



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO.2242 OF 2007

MICHAEL SERGON.....PLAINTIFF

=VERSUS=

JOSEPH K KIGEN.....1ST DEFENDANT

SANNEX ENTERPRISES LTD.....2ND DEFENDANT

REBECCA KIBOWEN.....3RD DEFENDANT

JOHN SERGON.....4TH DEFENDANT

CHIEF REGISTRAR OF TITLES.....5TH DEFENDANT

REGISTRAR OF TITLES.....6TH DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 6th December 2019 in which the 1st Defendant/Applicant seeks leave of the court to rely on additional documents which are annexed to the application and for leave to call a document examiner. The Applicant contends that the documents are not new to the Plaintiff/Respondent as they are mostly documents which had been annexed to the various interlocutory applications filed in this matter as well as the ones which were filed in the case which had been filed in the lower court.

2. The Applicant further contends that there will be no prejudice suffered by the Respondent if the documents are admitted as the Respondent is yet to conclude his evidence.

3. The Respondent opposed the Applicant's application based on grounds of opposition filed in Court on 24th January 2020. The Respondent contends that the late filing of the documents amounts to shifting of goalposts and is departure from the defence before the court. The Respondent argues that the documents being introduced are new and that they are being introduced 13 years after the case was filed and that some of the documents being introduced differ from the ones already filed by the Applicant and are therefore doubtful.

4. The Respondent further argues that the introduction of the documents will greatly prejudice the Respondent and that they are an ambush against the Respondent.

5. I have considered the Applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties. The Respondent does not oppose the prayer for calling of an expert witness. What the Respondent opposes is the filing of additional documents. Therefore, the only issue for determination is whether the additional documents should be allowed.

6. I have looked at the documents which the Applicant seeks leave to be admitted. Most of the documents have been extracted from the pleadings which were filed in this case and those from Nairobi Chief Magistrate Civil Case No.8341 of 2007. The rest of the documents are correspondence which were exchanged between the Advocate for the Applicant and the Respondent. These documents are therefore not new to the Respondent and cannot be taken to be an ambush on the part of the Respondent or change of goalposts as claimed by the Respondent.

7. The Applicant said that some of the documents which are sought to be introduced were inadvertently omitted and the wrong documents were filed. A look at the documents filed in the Applicant's bundle which was filed on 7th June 2016 shows for example that the sale agreement which was filed is not dated and is not stamped unlike the one which is being introduced which is dated and stamped.

8. The Respondent is yet to be cross-examined. The Respondent was stood down the moment the Applicant's advocate noticed that the documents they had filed were wrong documents and they needed to file additional documents. In considering whether to allow an application for leave to file additional documents, the court should consider the prejudice the introduction of the documents will cause to the other party. In the instant case, the Respondent is yet to be cross-examined. The documents being introduced are not new to the Respondent. There will therefore be no prejudice if the documents are allowed.

9. The Respondent has raised the issue of some documents not being signed and others being signed. This is an issue which should not be raised now as that is an issue of admissibility or weight to be attached to the said documents. This was the holding in the case of **Attorney General Vs Torino (2020) e KLR** where an objection was raised on admissibility of documents. The court stated that such an issue would be considered in the appeal after time to extend filing of additional evidence had been granted.

10. In the case of **Mohamed Abdi Mohamud Vs Ahmed Abdullahi Mohamed & 3 Others (2018) e KLR**, the Supreme Court stated that in considering admission of additional evidence, that evidence must be directly relevant to the matter before the court and be in the interest of justice ; that the additional evidence would influence or impact upon the result of the verdict; that the evidence has a direct bearing on the main issue in the suit and that the court should consider the proportionality and prejudice of allowing the additional evidence.

11. Applying the principles as set out in the case of **Mohamed Abdi Mohamud Vs Ahmed Adbullahi Mohamed & 3 Others (Supra)** , I find that the Applicant's application is well merited . I allow the same as prayed.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 12th day of November 2020.

E.O.OBAGA

JUDGE

In the virtual presence of:-

M/s Kivindu for 1st Defendant/Applicant

M/s Kiget for Mr Arusei for Plaintiff/Respondent

M/s Chebet for 3rd and 4th Defendants/Respondents

Court Assistant: Hilda

E.O.OBAGA

JUDGE