

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ELC LAND CASE NO. 78 OF 2024
(FORMERLY NAKURU ELC NO. E39 OF 2022)

**GURSHAN SINGH BRAR
PLAINTIFF**

VERSUS

**AGNES WANJIKU.....1st
DEFENDANT**

**SAMWEL N NDERITU.....2nd
DEFENDANT**

**DIRECTOR OF LAND ADMINISTRATION.....3rd
DEFENDANT**

**DIRECTOR OF SURVEY.....4th
DEFENDANT**

**ATTORNEY GENERAL.....5th
DEFENDANT**

RULING.

1. On 16th October 2024 hearing of the matter started De novo after the Plaintiff's health deteriorated wherein upon taking the evidence of PW1, a letter dated 14th October 1988, Minutes of 20th December 1988, allotment letter dated 24th October 1995, a bankers cheque dated 22nd July 2013, a receipt dated 9th September 2013 and a letter dated 13th August 2019 were marked as PMFI 2-7 respectively and the witness was examined at length.
2. PW2 and PW3 also testified wherein upon conclusion of their testimony and cross-examination, Counsel for the Plaintiff sought for an adjournment and informed the court that he had intended to call 5 more witnesses including Mr. Opiyo the Surveyor and therefore sought for summons stating that he would indicate in the summons the nature of the documents he wished the witnesses to produce. This application was vehemently objected to for reason that there had been pre trials conducted, the pleadings had closed wherein the Plaintiff had not

intimated or requested for summons as against the 5 individuals for which it had been too late in the day to make such an application. That there had been no statements filed in respect to the 5 individuals and calling them would be prejudicial to the 1st and 2nd Defendants. That the said individuals sought to be called were the listed as the 3rd and 4th Defendants.

3. A rejoinder by the Plaintiff's Counsel had been that the witnesses he sought to call were contained in his further list of witnesses wherein leave had been granted. That he had been facing difficulties in procuring attendance and secondly, they are professional witnesses who were to produce letters authored by themselves.
4. The court having considered that indeed the said leave had not been objected to and had been granted on the 12th March 2024, granted the adjournment and issued the summons as prayed.
5. The matter did not proceed for hearing for a while as the Plaintiff's Counsel had been unwell. The summons earlier issued had been re-directed to the Chief Office of Department of lands and physical planning as advised by the Nakuru County Attorney.
6. On the 8th July 2025 when the matter came up for hearing, the Plaintiffs' Counsel sought for an adjournment and leave to file further documents which had been in the custody of the witnesses from the department of survey and which documents had not been in their possession at the time of completion of the pre-trial. That the documents would help the court to fully adjudicate on the suit. That he had forwarded the documents to Counsel for the 1st and 2nd Defendants.
7. Wherein the State Counsel for the 3rd - 5th Defendants did not object to both applications, Counsel for 1st and 2nd Defendants also did not object to the application for adjournment and in relation to the second application for leave, sought to be served with all documents to enable him get instructions and to peruse the same so as to understand if they would be prejudicial to his clients.

8. The adjournment was granted and the Plaintiff's Counsel directed to file and effect service of the additional documents upon all parties within 14 days.
9. When the matter came up for mention and further directions on 23rd July 2025, the Plaintiff's Counsel confirmed the filing and service of their further list of documents and sought for a date for hearing. Counsel for the 1st and 2nd Defendants on the other hand sought for more time to get further instructions and peruse the documents. He also sought for a date in the new term.
10. Come the 6th October 2025, when the matter was called up for hearing, whereas the Plaintiff's Counsel and the State Counsel were ready to proceed, Counsel for the 1st and 2nd Defendants raised an objection to the Plaintiff's list of documents dated 21st July 2025 for reasons that pleadings had closed, introduction of the documents would be prejudicial to his clients, particularly since the trial had already commenced and 3 witnesses had testified and extensively cross examined.
11. That despite their objection the Plaintiff had previously been granted leave to file additional documents. That the Plaintiff's counsel's conduct was indicative that he was attempting to patch up his case which was highly prejudicial to the Defendants. That the documents the Plaintiff sought to introduce dated far back in the year 2014 and 2017 which showed lack of care and diligence. That the leave sought should be denied.
12. In response, the Plaintiff's Counsel's argument was that their list of documents dated 21st July 2025 were filed pursuant to the leave granted by the court and should therefore be admitted. That the court retained discretion to grant leave for filing further documents even after pre-trial and the closure of pleadings which discretion ought to be exercised judiciously to ensure the ends of justice are met. That whereas some documents were not in the Plaintiff's possession but in the custody of the surveyor and physical planner, they were essential as they showed the current position of the dispute before the court.

13. That Counsel for the 1st and 2nd Defendants had not explicitly stated what prejudice the documents would cause to his clients and therefore they should not be locked out. That Counsel was open to object to the specific documents, upon the calling of the professional witnesses (the makers of the documents) to testify. That in fact some of these documents had been listed earlier but were objected to by the defense, forcing the Plaintiff to seek summons to call their makers.
14. Whether or not to sustain the objection raised of inclusion of the additional documents in the list dated the 21st July 2021 thus forms the basis of this ruling.
15. It is indeed no doubt that the Plaintiffs in this case had not closed their case but had called 3 witnesses wherein they had purposed to call the remaining witnesses who happen to be expert witnesses. The provisions of Order 3 Rule 2 of the Civil Procedure Rules mandate parties to a suit to file their respective list of documents as well as a list of witnesses' statements in support of their case while instituting a suit. The general tenor of the Civil Procedure Rules is that parties ought to disclose their case at an early stage to avoid ambush, delay and increase of costs.
16. Upon the satisfaction at the pre-trial Conference, under Order 11 of the Rules, the matter was set down for hearing where it was expected that all the parties will have made full disclosure so that either party knows the case that they will face at the trial.
17. This notwithstanding even after the Pre-trial conference, it is trite that a court has the power to allow the parties to call further witnesses or produce further documents, as per the provisions of Order 18 rule 10 of the Civil Procedure Rules and Section 146 of the Evidence Act, so as to ensure that each party is afforded a fair trial as guaranteed under Article 50 (1) of the Constitution.
- 18.** In the case of **Johana Kipkemei Too v Hellen Tum [2014] eKLR**, the Court of Appeal held as follows;

“The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each Court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules”.

19. In the instant case, the Application for additional documents was made by the Plaintiff before they had closed their case most of which documents emanated from the office of the survey and physical planning and for which the Defendants would have the liberty to cross-examine the said evidence which in my view was a level playing field and not prejudicial to the Defence. In fact, majority of the said documents would ensure the ends of justice are met by enabling all parties involved appreciate the position on the ground. In my view, allowing the said documents, some of which had been marked for identification. (see No 2) would not amount to filling up of the gaps in

the Plaintiffs case as alluded to but would in fact enable the court arrive at a just determination of the matter.

20. Indeed, Courts have held time and again that the mistake of Counsel ought not to be visited upon a litigant and that the Court should endeavor to assert and preserve a litigant's rights to be heard without placing undue weight on a litigant's Counsel's mistake.

21. As it was held in the case of **Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR** that;

“Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their Counsels during pre-trial or in the course of the trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The Civil Procedure Act and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time of disposition. Since the procedural directions are meant to serve substantial justice it follows therefore careful weight should be given to facially legitimate and bonafide reason for any procedural errors or omission in order to exercise discretion for the interest of justice”.

22. I also find that although the 1st and 2nd Defendants Counsel have opposed the Application for reason that by allowing the additional documents, they would be prejudiced, they did not demonstrate what kind of prejudice the documents would cause to their case.

23. To this end and in the spirit of Article 50 (1) of the Constitution and Section 3A of the Civil Procedure Act, the additional documents herein dated the 21st July 2025 are admitted as being properly on record. The 1st and 2nd Defendants shall have the right to file and serve rejoinder documents and/or witness statement within 14 days.

Dated and delivered via Microsoft Teams at Naivasha this 9th day of October 2025.



M.C. OUNDO

ENVIRONMENT & LAND - JUDGE