



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 14 OF 2019

CYRUS MUCEBIU IRUNGU.....PLAINTIFF/RESPONDENT

VS

ALEXANDER MUGAMBI MIRITI.....1ST DEFENDANT/APPLICANT

MUKURA JAMES CHACHA.....2ND DEFENDANT/RESPONDENT

LUCY WANJERI CHACHA.....3RD DEFENDANT/RESPONDENT

JAMES MWANGI KAMAU.....4TH DEFENDANT/RESPONDENT

TERESIA WANGUI NG'ANG'A.....5TH DEFENDANT/RESPONDENT

GEORGE KANGATA MWANGI.....6TH DEFENDANT/RESPONDENT

ALLAN PETER KARANJA.....7TH DEFENDANT/RESPONDENT

THE LAND REGISTRAR, MURANGA.....8TH DEFENDANT/RESPONDENT

THE HON ATTORNEY GENERAL.....9TH DEFENDANT/RESPONDENT

RULING

1. The application before me is dated the 7/7/2020 by the Applicant seeking the following orders;

- a. Leave to file a further list of documents out of time.
- b. Costs of the application be in the cause.

2. The application is based on the grounds set out as follows: the further list of documents were not in possession of the Applicant when the matter came up for pretrial; the documents are crucial in the determination of the suit; the documents show how the suit land was transferred to the 1st Defendant by the Plaintiff; no prejudice shall be suffered by the Plaintiff if the said application is allowed.

3. The application is supported by the affidavit of the Applicant who deponed and reiterated the grounds above and in addition added that he and the Plaintiff entered into an agreement of sale in 1990 in respect to the sale of the suit land and in support of this averment annexed an agreement of sale marked as AMM1. That Land Control Board consent was duly applied and obtained. The same has been annexed as AMM2 and AMM3. Further he deponed that he had misplaced the documents when the suit was filed and only retrieved them after the closure of the pretrial conference.

4. The application is opposed by the Plaintiff through a replying affidavit filed on the 14/9/2020. He maintained that the entire application is inter alia bad in law; incompetent; an abuse of the process of the Court process, brought in bad faith and unmeritorious to say the least.

5. Further that the case was heard on pretrial on 4 occasions which afforded the 1st Defendant the chance to comply but failed to do so. That it is too late to now seek to produce the list of documents more so because the Plaintiff has already testified and will be prejudiced if the application is allowed. The 1st Defendant challenged the agreement of sale annexed by the Applicant and averred that the same differs from another one that the Applicant had relied on in Criminal Case No 17 of 2019 -Muranga – R Vs Alexander Muriti Mugambi, which agreement

is alleged to have been drawn by an Advocate in Nairobi while the agreement he seeks to produce in this suit is allegedly executed before an advocate in Embu. He contends that the agreements are forgeries.

6. In addition, the Plaintiff argues that the Applicant has not explained why he did not obtain the documents at the pretrial stage and further that he has neither shown when he did find the documents and where.

7. The 2nd – 9th Defendants did not oppose the application.

8. Parties through their advocates on record argued the application orally before me in Court. They reiterated the grounds relied in the supporting affidavit as well as the Replying affidavits respectively.

9. I have considered the application, the affidavit evidence and the oral arguments made by the Counsels in open Court and the key issue for determination is whether the application should be allowed.

10. It is on record that the suit was filed on the 10/5/19 and as alluded by the Plaintiffs' Counsel, pretrial was concluded on the 24/2/2020 and the suit was duly certified ready for hearing. By the consent of the parties the hearing date was fixed for the 12/3/2020. The Plaintiff testified on the 12/3/2020.

11. 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.

12. The above procedural law provides the list of the documents that must accompany the statement of defence. Some of the documents include copies of documents that the Defendant wishes to rely on his defence.

13. It is on record that the 1st Defendant filed inter alia a joint statement of defense on the 11/7/2019 together with a list of witnesses and list of documents as well.

14. On the 24/2/2020 the 1st Defendant confirmed to the Court that he had complied fully with Order 11 of Civil Procedure Rules and the suit was certified ready for hearing paving the way for the commencement of the hearing on the 12/3/2020. It is on record that the Plaintiff has testified although he is yet to close his case.

15. The Applicant has not given me good reasons why the list of documents were not filed prior to the hearing and in my view it amounts to an afterthought perhaps intended to steal a march on the Plaintiff. It is not enough to aver that he did not have in his possession the said documents. Good order requires that he gives details of how the same were obtained and when. The Applicant made cavalier assumptions before the Court.

16. Having said that it is my belief that a party who approaches the Court should be heard and am guided by the tenets of the provisions of Article 159 (2) d) which requires that justice be administered without undue regard to procedural technicalities. That said the Applicant must be sanctioned for flouting rules of procedure. It is clear that the Plaintiff was led to believe that the 1st Defendant had filed all his documents and prepared and presented his case based on what was on record. It cannot be said that he has not suffered prejudice. Indeed, he has, given that he has testified already.

17. To even the playing field, the 1st Defendant is condemned to pay throw away costs to the Plaintiff for late filing of the list of documents in the sum of Kshs 20,000/- payable within 14 days. In default the application shall stand dismissed and the parties will fix the matter for further hearing.

18. In the upshot subject to para 17 above, the application is allowed. The Plaintiff is granted leave to file any further documents within a period of 7 days upon service to controvert those of the 1st Defendant and recall PW1 if he so desires.

19. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF SEPTEMBER, 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ndegwa for the Plaintiff

1st – 9th Defendants: Absent

