



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.156 OF 2012

JOSEPH MUYA NJURU.....PLAINTIFF

VERSUS

STEPHEN NJOROGE KUNDA & 4 OTHERS.....DEFENDANT

RULING

***(Application by defendants seeking to be allowed to call additional evidence not earlier discovered; application being made during the defence hearing of the case; plaintiff already having closed his case; application if allowed will greatly prejudice the plaintiff; application dismissed).***

1. This ruling is in respect of an oral application made by Mr. Kipkoech, learned counsel for the defendants, seeking leave to call two additional witnesses, being the Director of Land Adjudication and Settlement, and the District Land Registrar, Naivasha. Counsel has applied to have these persons called to testify and present the list of allottees of Ol Jorai Phase 2, Kapkures Area, and the Green Card for the land parcel Naivasha/Ol Jorai Block 2/1493. The application is opposed by Mr. Kisila, learned counsel for the plaintiff.

2. By way of background, this suit was commenced through a plaint which was filed on 22 February 2012. In the suit, the plaintiff sought orders to have the defendants evicted from the land parcel Naivasha/Ol Jorai Block 2/1493, measuring 70 acres. The defendants filed defence and counterclaim. They pleaded that they were allocated the plots Nos. 212, 3039, 3767 by the Agriculture Development Corporation in 1992 by virtue of their long occupation and possession. They contended that the defendant was only allotted a plot measuring 20 acres. They pleaded that they got displaced during the 2007/2008 post-election violence and when they came back, they found that the plaintiff was now claiming 70 acres, including what they believe was allotted to them. In their counterclaim they have sought the plaintiff to be restrained from their 50 acre portion and an eviction order against him.

3. The suit commenced hearing on 28 January 2018 when the plaintiff gave evidence and closed his case. On that day, the defendants were not present and I ordered the defence case closed. However, before I could write judgment, the defendants filed an application seeking to be allowed to reopen their case, which I granted. The matter thus proceeded for defence hearing on 15 November 2018, when the five defendants testified. It is after they had finished giving their evidence that Mr. Kipkoech made the application that I have alluded to above. Mr. Kisila in his rejoinder, submitted inter alia that this case was filed in 2012 after the enactment of the 2010 Civil Procedure Rules, and that the defendants ought to have listed all their witnesses and the documents they intended to produce before hand.

4. I have considered the application and the reply.

5. It is a requirement of the Civil Procedure Rules, that each party do present its evidence before the

commencement of trial. For the plaintiff, he is supposed to accompany his plaint with the list of witnesses, their statements and the documents to be relied upon during trial. This is provided for under Order 3 Rule 2 which provides as follows :-

*Documents to accompany suit [Order 3, rule 2.]*

*All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied*

*by—*

- a) the affidavit referred to under Order 4 rule 1(2);*
- b) a list of witnesses to be called at the trial;*
- c) written statements signed by the witnesses excluding expert witnesses; and*
- d) copies of documents to be relied on at the trial including a demand letter before action:*

*Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.*

6. It will be seen from the above, that there is leeway to file the statements at least 15 days prior to the trial conference, which is generally a mention to confirm that the matter is ready for trial.

7. For the defendant, Order 7 Rule 5 applies and it is drawn as follows :-

*Documents to accompany defence or counterclaim [Order 7, rule 5.]*

*The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—*

- a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;*
- b) a list of witnesses to be called at the trial;*
- c) written statements signed by the witnesses except expert witnesses; and*
- d) copies of documents to be relied on at the trial.*

*Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.*

8. It will be noted from the above, that the defendant is supposed to furnish his list of witnesses, witness statements and documents when filing the statement of defence or counterclaim, again with leeway to file any late statements, 15 days prior to the trial conference.

9. The reason why these rules were enacted is so as to enable each party know the other party's position on the matter and prevent an ambush during the hearing of the case. The rules are of course not cast in stone and the court does retain some discretion, depending on the reasons and circumstances of the case, to allow a party to present some additional evidence not earlier disclosed. It is easier for example for the court to extend time when the trial has not begun or has just begun, for the defendant may still be able to counter the new evidence.

10. But the more advanced the trial gets, the more prejudice the other party suffers, and the more difficult it is for the court to allow the presentation of additional evidence that was not earlier discovered. Thus in the case of *Johana Kipkemei Too vs Hellen Tum (2014) e KLR*, I was not persuaded to allow the

defendant to call additional evidence not earlier discovered at the defence stage of the proceedings.

11. I have not seen any reason to depart from my position in the above mentioned decision. In this instance, the defendants wish to call witnesses who were never disclosed and also seeks to rely on documents which were never discovered to the plaintiff. The plaintiff has already closed his case, and will not be able to call forth any additional evidence to counter any, that may be presented by the two officers sought to be called to testify for the defendants. To me it will defeat the very purpose why the rules on prior discovery were enacted if I am to allow the application before me, and it goes without saying, that the plaintiff will be greatly prejudiced. In any event, this suit was filed in the year 2012. The defendants had over 6 years to assess their case and see what witnesses and documents they would need to present to support their position in this matter. Whichever way you look at it, this application is coming too late in the day, and if allowed, will cause the plaintiff significant injustice.

12. For the above reasons, I am not persuaded to allow the application and it is hereby dismissed with costs.

13. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of February 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Ms. Amulabu holding brief for Mr.Kisila for the plaintiff.

Ms. Oganga holding brief for Mr. Kipkoech for the defendants.

Court Assistant : Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**