



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 104 OF 2017

SOLOMON MAGANA KAMITI (Suing as Father and Administrator of the Estate of
the late **DAVID GIKONYO KAMITI**.....**PLAINTIFF**

VERSUS

1. MOSES KWERI KINYA.....**1ST DEFENDANT**

2. PETER KIMEMIA NJOROGE.....**2ND DEFENDANT**

3. JOHN KURIA NJOROGE.....**3RD DEFENDANT**

4. BILHA NGONYO ISAAC.....**4TH DEFENDANT**

5. JOSEPH KITSAO KARISA KATSOMA

IRUNGU MWANGI KABUTSA

GUNI BATI GUNI (Sued on behalf of **MAISHA**)

MAPYA SELF HELP GROUD.....**5TH DEFENDANT**

6. THE REGISTRAR OF LANDS, MOMBASA.....**6TH DEFENDANT**

7. THE ATTORNEY GENERAL.....**7TH DEFENDANT**

RULING

1. By this Notice of Motion dated 16th May 2019, Solomon Magana Kamiti suing as the Father and Administrator of the Estate of David Gikonyo Kamiti (the Plaintiff) prays for orders as follows:-

- 1. That the Honourable Court be pleased to expunge the letter of consent dated 2/8/1995 issued to Nicodemus Kenga Kashuru by Maisha Mapya Self Help Group attached in the Plaintiff's Witness Statement dated 4/5/2017 and marked Dex5;**
- 2. That the Plaintiff be allowed to recall PW1 to produce the letter of consent dated 19/6/1999 issued to the late David Gikonyo Kamiti by Maisha Mapya Self Help Group as the letter of consent intended to be produced and be admitted as evidence in this Honourable Court;**
- 3. That in the alternative, the applicant be permitted to file a further list of documents including the letter of consent dated 19/6/1999; and**
- 4. That the costs of this application be provided for.**

2. The application which is supported by an affidavit sworn by the Plaintiff's Advocate on record Tukero Ole Kina is based on the grounds inter alia that:-

i) The letter of consent dated 1/8/1995 issued to Nicodemus Kenga Kashuru by Maisha Mapya Self Help Group attached in the Plaintiff's Witness Statement dated 4/5/2017 and marked as Dex 5 was erroneously attached; and

ii) The Plaintiff's intention was to attach the letter of consent dated 19/6/1999 issued to the late David Gikionyo Kamiti by Maisha Mapya Self Help Group as the relevant document to be produced and be admitted as evidence.

3. The application is opposed. In a Replying Affidavit sworn by the 5th Defendant Guni Bati Guni and filed herein on 24th June 2019, he avers that the application is an afterthought and meant to help the applicant build his case by ambushing the Respondents at the very final stage.

4. The 5th Defendant avers that this suit was filed on 5th May 2017 under Certificate of Urgency and parties went for pre-trial. All parties have tendered their evidence and this case is awaiting final submissions.

5. The 5th Defendant further avers that the Court does not have powers to expunge from its record, an exhibit which has been properly produced by a party, more so where it is the same party that produced it that is the one seeking to expunge the exhibit. The Defendant further asserts that no basis has been laid as required under the Evidence Act or any other written law to warrant expunging the same from the record.

6. The 5th Defendant avers that during his testimony in Court, the Plaintiff neither stated that he had no knowledge of the exhibit that he now seeks to expunge nor did he talk about the one he now seeks to produce. The Defendant further asserts that the document sought to be produced has not been in existence and that recalling the Plaintiff will greatly prejudice the Defendants who have already testified and have been cross-examined.

7. I have considered the Plaintiff's application and the response thereto by the 5th Defendant. The 1st, 2nd and 3rd Defendants rely on the 5th Defendants' affidavit and support the position taken therein. I have also benefited from the submissions and authorities placed before me by the Learned Advocates for the parties.

8. The issue before me is when and under what circumstances in the course of the trial, a party may be allowed to produce new evidence in support of its case. Order 18 Rule 10 of the Civil Procedure Rules provides that:-

"The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him as the Court thinks fit."

9. A similar provision is found in Section 146(4) of the Evidence Act which provides that:-

"The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

10. As it were the general tenor of the Civil Procedure Rules is that parties ought to disclose their case at the very earliest stage to avoid ambush, delay and accumulation of costs. That is why the Plaintiff is required to file a verifying affidavit, list of witnesses, statements of witnesses and copies of documents to be relied upon at the trial under Order 3 Rule 2 of the Rules.

11. A similar requirement is imposed on a defendant when filing the defence and counterclaim, if any under Order 7 Rule 5 of the Rules. Before the pre-trial conference, written statements may be filed with the leave of the Court at least 15 days prior to the pre-trial conference under Order 11 of the Rules. After the pre-trial conference, the matter is set down for hearing as it is expected that at the pre-trial conference, all the parties will have made full disclosure so that either party knows the case that they will face at the trial.

12. The provisions of Order 18 Rule 10 aforesaid however grants the Court discretion to allow the parties to call further witnesses or to produce further documents. This provision as well as that of Section 146 of the Evidence Act are in my view intended to ensure that each party is afforded a fair trial as guaranteed under Article 50(1) of the Constitution.

13. Considering whether to allow additional evidence filed outside the contemplation of the Rules in a Presidential election Petition in ***Raila Odinga & 5 Others –vs- IEBC & 3 Others, SCK Presidential Petitions No. 3, 4, and 5 of 2013(2013) eKLR***, the Supreme Court adverted to the applicable principles 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 is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omission, or inadvertence, 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 and extent of the new material intended to be produced 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 admission of additional evidence."

14. In the instant matter before me, the Plaintiff had in actual fact filed a List of Documents and all parties herein had testified and closed their cases. The Plaintiff however asserts through his Counsel on record that in the course of the preparation of the List of Documents, the Counsel who was also handling a separate case before the Chief Magistrates Court Malindi being **Malindi CMCC No. 169 of 2009; Solomon Magana Kamiti –vs- Nicodemus Kenga Kashuru** erroneously attached a Letter dated 2nd August 1995 issued to one Nicodemus Kenga Kashuru who was the Defendant in the matter before the Chief Magistrate’s Court. It is the Plaintiff’s case that his intention was instead to attach the Letter of Consent dated 19th June 1996 issued by the 5th Defendant/Respondent herein to the late David Gikonyo Kamiti.

15. Going by the applicable principles alluded to by the Supreme Court in **the Raila Odinga Case (Supra)**, I am persuaded that despite this late stage in the proceedings, the Plaintiff merely intends to introduce a single document, a letter, to which the Defendants may respond effectively and without too much use of resources in terms of the amount of time required or otherwise.

16. In the premises, I am persuaded that there is merit in the application and I allow the same in terms of Prayer Nos. 2 and 3 thereof.

17. The Defendants shall however have the costs of this application.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE