



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 21 OF 2017

JAMES O. E. ONYANGO.....PLAINTIFF/APPLICANT

= VERSUS =

WENSLAUSE OCHOMO OKEMER.....DEFENDANT/RESP.

R U L I N G

1. For determination is the application dated 22/10/2020 brought under the provisions of order 10 rule 11 of Civil Procedure Rules and sections 3, 3A and 63(e) of the Civil Procedure Act. The orders sought are;

1) Spent

2) That the Plaintiff/Applicant be granted leave to file a Further List of Documents as annexed herein.

3) That an order be issued recalling DW1 for cross examination on the basis of the Documents as filed in the further list of documents annexed herein.

4) Costs of this application be in the cause.

2. The application is premised on the grounds listed on its face *inter alia*;

1) That on 14th October 2020, the matter proceeded with DW1 testifying.

2) That the case was given a further Hearing date of 27/10/2020.

3) That however, it has since been discovered that whereas the Defendant in his testimony denied knowledge of subdivision of land parcel No. SOUTH TESO/APOKOR/3538, there is new information to the contrary.

4) It is important that the defendant be recalled for purposes of cross-examination.

5) That it is in the interest of justice that this Application be allowed.

3. The plaintiff proceeded to swear an affidavit on 23/10/2020 annexing the documents sought to be introduced at this stage of the proceedings. He deposed that the information pertaining to sub-division was not within his reach until after the defendant gave evidence. He urged the court to grant the orders sought.

4. The defendant in opposing the application filed the grounds of opposition dated 26th October 2020. The grounds raised in opposition thereto as follows;

- a) *That the application intends to introduce new documentary evidence that ought to have been produced during the hearing of the plaintiff's case.*
- b) *That the plaintiff has already had opportunity to testify and produce all relevant documents he intended to rely in his case.*
- c) *That allowing the application will be to subject the defendant witness into mental distress since is an old sickly man of 89 years.*
- d) *That the new documentary evidence to be produced is not part of the court records and therefore intends to disorganize the defendant's case.*
- e) *That the Application is res-judicata after the closure of the plaintiff's case he ought to have brought out his whole case and claim at the beginning of the trial.*

5. The counsels appearing for the parties made oral submissions. Mr. Makokha learned counsel for the applicant submitted that they can only re-open their case and introduce the new documents with leave of the court. That the issue of these documents came to their knowledge when the defendant made an offer during his testimony on exchanging L.R No. 3537 and 3538. Mr. Omeri learned counsel for the defendant submitted that the application was made late in the day and if allowed, it will disorganize the defence case. That the defendant is very old and it will be difficult to bring him back to court.

6. I have perused the documents sought to be produced and the entire file. Although the defendant raised a ground that these documents are already part of the documents filed, I looked through the pleadings filed by both parties but did not find any of them. The plaintiff has explained that the information came to his knowledge when the defendant made the offer of exchange during his testimony a fact which has not been denied. The defendant opposed the application on two grounds i.e. that the plaintiff had three opportunities to introduce the said documents and secondly that it will be difficult to bring back the defendant who is old.

7. The plaintiff has explicitly explained that he did not know the existence of these documents until after the offer made by the defendant in his testimony. The defendant has not closed his case as on 14/10/2020 he asked for more time to call additional witness. In the circumstances, i do not find that the plaintiff moved the court late since he filed this application was filed soon after the testimony of the defendant. The defendant will have opportunity of being recalled to challenge the veracity of those documents if deemed necessary. Therefore, I do not see any prejudice the defendant is likely to suffer that cannot be remedied.

8. Further, the defendant's counsel submitted that it will be difficult to bring back the witness because of his age. The defendant was able to come to court and testify; a recall will not take a lot of his time before the court. The defendant stated that he comes from S. Teso which is within Busia County. It is not submitted clearly how travelling the short distance exerts shock on him. In any event, the plaintiff is directed to meet the defendant's travelling expenses.

9. Consequently, I find merit in the motion dated 22/10/2020 and allow it in terms of prayer 2 and 3 with costs of the application awarded to the defendant. The plaintiff shall also meet the costs of travel for the defendant's return to court pegged at Kshs.1000 and payable before the date that will be set for further hearing of the case.

Dated, signed & delivered at BUSIA this 14th day of Dec., 2020.

A. OMOLLO

JUDGE