



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 142 OF 2012

DR. PRAWAN KUMAR GUPTA.....PLAINTIFF

VERSUS

1. ENG ISAAC G. WANJOHI

2. RASHID M. KHERI

3. OMARN MZARUBA MWISHEE.....DEFENDANTS

RULING

1. On 11th October 2018 this matter came up for further defence hearing. Dr. Kamau Kuria, SC, counsel for the 1st defendant wanted to introduce his next witness, Mrs. Damaris Gitonga, the author of two letters in the 1st defendant's bundle of documents. However Mrs. Umara, counsel for the plaintiff, Mr. Oddiaga counsel for the 2nd defendant and Mr. Simunyu, counsel for the 3rd defendant objected to the witness testifying for the reason that the witness was not one of the witnesses listed in the 1st defendant's witness list and that no witness statement had been filed and served in respect of the said witness. Further that the witness is not an expert witness hence cannot testify and produce the said documents.

2. I have considered the objection raised and the rival submissions made. There is no dispute that the documents in question form part of the 1st defendant's bundle of documents filed on 24th October 2012. The documents are not being introduced in the proceedings for the first time.

3. There is also not doubt that the witness sought to be introduced did not form part of the 1st defendant's list of witnesses and has not recorded any witness statement. The court however, takes note that the trial is still on and the witness is yet to testify. In my view and being guided by the provisions of Article 159 (2) (d) of the constitution, the 1st defendant can be allowed to call the witness to adduce the documentary evidence in issue. In my view, no prejudice will be caused to the other parties by the testimony of the said witness and the production of the said documents as they will have an opportunity to cross-examine the witness on the same. There is therefore room for the other parties in the case to test their worth in cross-examination. Furthermore, allowing the witness to testify and admitting the documents does not mean that they will be taken as gospel truth by the court especially where there is evidence to the contrary. It is the opinion of this court that a litigant should not be barred from laying all he has in terms of evidence before a court of law in furtherance of his case in a situation where the other side can be compensated by way of costs. If necessary, the 1st defendant may be allowed to file a further witness statement and serve the same on the other parties who will then prepare and interrogate the same during cross-examination.

4. The upshot is that the objection is overruled. The 1st defendant is at liberty to call the witness and proceed to testify, unless the other parties are desirous of being served with a witness statement, in which case the same may be filed and served forthwith to allow the matter to proceed.

DATED, SIGNED and DELIVERED at MOMBASA this 6th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Dr. Kamau Kusia. SC for 1st defendant

Mrs. Umara for plaintiff & holding brief for Siminyu for 3rd defendant.

Ms. Mwainzi holding brief for Oddiaga for 2nd defendant

Yumna Court Assistant

C.K. YANO

JUDGE

6/2/19