



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1194 OF 2013

ESTHER WANGUI NDEGWA.....PLAINTIFF/RESPONDENT

=VERSUS=

HELLEN WAMBUI MIRIA.....1ST DEFENDANT/APPLICANT

DOUGLAS MURAYA KARUIRU..... 2ND DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR, SUED ON BEHALD FOR THE LAND REGISTRAR

THIKA.....3RD DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES..... 4TH DEFENDANT/RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 17th November 2017 brought under Section 1A, 3A and 63 (e) of the Civil Procedure Act, Order 51 of the Civil Procedure Rule, Section 146 (4) of the Evidence Act and Article 159 of the Constitution, the 1st defendant/applicant seeks orders:-

1. Spent

2. Spent

3. That the plaintiff's witness be recalled for cross examination by the defendant's counsel.

4. That the plaintiff's counsel be granted the right to re-examine the witnesses after cross examination by the defendant's counsel.

5. That to facilitate the cross-examination, the defendants be availed the typed proceedings containing the testimony of the witnesses.

6. That the 1st defendant/applicant be granted leave to file list and bundle of documents and witness statements.

7. That the documents filed together with this application be admitted on record and be deemed as properly filed.

8. That the case be transferred to Thika Land and Environment Court.

2. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

3. The application is supported by the affidavit of Hellen Wambui Meria the 1st defendant/applicant sworn on the 17th November 2017.

4. The application is opposed. There are grounds of opposition filed by the plaintiff/respondent dated 1st December 2017.

5. On the 21st June 2018 the court directed that the notice of motion dated 17th November 2017 be canvassed by way of written submissions.

6. The 1st defendant's/applicant's submissions

The 1st defendant/applicant did not attend court because her advocate on record failed to inform her. The 1st defendant/applicant is the registered proprietor of the parcel of land in dispute. She was not informed of the hearing date of 25th May 2017. The mistake of an advocate should not be visited upon a client. She has relied on the case of **Lucy Bosire vs Kehencha Div. Land Dispute Tribunal & 2 Others [2013] eKLR** and **Branco Arabe Espanol vs Bank of Uganda [1999] 2 EA 22**. The subject matter is situated in Ruiru whose proximity is near Thika hence the matter should be transferred there.

7. The plaintiff's/respondent's submissions

The application has been brought after a long inordinate delay, six months after the parties had closed their cases. There is no prayer to re-open the cases hence the prayer to recall witnesses is incompetent and cannot be granted as drawn. The 1st defendant/applicant cannot be allowed to introduce her witness statements and list of documents at this stage. The plaintiff/respondent prays that this application be dismissed.

8. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition, the written submissions of the counsel and the authorities cited. The issue for determination is whether this application is merited.

9. I have gone through the court record on the 21st November 2016, Mr. Ndirangu who held brief for Mr. Wakahu for the 1st defendant sought 14 days to comply fully with order 11. The matter was fixed for another pretrial on 7th March 2017. On 7th March 2017 Mr. Olonde held brief for Mr. Musundi for the plaintiff, prayed for a hearing date as the matter was ready for hearing. There was no appearance for the defendants.

10. A date for hearing was then fixed for 25th May 2017, on which date; Mr. Bismama held brief for Mr. Wakahu for the defendant. He sought an adjournment on his behalf as he was taking his mother to hospital that morning. The court went ahead and directed that the matter proceeds.

11. I have considered the relevant provisions specifically Section 146(4) of the Evidence Act, Order 18 Rule 10 of the Civil Procedure Rules, Article 50 (1) and 159 (2) (d) of the Constitution 2010. I find that the 1st defendant/applicant ought to be given an opportunity to be heard. Her averment that she was not informed of the hearing date of 25th May 2017 has not been rebutted by the plaintiff/respondent. A mistake of counsel ought not be visited on the client.

12. I note that only the plaintiff testified and closed her case on that date. No prejudice will be occasioned to the plaintiff if she is recalled for cross examination.

13. I have considered the prevailing circumstances herein and I find that the 1st defendant/respondent herein who is the registered proprietor of the suit land ought to be heard.

14. I find merit in the application and the same is allowed there by grant the orders ought namely:-

- a. That the plaintiff's be recalled for cross examination by the defendant's counsel.**
- b. That the defendant's counsel be granted the right to re-examine the plaintiff.**
- c. That the defendants be supplied with typed proceedings at their expense.**
- d. That the 1st defendant/applicant be granted leave to file list and bundle of documents and witness statements within 21 days from the date of delivery of this ruling. In the alternative the documents filed together with this application be admitted on record and be deemed as properly filed upon the payment of the requisite fees.**
- e. That the 1st defendant be granted an opportunity to be heard and/or to avail witnesses.**
- f. That the matter is hereby transferred to Thika Land and Environment Court for hearing and disposal.**
- g. That the plaintiff do have costs of this application.**

It is so ordered.

Dated, signed and delivered in Nairobi on this 30TH day of JANUARY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd defendant

.....Advocate for the 3rd, 4th, & 5th defendants

.....Court Assistant