



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 930 OF 2012

LORNAH JEBIWOTT KIPLAGAT.....PLAINTIFF/RESPONDENT

VERSUS

ESTHER CHERUIYOT.....2ND DEFENDANT/RESPONDENT

WINNIE KIBISACH.....3RD DEFENDANT/RESPONDENT

CHIEF AND REGISTRAR.....4TH DEFENDANT/APPLICANT

THE COMMISSIONER OF LANDS.....5TH DEFENDANT/APPLICANT

THE ATTORNEY GENERAL.....6TH DEFENDANT/APPLICANT

RULING

The Honourable Attorney General applies to be granted leave to file and serve supplementary list of documents and supplementary list of documents attached be deemed as duly filed and served. That the respondent be at liberty to recall any of their respective witnesses.

The application is based on grounds that this court has unfettered discretion and jurisdiction to grant the orders sought. That the overriding objective is to administer justice without undue procedural technicalities and that documents to be introduced are public documents within respondent's knowledge. He believes that the respondents stand to suffer no prejudice as they can always recall their witnesses.

The applicant rightly states that this court is a temple of justice and it is only fair and just that this application be granted. The application is supported by the affidavit of Sarah Chelimo Maina, County Land Registrar, Uasin Gishu who states that she has procured the correspondence file in respect of the suit land. She has further procured an excerpt of presentation book that confirms genuine transactions. She states that the respondents suffer no prejudice if witnesses are recalled.

The plaintiff in opposition to the application states that no reason has been given for the late filing of the documents. The suit was filed in the year 2005 and therefore the application seeks to delay further the determination of this matter. The plaintiff testified and called witnesses, the 1st to 3rd defendants testified and called witnesses. Both plaintiff and 1st to 5th defendants have closed their respective cases and therefore it would be prejudicial for the 4th and 6th defendants to introduce new evidence. The 1st to 3rd defendants do not oppose the application.

I have considered the application and the provision of Article 159 of the Constitution and do find that to allow the application would be the infringe on Article 159 of the Constitution of Kenya 2010 as it will cause a serious delay in the determination of the dispute which was filed in the year 2005 almost 19 years ago. This court ought to weigh justice on both sides of the coin and doing so, I do find that allowing the application would cause a restart of the suit as parties will have to amend the pleadings and the suit will have to be heard de-novo.

In *Raila Odinga & 5 Others vs IEBC & 3 Others*, SCK Presidential Petitions Nos. 3, 4 and 5 of 2013 [2013] eKLR, the Court had to consider whether to allow additional evidence filed outside the contemplation of the rules in a Presidential election petition. It adverted to the principles applicable as follows;

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of

the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.

The applicant does not explain the hardship he had in filing the documents before the viva voce hearing of the suit which commenced on 22.7.2013. Pursuant to the provision of Order 7, Rule 5 of the Civil Procedure Rules, 2010, the 4th to 5th defendants had been required to file copies of documents to be relied upon by the 7.03.2012 as per the direction of Hon Lady Justice A. Mshilla on 23.11.2011. The parties were given 3 months to comply by Justice Mshilla. The 4th and 5th defendants have never sought leave of the court to file supplementary documents before the commencement of hearing of the case.

This court finds that it would fundamentally alter the course of the trial and substantially prejudice the plaintiff if it allows to 4th to 5th defendant to introduce new documents at this time when the plaintiff has closed her case. The application is dismissed with costs.

Dated and delivered at Eldoret this 5th day of March, 2019.

A. OMBWAYO

JUDGE