



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 32 OF 2018

NILESH KUMAR KRISHNAKUMAR LAKHLANI (Suing as a Legal

Representative of the estate of KRISHNA KUMAR SHIVALAL

alias KRISHNAKUMAR SHIVLAL LAKHLANI deceased).....PLAINTIFF

VERSUS

PRAVIN CHANDRA SHIVALAL LAKHLANI.....DEFENDANT/APPLICANT

AND

EQUITY BANK LIMITED.....INTERESTED PARTY

RULING

1. This matter relates to the Notice of Motion dated 14/01/2020 brought under ***Section 3, 3A & 63(e) of the Civil Procedure Act, Article 50 (1) and 159 (2) (d) of the Constitution of Kenya 2010 and all other enabling provisions***. The applicant seeks amongst other orders leave to file supplementary list and bundle of documents; and that the court to recall any witnesses as it may deem fit.
2. The grounds in support of the application are set out in its body and the supporting affidavit of David Muthee Michuki, advocate of the High Court of Kenya, sworn on 14/01/2020. It is contended that the applicant has obtained additional documents and statements which were not available and are crucial in assisting the court reach a just determination. These documents were filed in ***Meru CM Succession Cause No. 146 of 2018*** and are well within the plaintiff's knowledge which he ought to have discovered at the pretrial stage. No prejudice will be occasioned to the plaintiff since he is aware of the documents and he has a chance to comment on the same.
3. The application was opposed vide the replying affidavit of Carlpeters Mbaabu, advocate of the High Court of Kenya, sworn on 22/01/2020. He deponed that the application ought to be dismissed for it has no merit. That the applicant was privy of the documents prior to pre-trial directions, since the widow of the deceased who is his witness herein was an objector in ***Meru CM Succession Cause No. 146 of 2018*** since 20/08/2018. Moreover, the aforementioned witness lives in the same house with the defendant. Thus, the applicant has belatedly sought production of the documents which were filed in July and August 2019.
4. This matter was canvassed by way of written submissions. The applicant submitted that all the documents sought to be produced are part of ***Meru CM Succession Cause No. 146 of 2018***. The applicant was not aware of their existence. The plaintiff, who is the son of the deceased, has always been privy to and had custody of the said documents. Moreover, the plaintiff breached the duty of discovery for he was in custody of the documents relevant to this case.
5. The applicant has further submitted that this matter is part heard, but the proceedings are not well advanced hence it will not be prejudicial to the respondent.
6. The applicant relied on the cases of ***Desphal Omprakash v Habib Ali Mohammed & 4 others [2018] eKLR*** and ***Johana Kipkemei Too v Hellen Tum [2014] eKLR*** to support his submissions.
7. The respondent submitted that the relevance of the documents sought to be filed have not been explained. Moreover, the relief sought is a belated afterthought for on 07/03/2019, the applicant was to file further documents. They failed to comply with the time-lines and their documents were expunged from the record on 08/07/2019. Now the applicant seeks to circumvent the order. When the respondent testified and reappeared in court on 11/11/2019 for further hearing, there was no mention of the subject documents. The applicant was granted leave to reply to the specific statement which was filed by the plaintiff but without introducing additional evidence but he failed to do so.
8. The respondent contends that the application is an afterthought considering that the applicant was aware of the documents all along. He

relied on the case of Japhet Kirimi & 3 others v Rosemaru Karoki Rutere & another [2018] eKLR, Lornah Jebiwott Kiplagat v Esther Cheruiyot 5 others [2019] eKLR and Raila Odinga & 5 Others vs. IEBC & 3 Others, SCOK Presidential Petition no's 3, 4 and 5 of 2013 (2013) to support his submissions.

9. The issue for determination is *whether to grant leave to the applicant to file supplementary list and bundle of documents.*

10. Order 7 Rule 5 of the Civil Procedure Rules states as follows:

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

(a)

(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.

11. P. Nyamweya J in the case of Anne Mumbi Hinga v Gaitho Oil Limited [2013]eKLR, held as follows:-

“In addition I would like to add that the provisions of the Civil Procedure Rules are not cast in stone, and the court is enjoined by Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to ensure that in implementing the rules we dispense substantive justice, and ensure that there is just, expeditious, proportionate and affordable resolution of civil disputes. To this end this Court is given inherent power under section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice.”

12. In exercising this discretion the Supreme Court in the case of Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others [2013] eKLR expressed itself as follows on the issue of compliance:

“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 inadvertences 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.”

13. This is a case whereby the issue of introduction of additional evidence by the applicant/defendant came up on 8/7/2020 and after quite some lengthy submissions, counsel for the applicant addressed the court as follows **“we have now abandoned the bundle of 26.6.2019”**. However after the plaintiff has commenced his testimony, the applicant now claims he needs to introduce more documents which in essence is an ambush upon the respondent. Notwithstanding this reasoning, I find that the issue of allowing additional evidence should be considered on a case to case basis. For instance in the case of Japhet Kirimii & 3 others v Rosemaru Karoki Rutere & another [2018] eKLR, 3 witnesses had already testified and the case was quite old.

14. In the instant suit, I find that the documents sought to be introduced are documents already produced in another suit (the succession case) which are; an application, petition for grant of probate and accompanying documents, an affidavit and a limited grant. This material does not appear to be substantial. The respondent has also not rebutted the averment that he is aware of the said documents.

15. Accordingly, I am of the view that the application ought to be allowed and I proceed to give the following orders:

- a) The applicant is hereby allowed to introduce ONLY the four documents cited in his application dated 14.1. 2020.
- b) The respondent is at liberty to give further evidence in chief which touches on the new documents.
- c) The applicant/defendant is condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 9.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE