



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO.103 OF 2017

(FORMERLY MACHAKOS ELC CASE NO. 116 OF 1998)

ESTHER KALUNDE MOKI.....PLAINTIFF/APPLICANT

-VERSUS-

REUBEN MUI IVUIDEFENDANT/RESPONDENT

R U L I N G

1. By her notice of motion application dated 27th September, 2019 and filed in court on 30th September, 2019, the Plaintiff/Applicant prays for: -

1. THAT the Plaintiff be granted leave to file a further list of documents, a further list of witnesses and further witness statements in view of the amended plaint dated 25/4/2019 enjoining the estate of Moki Ivui Nzei (deceased) as a party to the suit herein.

2. THAT the Plaintiff be granted leave to give further evidence and to recall her witness(es) who has/have already testified before calling her remaining witnesses, in view of the amended plaint dated 25/4/2019.

3. THAT costs of this application be in the cause.

4. THAT this Honourable Court do make such other and/or further orders as it may deem fit and just.

2. The application is predicated on the five (5) grounds on its face and is further supported by the affidavit of Esther Kalunde Moki, the Plaintiff/Applicant herein, sworn at Machakos on the 27th September, 2019.

3. Reuben Mui Ivui, the Defendant/Respondent, has opposed the application vide his replying affidavit sworn at Machakos on the 01st of October, 2019 and filed in court on 02nd October, 2019.

4. The application was canvassed by way of written submissions.

5. The Plaintiff/Applicant has deposed in paragraphs 2, 3, 4, 5 and 6 of her supporting affidavit that she has already testified and called one (1) witness, and is yet to call her remaining witnesses, that after giving evidence and calling one (1) witness, and with this Court's leave, she filed an amended plaint (dated 25th April, 2019) vide which the estate of Moki Ivui Nzei (deceased), of which she is the legal representative, has been brought into the suit as a party, that she has brought the suit herein on her own behalf and on behalf of the aforesaid estate, that in view of the aforesaid amendment of her pleadings (plaint), it is only fair that she be allowed to file a further statement, a further list of documents, and a further list of witnesses in order to place before Court the necessary evidence and material regarding the aforesaid estate's interest in the suit property, that it is also fair that she be allowed to give further evidence, in view of the aforesaid amendment, and to recall any of her witnesses who has already testified; to testify on the aforesaid deceased person's estate vis-a-vis the suit parcel of land, and the said estate's interest in the suit property.

6. On the other hand, the Defendant/Respondent has deposed in paragraphs 3, 4, 5, 6, 7 and 8 of his replying affidavit that it is quite clear from the records the Applicant is out to frustrate his case by adjournments and applications' noting that the suit is of more than 20 years old in court, that he has always been desirous to finish up the case but now the Applicant is trying to employ tricks and delay tactics, that the addition of new evidence, statements, re-testifying by the Applicant and her witnesses is unjustified as his Advocates had already cross-examined the Applicant and his witness and now they only want to cover short-comings in their evidence, that he is over 90 years old and it's only fair case proceeds from where it had reached so that he testifies and get judgement/closure to this case, that by opening up the case, it's

quite prejudicial to his defense, against rules of natural justice and inhumane, that the inclusion or addition of statements, witnesses is only to delay case and cover the Plaintiff short coming from what his Advocates have so far advanced in cross-examination and same should not be allowed.

7. The Plaintiff's/Applicant's Counsel cited **section 3A of the Civil Procedure Act** which provides that: -

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

8. Arising from the above, the Counsel was of the view that the orders sought by the Plaintiff/Applicant are within this Court's inherent power/discretion and are necessary for the ends of justice. The Counsel pointed out justice will be served if the application herein is allowed and that the Defendant/Respondent will not be prejudiced as he will have the liberty to also file further lists of documents and witness statements. The Counsel went on to submit that in addition, the Defendant/Respondent will also have the opportunity to further cross-examine the Plaintiff/Applicant and her witnesses upon their further testimony in court. It was also the Counsel's submissions that the Defendant/Respondent may further be compensated with costs.

9. On the other hand, the Counsel for the Defendant/Respondent in his submissions cited **Order 18 Rule 10 of the Civil Procedure Rules, 2020** which provides as follows: -

“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.”

10. The Counsel further cited **section 146(4) of the Evidence Act, chapter 80 of the Laws of Kenya** which provides: -

“(4) 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.”

11. Arising from the above, the Counsel submitted that the question that arises is whether the interests of justice will be served in allowing this application. The Counsel pointed out that the Plaintiff/Applicant has already testified and called her witnesses who were cross-examined on the 09th July, 2018. The Counsel further submitted that the Defendant/Respondent who is over 90 years old has not had the opportunity to testify. The Counsel added that the Plaintiff/Applicant wants to change the cause after she was cross-examined and it would be unfair to the Defendant/Respondent.

12. The Counsel drew the Court to **sections 1A, 1B and 3A of the Civil Procedure Act chapter 21** and in addition the Counsel cited the case of **Hunker Trading Company Ltd vs. Elf Oil Kenya Ltd [2010] eKLR**.

13. The Counsel was of the view that disposal of these proceedings has not been at all timely and it is time for the Defendant to be heard by this Court as he is yet to testify. The Counsel cited **Article 159(2) (b) of the Constitution** and submitted that justice delayed is justice denied and that the courts have an obligation to ensure steady litigation terminating within a reasonable time frame. The Counsel pointed out that it is on record that there is laxity by the Plaintiff/Applicant to prosecute this matter.

14. As for the right to fair trial, the Defendant's/Respondent's Counsel cited **Article 50(1) of the Constitution** that guarantees the right in question. The Counsel went on to submit the aim of this right is to ensure the fair administration of justice and adherence for one to have an opportunity to be heard by an independent tribunal or Court without any obstacles being laid on the way. The Counsel further relied on the case of **George Ngodhe Juma & Others vs. Attorney General [2003] eKLR**.

15. The Counsel concluded by urging the Court to dismiss the application and direct that the case proceeds from where it had reached.

16. I have considered the application and the rival submissions filed by the Counsel on record for the parties. In my view the only issues for determination are; whether or not the Plaintiff/Applicant should be allowed to file a further list of documents, witnesses and further statements in view of the amended plaint dated 24th April, 2019 enjoining the estate of Moki Ivui Nzei as a party to this suit and whether the Plaintiff should be granted leave to give further evidence and to recall her witnesses who have so far testified.

17. It is not in dispute that the Plaintiff's/Applicant's amended plaint dated 24th April, 2019 was allowed by the consent of the parties herein. This was after the Plaintiff and her witness Eliud Moki (PW1) had testified. The interest of justice would therefore demand that the Plaintiff/Applicant be granted leave to file a further list of documents, a further list of witnesses and witnesses' statements. It is fair and just that the Plaintiff/Applicant be granted leave to adduce further evidence and to recall the witnesses who have testified before calling her remaining witnesses. The Defendant/Respondent will not be prejudiced in any way as he will have the chance to further cross-examine the Plaintiff and the witnesses who have so far testified. In addition, the Defendant/Respondent will have corresponding leave to file and serve further lists of documents, witnesses and witnesses' statements, if need be. In view of the above, I will grant prayer (1) on condition that the Plaintiff/Applicant files the further list of documents, further list of witnesses and statements within 30 days from today failure of which she will be deemed to have forfeited her right to do so. The Defendant/Respondent will have corresponding leave to file and serve his list of documents, list of witnesses and statements within same number of days, if need be.

18. Prayer (2) of the application is also granted.

19. The Defendant/Respondent shall have costs of the application.

Signed, dated and delivered at Makueni via email this 27th day of November, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi