REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 46 OF 2011

SAMWEL KIPTOO ROP.....1ST PLAINTIFF

MOSES KIBIWOTT LIMO.....2ND PLAINTIFF

VERSUS

BEATRICE NAKHUMICHA KHAOYA.....1ST DEFENDANT

PATRICK KOOKO KALENDA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR

TRANS-NZOIA DISTRICT.....3RD DEFENDANT

HENRY MUTAMBO WEPUKHULU.....4TH DEFENDANT

RULING

1. On the **11/3/2020 Mr Wanyonyi** for the 2nd defendant made an oral application seeking that leave be granted to the 2nd defendant to call one **Esther Chebet** as a witness and to file and serve witness statements on her behalf.

2. Prof. Sifuna, for the 1st defendant, naturally, and **Ms. Tigoi** for the 3rd defendant supported the application.

3. Mr. Arusei for the plaintiff, objected to the application on the grounds that pleadings closed long ago; that the proposal to call the said witness amounted to sealing of loopholes in the defendant's case which would prejudice the plaintiff and that though the first defendant had listed the said *Esther Chebet* as a potential witness no witness statement signed by her was filed. Though Mr Arusei had at one point struck a conciliatory note by intimating that the witness could be called by the 1st defendant who had included her name in the list of witnesses he later beat a retreat and opposed the same and I consider his last opinion as his true opinion on the matter.

4. Mr. Sambu for the 4th defendant opposed the application on the same grounds set out by Mr Arusei and added that exchange of documents should be done within the time provided before the hearing, and that allowing the filing of a statement at the present stage in these proceedings may prejudice the rest of the parties.

5. Mr Wanyonyi's response to the grounds of opposition above is that at the time of the filing of the list of

documents by the 2nd defendant he never thought that Esther Chebet was a crucial witness.

6. After all the above altercation Professor Sifuna appearing for the 1st defendant compounded the issue by applying that he be allowed to file a statement of the said *Esther Chebet* into the record. Mr Wanyonyi naturally supported the application and Ms Tigoi was of the same opinion. Mr Arusei and Mr Sambu opposed the application on the basis of the grounds they had earlier given above.

7. The name of one *Esther Chebet* appears in the list of witnesses filed by the 1st defendant but no statement signed by her is in the court record. This court is now certain that at one time during the preparation of documents she was considered by the 1st defendant, and certainly not by the second defendant, to be a crucial witness in this suit. Whatever occasioned the omission to file her statement is not known.

8. I note that as stated by Prof Sifuna the hearing of the defence case has not begun. This court has discretion to allow the calling of any person as a witness in proceedings if it deems him or her a proper witness in a matter. That witness does not have to be a witness for either of the parties.

9. This court has noted the manner in which the proceedings herein have progressed, it has been the plaintiff's evidence that the 4th defendant purchased land from Esther Chebet in **1991**. The 4th defendant corroborated this evidence. There is no indication of the nature of evidence that the said Esther Chebet will give if she was allowed to appear in court and testify.

10. Proper preparations for hearings is a necessity in our judicial system an indeed there are Civil Procedure Rules that have been enacted and, as long as they are strictly adhered to, are meant to accord each and every litigant a fair hearing, a level ground so to speak.

11. Ordinarily, parties are supposed to confirm that they are ready for hearing before the commencement of the plaintiff's case. Normally, this confirmation is taken down at a mention of the suit.

12. The main purpose of the **Civil Procedure Rules** aforementioned is to avert any attempts at ambush of any party to the proceedings.

13. Under **Order 3 Rule 2,** when filing suit, a claimant needs to file a Verifying Affidavit, list of witnesses, statements of witnesses (excluding expert witnesses), and copies of documents to be relied upon at the trial

14. Under **Order 7 Rule 5** the defendant is required to file his defence together with copies of documents that he wishes to produce and also any statements of witnesses that he desires to call at the hearing. **Order 7 Rule 5** provides as follows:

"The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d)copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11."

15. Statements or documents not supplied at the filing stage may be supplied later but only with the leave of the court, but they must be availed at least **15** days before the pre-trial conference contemplated in

Order 11 Rule 7.

16. Allowing the statements of witnesses or any other documents after the plaintiff's case has been closed may often lead to a lingering feeling of unfairness and possibly have the deleterious effect of protracting the hearing perchance the plaintiff determines that he needs apply to reopen his case to recall his witnesses, or call fresh witnesses, to counter the new evidence from the defence.

17. It is hardly a desirable consequence especially where efforts are being made to clear our judicial system of a great backlog of old cases, this nine year old case being one of them. However it is not uncommon to find such applications being granted by the court for good reasons.

18. In the case of **Johana Kipkemei Too V Hellen Tum [2014] eKLR E&L NO. 975 OF 2012 (*Formerly HCC 44 of 2012)*** Munyao J observed as follows:

> **"There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.**
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> **The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules."**

19. Therefore, the court in the **Johana Kipkemei Too case** (supra) was emphatic that there is no hard and fast rule forbidding the granting of leave to a party to adduce additional evidence, that was not furnished to the other party as provided under the rules and that such an application must be considered on a case by case basis and determined on the basis of the prevailing circumstances.

20. In the said **Johana Kipkemei Too case** where the plaintiff had closed his case and the defendant testified before applying to call three more witnesses for the defence the court, while declining the application, observed as follows:

> **"The plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the plaintiffs, if I am to allow the defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the plaintiffs and will violate the provisions of Article 50(1) of the Constitution."**

21. In the instant case the plaintiffs have closed their case and the 4th defendant who seems to admit that he sold the plaintiff's father land has also testified. The distinction between this case and that of **Johana (supra)** is that the main defendants in the matter, that is the 1st and the 2nd defendants have not given evidence.

22. However in my view the plaintiffs closed their case without knowledge of what may have been contained in the witness statement of *Esther Chebet* which the 1st defendant had intended to file before she was derailed by unknown circumstances. No clear reasons have been stated to the court to justify the

non-filing of that statement by counsel for the 1st defendant.

23. Further, it is not counsel for the 1st defendant who had listed the said *Esther* as a potential witness who made the first application for her to be called as a witness and that her statement be allowed into the record but counsel for the 2nd defendant, a party who had not listed the said *Esther* as a potential witness. In this regard I find it difficult to take the application by Prof Sifuna, having been made only as a supplementary to Mr Wanyonyi's application, seriously. It is clear that Mr Wanyonyi's client had not from inception considered the said *Esther Chebet* as a potential witness in his case before the date of that oral application.

24. In the case **Pinnacle Projects Limited V Presbyterian Church Of East Africa, Ngong Parish & Another Kajiado Civil Case No. 21 OF 2017 [2019] eKLR** of where a witness statement was sought to be produced after the plaintiff had closed his case, the court (Nyakundi J) also observed as follows:

> **"In terms of this doctrine of discovery and disclosure there is no question an inquiry as to the diligent, duty of care or what amounts to unreasonable delay are matters that must weigh heavily upon the court exercising discretion in one way or another dependent upon the circumstances of facts of a particular case."**

25. I must also set out the Supreme Court's dicta in the case of **Raila Odinga & 5 Others v IEBC and 3 Others 2013 eKLR** where it was stated 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 no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics 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 of the new material intended to be provided 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, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."***

26. The dicta by the Supreme Court in the **Raila case (supra)** as to the *nature* and *magnitude* of the additional evidence intended to be produced must guide this court in this matter for the reason that the application made by Prof Sifuna and Mr Wanyonyi are oral and no draft affidavit or statement of the said *Esther Chebet* was exhibited to give the plaintiffs an inkling of the evidence she was intended to come and give before court. Such a draft would have enabled the plaintiff's counsel to determine whether to oppose the applications or not.

27. In the **Pinnacle Projects Limited case (supra)** there was no indication that the witness statement was tabled before the court and availed to the plaintiff as the application was being made. Nevertheless the court agreed on the need to consider the weight and nature of the evidence intended to be called at such a stage in the proceedings, and observed as follows:

> **"When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law.**
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> **In the instant case although the plaintiff has closed its case and (it) is time for the defendant to answer both of them are on a mission for the quest of administration of justice. There is no**

greater duty for the court than to deliver substantive justice as provided for under Article 159 2(d) at the end of it all."

28. The court in the **Pinnacle Projects Limited** case allowed the application but not without alluding to the possible occurrence in that case of the deleterious consequences of allowing such an application as mentioned earlier in this ruling.

29. As I have already stated this is one of the oldest cases in this station and the 1st and 2nd defendants having filed their respective defences in **2011**, have had ample opportunity to review the record and apply formally for inclusion of the said witness' statement over a period of **8** years. The inordinate delay in doing so has not been explained by the 1st and 2nd defendant. Litigation must come to an end and this principle can not be upheld by allowing the applications made by the two defendants. Rather the granting of those applications may delay justice further in this suit.

30. In my view, part of the explanation for the opposition to the calling of a further defence witness may lie in the fear of the unknown. It was the counsel's choice in risking to make an oral application without any drafts of the supposed evidence. It is not the task of this court to attempt to guess, and indeed in the absence of such a draft witness statement it is not possible for this court to gauge, how much prejudice such evidence may occasion the plaintiffs in this case who never expected it at the time of confirming the suit for hearing, tabling their evidence or at the time of closing their case.

31. Consequently in this particular case this court is of the view that there is possibility that permitting the 1st and 2nd defendant's application for leave to file the witness statement of *Esther Chebet* and call her as a witness would occasion the plaintiff a certain amount of prejudice and render the protection of the right to a fair and impartial hearing accorded to the plaintiffs by **Article 50(1)** of the constitution to be impliedly vacated. I therefore decline the two applications. Hearing will proceed on the basis of the witness statements on the record.

It is so ordered.

Dated, signed and **delivered** at **Nairobi via Teleconference** on this **14th** day of **May, 2020.**

MWANGI NJOROGE

JUDGE.

Ruling read in the presence of:

Hon Mercyline Lubia, DR

N/A for the plaintiffs.

N/A for the defendants

MWANGI NJOROGE

JUDGE.

14/5/2020.