



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 195 OF 2012

DAVID MUNGA MACHARIAPLAINTIFF

VERSUS

CHRISTOPHER M MWANGIDEFENDANT

RULING ON DIRECTIONS

(Plaintiff not filing list of witnesses and witness statements together with plaint; plaintiff allowed time to do so; no witness statements filed within the prescribed time or at all; no explanation given for failure to comply; paragraph 43 of Practice Directions of 25th July 2014 giving court power to dismiss suit for failure to comply with directions; without witnesses, plaintiff cannot prove his case; plaintiff's suit dismissed with costs)

1. This matter was commenced by way of plaint filed on 20 January 2011. The case of the plaintiff as pleaded is that he is the registered proprietor of the land parcel Bahati/Bahati Block 1/1432 and that the defendant started laying claim to it in the year 1987. It is averred that in August 2010, the defendant came to the land and demanded rent from the plaintiff's tenant on the premises. In the suit, the plaintiff asked for a declaration that the suit property belongs to him and for a permanent injunction against the defendant to stop him from interfering with the property.

2. The defendant filed appearance and defence which he later amended to include a counterclaim on 5 May 2011. He pleaded that he is the first registered proprietor of the property and denied possession of the land by the plaintiff. In his counterclaim, he asked for a permanent injunction against the plaintiff and costs of the suit.

3. On 9 June 2015 when the matter came before me for pre-trial, I noted that the plaintiff had not filed his list of witnesses and statements. I noted my surprise that despite the suit having been filed more than three years before, the plaintiff had not filed his witness statements as required by the Rules. I gave the plaintiff 30 days to compile all the required documents and reserved the discretion to strike out the suit if this was not done. I further directed that the matter be mentioned on 2 November 2015 to confirm compliance.

4. On 2 November 2015, neither the plaintiff and his counsel appeared in court. No list of witnesses and no statements of witnesses had been filed.

5. It is a requirement of the Civil Procedure Rules of 2010, that a plaint, at the time of filing, be accompanied by the documents to be relied upon at trial and a list of witnesses together with their statements. This is brought out by Order 3 rule 2 which is drawn as follows :-

Documents to accompany suit [Order 3, rule 2.]

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

- (a) the affidavit referred to under Order 4 rule1(2);*
- (b) a list of witnesses to be called at the trial;*
- (c) written statements signed by the witnesses excluding expert witnesses; and*
- (d) copies of documents to be relied on at the trial including a demand letter before action:*

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

6. This suit is not a small claim and therefore statements of witnesses are required to be filed together with the suit. It will be observed that a party may be granted leave to furnish statements, if not filed together with the suit, at least 15 days prior to the trial conference. A date for pretrial conference had earlier been given on 6 October 2014 and as I have mentioned, the pretrial meeting was held on 9 June 2015. The 15 days window for filing of statements late had already passed. Despite being given additional time to file the list of witnesses and his witness statements, the plaintiff has failed to do so, and this is over 5 months since the order was given. There is no explanation given as to why the plaintiff has not complied with the court directions.

7. There is a reason why the Civil Procedure Rules were amended in 2010 to provide for a party to avail his witness statements and documents to the other party before hand. This is so that the defendant can see for himself what exactly he is intended to face. In our case, the defendant does not know what witnesses the plaintiff intends to call, and does not know what they wish to state. Clearly, the defendant is being prejudiced by the failure of the plaintiff to make his case ready for trial.

8. This is the Environment and Land Court, and there are Practice Directions issued by the Honourable Chief Justice, on the 25th July 2014. Paragraph 43 of the Directions provides as follows :-

43. Non-compliance with relevant Civil Procedure Rules, orders and or directions issued by a Judge, shall attract sanctions including but not limited to imposition of costs, fines, striking out of pleadings, the dismissal of a suit and/or meting out punishment prescribed by the Environment and Land Court Act or any other Statute as the court may deem fit bearing in mind the overriding interests of justice.

9. In our case, without the plaintiff availing any list of witnesses and any witness statements, the only assumption one can make is that he does not wish to call any witness, including himself. Without witnesses, I do not see how a litigant can present his case as he will have no way of tendering evidence before court. In essence the plaintiff in the circumstances herein is incapable of proving his case. That being the position, the fairest order that I think fits the situation herein is for the dismissal of the plaintiff's suit with costs.

10. Owing to the foregoing, the plaintiff's suit is hereby dismissed with costs to the defendant. The defendant is at liberty to list his counterclaim for hearing.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 3rd day of November 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of : -

Mr. Hari Gakinya for plaintiff

Mr Rubua Ngure for defendant

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU