



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 567 OF 2012

JULIA WANJIRU KIIRU

[Suing as the Administratrix of the Estate of the late

JECINTA WANGUI KEIRU – DECEASED.....PLAINTIFF

VERSUS

DORIS OCHIENG OLUOCH.....1ST DEFENDANT

R. O. OKELLO.....2ND DEFENDANT

GEORGE L. A. BENGU.....3RD DEFENDANT

DIRECTOR, DEPARTMENT OF LAND ADJUDICATION &

SETTLEMENT.....4TH DEFENDANT

SETTLEMENT FUND TRUSTEES.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

By Notice of Motion dated 4.2.2019, the plaintiff prays that the 4th, 5th and 6th defendants’ DW1 Mr. Dan Mbuvi Ndonge be recalled for purposes of further cross examination by counsel for plaintiff. The application is based on grounds that upon making a copy of the Settlement Fund Trustee file which was produced in court as PExh.10 and perusing it, it emerged that there are issues that require clarification by the 4th, 5th and 6th defendants’ defendants DW1, Mr. Dan Mbuvi Ndonge. The clarification of the said issues can only be done by way of further cross examination of the 4th, 5th and 6th defendants’ DW1. The plaintiff would be prejudiced unless the orders sought are granted.

The plaintiff states that under Article 159 of the Constitution, courts are required to administer justice without undue regard to technicalities of procedure and that the defendant would not suffer any prejudice if the orders sought are granted. That this Honourable court has the power to grant the orders sought.

In the supporting affidavit, Julia Wanjiru Kiiru states that upon perusing a copy of the Settlement Fund Trustee file and more particularly the Ground Status Report which was produced in court as an exhibit, it emerged that there are issues that require clarification by the 4th, 5th and 6th defendants’ DW1, Mr. Dan Mbuvi Ndonge. She is advised by her Advocates on record that such clarification can only be done by way of further cross examination of the 4th, 5th and 6th defendants. DW1, Mr. Dan Mbuvi Ndonge.

She believes that it is in the best interest of justice that the 4th, 5th and 6th defendants’, DW1, be recalled for purposes of further cross examination. That she will be prejudiced if the orders sought are not granted.

She is further advised by her Advocates on record which counsel she holds true that the defendants would not suffer any prejudice if the orders sought are granted as they will have a chance to further re-examine the witness.

That the further cross examination will enable the court to fully adjudicate the issues in dispute in this suit. That this application has been brought timeously and in good faith. That this court has the power to grant the orders sought. That it is therefore fair and necessary that the

instant application be allowed as prayed.

Mr. Reuben O. Ogelo states that the application before the court is incompetent, an afterthought, frivolous, vexatious and therefore, an abuse of the due process of this court.

and that that the applicants are on a fishing expedition hence the prayers sought in the instant application are not available and that the application is an afterthought. DW1 testified on 6.12.2018 when counsels for all p[arties were present in court, counsel for the 4th, 5th and 6th defendants had all the time to examine the witness which he did, it cannot therefore, be said that there are issues which need clarification. In any event, counsel for the 4th, 5th and 6th defendants had a chance to re-examine the witness which he did.

He is apprehensive that the applicants have an intention of introducing new evidence before the court and this will be prejudicial to the 1st and 3rd defendants who have already closed their cases. The document is their own and all along, it has been within their possession. They cannot therefore wake up one morning and say there are issues which they were not aware of.

That the 4th, 5th and 6th defendants' application is calculated to cure gaps which were exposed during DW1's examination in court. The applicants are therefore seeking to gain collateral advantage over the 1st and 3rd defendants.

That the application before the court is coming too late in time when all parties have closed their cases and the matter is awaiting mention for submissions on 27.2.2019. That the applicants intend to delay this matter for no good reason. That the 1st and 3rd defendants/respondents will be greatly prejudiced if the application is allowed. That the application for further cross examination is unnecessary and meant to delay the course of justice.

That the application before the court has been brought in bad faith and therefore should be dismissed with costs to the 1st and 3rd defendants/respondents. The 4th, 5th and 6th defendants filed grounds of opposition stating:

That the Notice of Motion is an abuse of the court process due to the fact that the application is premised on correcting or clarifying issues that were known to the plaintiff/applicant at the time of defence hearing.

That the Notice of Motion lacks any merit as it falls short of meeting the threshold of recalling of witness as adumbrated in the celebrated case of **Raila Odinga & 5 Others Vs IEBC & 3 Others, SCK Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR** and **Jane Wanjiku Mbugua Vs Josephine Mumbi Ngugi & 2 Others [2006] eKLR**.

That the Notice of Motion is a mere grope in the dark and that the applicant is merely attempting to re-open the case after all parties had availed their evidence and the applicant was aware of the evidence to be tendered by the 4th, 5th and 6th defendants' witness.

That the Notice of Motion is a non-starter, abuse of court and justice as the orders sought are well unmerited, waste of the court's time and merely meant to delay the finalization of this suit. That the application is bad in law and should be dismissed with costs to the respondent

I have considered the application, supporting affidavit and the replying affidavit, grounds of opposition and do find that I have a discretion to allow the recall of a witness under Section 146(4) of the Evidence Act. Order 18, Rule 10 of the Civil Procedure Rules further allow the court recall a witness. Discretion is to be exercised judiciously and not capriciously. **Some documents were introduced by the 4th, 5th and 6th defendants when the suit had progressed and therefore it is necessary to allow the recall of the 4th 5th and 6th DW1.** I do allow the plaintiff to cross examine the DW1. Orders accordingly. Hearing on 14TH March, 2019.

Dated and delivered at Eldoret this 12th day of March, 2019.

A. OMBWAYO

JUDGE