



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT MISC. NO. 53 OF 2005

FRANCIS GITHINJI KAROBIAPLAINTIFF

Versus

STEPHEN KAGENI GITAU.....DEFENDANT

RULING

Introduction

[1] This ruling relate to the Notice of Motion dated 28th February, 2014 filed on 04 March, 2014 and expressed to be brought under Article 50(1) and 159 of the Constitution of Kenya, Sections 1(A), 1(B) and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling laws. It seeks for leave for the Defendant to file and serve; 1) witness Statements of Duncan Nkonge Stanley and Mr. J.V. Otieno in this suit; and 2) a Further Supplementary List and Bundle of Documents and list of witnesses. It is also asking for costs of the application to be provided for.

[2] The application is supported by the affidavit of STEPHEN KAGENI GITAU and on the following grounds:-

1. **When the case came up for hearing on 6th November, 2013, the Defendant Applicant applied orally in court for the admission of the said witness but the court directed that a formal application be made.**
2. **Before making the formal application, reference was made to the pleadings where it was found that in paragraph 13 of the amended Written Defence, it averred that the Plaintiff took possession of the portion of one acre to be sold to him in early November, 1996, which averment was not denied or made an issue in the Plaintiff's list of issues.**
3. **The date of possession as stated by the Defendant as aforesaid, it was the Defendant's advocates considered opinion that for the sake of expeditious disposal of the suit and in order to save the time of the court, it was necessary to take out the application.**
4. **When the plaintiffs gave evidence in court on 26th February, 2014, he said that he took possession of the said portion of one acre in the year 1999 and denied that he took possession in November, 1996 as averred in the Amended Written Defence in consequence whereof it became necessary to call independent evidence to corroborate the evidence of the Defendant.**
5. **The Defendant's oral application for additional witness or witnesses to give evidence on**

- commencement of possession, having been opposed by the Plaintiff's advocates and after the Honourable trial judge having made reference to the ruling stated in ground 1 hereinabove, the court directed that this formal application be made, which has been done.
6. **The issue of commencement of possession by the Plaintiffs is important and any evidence tending to show when possession commenced is essential and ought to be given in the interest of fair and just determination of this suit. Procedural technicalities should not be invoked to defeat the objectives of the Civil Procedure Act spelt out in Sections 1A and 1B and the intent and spirit of the Kenya Constitution prescribed under Article 159(2) (d).**
 7. **The said DUNCAN NKONGE STANELY was an employee of the plaintiff from 14th August, 1996 to the year 2000 at the Plaintiff's home on the one acre piece of land along Mirema Drive, Roysambu, Kasarani, Nairobi County.**
 8. **The Defendant has also obtained new evidence in the form of a Survey Report by the said J.V. Otieno to proof that he did all that was humanly possible to effect the transfer of the one acre piece of land to the plaintiff contrary to the plaintiff's assertion that the Defendant was the cause of the delay.**
 9. **The interest of justice will be best served if the said witnesses are allowed to testify on behalf of the defendant.**

[3] **MR. WAMAE** for the defendant submitted that he was willing to have the survey report and the statement by J.V Otieno expunged from the application. Thereby, admitting the preliminary objection herein to that extent. He went on to state that on 9/6/2010 the Defendant filed amended defence. In paragraph 13A thereof, he pleaded that the plaintiff took possession of the one acre by November, 1996. The plaintiff alleged he took possession in 1999. The Plaintiff filed reply to original defence; that the defence had not pleaded that the plaintiff took possession in 1996. According to counsel for the Defendant, the conditions and agreement of sale by the Law Society of Kenya (LSK) were incorporated into the suit agreement. The LSK Conditions provided for obligations to parties on taking possession. Date of possession is important in this case and should either be agreed on or evidence be led towards that end. It is alleged that on 27/9/2012 Mabeya J ordered no further witness statements should be filed. But counsel urged that 'further witness statement' does not bar witnesses who were in the list of witnesses to file statements. In any event, Mabeya J later on gave the defendant liberty to apply to call extra witness. On 26/2/2014, similar liberty was extended to the Defendant by the Court. Fair trial demands that the Defendant should be allowed to call the proposed witness to testify on the issue of possession. Counsel was relying on Article 159(2) (b) and 40 of the Constitution. Counsel asked the court to dismiss the preliminary objection.

[4] **MR MURAGE** for the plaintiff submitted that the Defendant is trying to steal a match by introducing the statement before leave is granted. . Pre-trial took a while and eventually court (Mabeya J in September, 2012) ordered that no more statements should be filed due to the delay by the defendant. No reason has been advanced to show why the Defendant could not have filed the statements in good time. The only reason is that the evidence by plaintiff on 26/2/2014 on possession had taken them by surprise. That is not the issue. The original defence alluded to that. Order 2 Rule 12(2) of Civil Procedure Rules is clear – on joinder of issues after last pleading. They should have filed statements. In the affidavit filed in support of the application, the Defendant has been saying they need to file a witness statement but with no action. The Defendant has waited until the Plaintiff had closed his case.

[5] There is a possibility of this becoming a dangerous cycle for the Plaintiff can also ask for leave to file further witness statements after hearing their case. Order 7 Rule 5 talks of 15 days prior to pre-trial conference. Counsel relied on the preliminary objection and grounds of opposition. He asked the court to disallow the request.

COURT'S RENDITION

Prospects of the PO

[6] The preliminary objection was conceded to by Mr Wamae to the extent that the “survey report” and the statement by J.V. Otieno should be expunged from the record. I so order. I also order the “statement” by a Mr. Peter Ngugi Chege annexed to the application herein to be expunged from the record as it is not one of the documents for which leave is being sought. But and without rendering any credence to the allegation by the Plaintiff’s counsel that the said statement was aimed at influencing the court, I do not understand why it was annexed in the first place. The impugned documents shall be returned forthwith to the Defendant counsel.

Filing of witness statement

[6] Filing of statements by witnesses for the defence is governed by Order 7 rule 5 of the Civil Procedure Rules. The statements are supposed to accompany the defence at the time of filing, although, however, the court may grant leave for statements to be filed at least fifteen days prior to the trial conference under Order 11. I find the turn of events in this matter quite disturbing. First it is such an old matter but for one reason or other it is never ending. The Defendant has contributed greatly to the delay and his conduct is appealing for a sort of chastisement from the court. But again, the court is precluded from acting impulsively or reactively to an annoying state of affairs. The court must always be guided by the interest of justice and be eager to serve substantive justice- the great promise of the Constitution in Article 159 of the Constitution. However, I should be understood that Article 159 was not meant to aid defaulters on court orders. The Defendant was given time to file witness statements but he failed to do so in the due time given by the court.

Should Defendant receive aid by court?

[7] His conduct is a complete negation of the overriding objective of the law of attaining an expeditious, affordable, proportionate and just disposal of dispute. Intuitively, I should deny them an opportunity to file any other statement on account of their conduct. Nevertheless, the Constitution says something else, and as I stated earlier, I will decide this case purely on the basis of the desire to serve substantive justice not on the basis of the conduct of the Defendant which has been exemplary and admirable in the breach of court orders and all rectitude in expeditious adjudication of cases. No doubt the issue of possession is pleaded in paragraph 13 of the Amended Defence and has become such a hotly contested issue. The Plaintiff also gave elaborate evidence on the time when he took possession of the suit property, which makes it imperative for the court to receive all necessary evidence on possession in order to effectually and completely determine the issue. I have looked at the statement by DUNCAN NKONGE STANLEY and it is relevant to the issue of possession herein. That does not, however, guarantee its veracity or probative value in proving the issue of possession as that will depend on the result of examination of the said witness in court. I do not also think the Plaintiff will be prejudiced by allowing the said proposed witness to testify. Needless to state, the Plaintiff will have the opportunity to test the evidence and so will the court in its usual powers in receipt and admission of evidence. On that basis, I will allow the Defendant to file and serve the written statement by DUNCAN NKONGE STANLEY which is annexed to the affidavit in support of the application herein within 7 days of today. Should the Plaintiff find it necessary to recall the plaintiff or call a witness to speak to the contents of the statement by DUNCAN NKONGE STANLEY, he is hereby allowed do so; provided that if he intends to call a new witness, he shall file and serve a written statement of such new witness within seven days of being served with the statement of DUNCAN NKONGE STANLEY. The decision I have taken does not offend Order 7 rule 5 of the Civil Procedure Rules. When the Order is read in light of the Constitution, one would see that the discretion of the court under the proviso to Order 7 rule 5 should be guided by the dictates of the Constitution on the need to serve substantive justice in accordance with the circumstances of each case as opposed to plain reading of the said proviso independent of the facts. The rules applicable here are akin to those which govern admission of evidence in the interest of justice even after the case has been closed. But I should be clear that, there shall be no any other statement or statements by witness which shall be filed by any party save as permitted by this ruling. Litigation should have an end; a principle of justice which is so well settled that it cannot be called upon to justify its existence. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 16th July 2014

F. GIKONYO

JUDGE