that this application is merited.

12. I therefore dismiss this application with costs to the 1st and 2nd defendants.

13. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF MAY, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.