



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC NO 118 OF 2011

ALEXANDER MBUGUA.....1ST PLAINTIFF/APPLICANT

MWARI MBUGUA.....2ND PLAINTIFF/APPLICANT

VERSUS

BEATRICE MUTUNGI M'TUAMIKWA.....1ST DEFENDANT/ RESPONDENT

EVEREST ENTERPRISES LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This is a ruling in respect to the Notice of Motion dated 30/4/18 and filed on the 4/5/18 by the Applicant brought under Article 50 and 159(2) of the Constitution, section 146(4) of the Evidence Act Cap 80, Section 1'A' (1) OF Cap 21 and Section 1'B'(1)(a) of Cap 21 order 18 rule 10 of the Civil Procedure Rules for Orders that:-

a) That the honourable Court do withhold the delivery of judgment to allow the Applicant leave to recall the 1st Respondent, Beatrice Mutungi for further cross-examination.

b) That the honourable Court to find and hold that it will be in the interest of Justice to allow this application in order to have the 1st Respondent recalled to reveal and elucidate the fundamental factors which have recently come to the knowledge of the Applicant and which the 1st Respondent had hidden or concealed from the Applicant.

2. The grounds of the application are that: -

a) The Applicant has discovered lately that the 1st Respondent is not the legal the owner of parcels NOS. KALALU/618 AND 619 as she had not taken out letters of administration of her late husband's estate before she became the registered proprietor.

b) The Applicant is afraid that the 1st Respondent could either be a fraudster, impostor, a thief or a criminal as she obtained the registration of her husband's estate without even filing for letters of administration 8 years after the death of her husband.

c) The Applicant has also learnt that the 1st Respondent had indeed filed Succession cause No.467 of 2007 but that succession cause did not involve the suit parcels at all.

d) That it is in the interests of justice that the 1st Respondent be tasked to explain how she became the registered proprietor of the suit lands eight (8) years after the death of her husband.

3. The application is supported by the affidavit of Mwari Mbugua the Applicant who deposes that she was substituted in place of her husband upon his death. That when the suit was filed in 2011 the 1st Respondent claimed that she had acquired titles in her names for our lands in place of her late husband. She claims that a copy of the succession cause No. 467 of 2007 filed by the 1st Respondent in respect to the estate of her late husband has been shown to her and she has discovered that the parcels of the land, the subject matter of the instant suit was not included as part of the estate. She is aware that the subject parcels of land became registered in the name of the 1st Respondent 7-8 years after demise of her husband. She claims that the 1st Respondent has also caused other parcels of land to be transferred to third parties after the death of her husband for example land parcel No.617 was transferred to Nkirote Gichuru. She is curious on how the said transfers would have been effected without succession. She believes that the said transfers were done fraudulently and requires this Court to summon the Land Registrar – Nanyuki and call for the Land Control Board register in order to shed light. She cautions the Court that it is dealing with corrupt parties and requires the Court to come to his aid to unearth the said illegalities.

4. In opposition to the application the 1st Respondent filed a replying affidavit dated 12/7/18 in which she contends that the Applicant had

ample time to discover the alleged untruths before the hearing of this suit. That this Court lacks jurisdiction to recall a witness under Order 18 rule 10 of the Civil Procedure Rules for purposes of cross examination but only permits recalling for the purpose of examination by Court. She is of the opinion that Section 3A of the Civil Procedure Act cannot be exercised in a manner contrary to or different from the procedure expressly provided for in the Civil Procedure Rules. That the Applicant has not placed sufficient evidence on record to justify an order for recall of the 1st Respondent for full cross examination. She is of the opinion that the purpose of Order 18 rule 10 was to enable the Court to clarify any issues it may have doubts about arising from the evidence adduced by the parties as opposed to being used by litigants to fill in gaps/omissions in the evidence of a witness who has already been examined. She claims that the intended cross examination has no bearing on the ultimate decision of the Court as change of ownership of the suit land cannot defeat a claim for adverse possession. She claims that the suit parcels of land were registered lawfully in her name and the transfers were not tainted with fraud. She contends that the Applicant has unreasonably delayed the hearing of this matter as it has been pending for more than 7 years, and is apprehensive that the instant application is intended to delay the case further. That parties have closed their cases and it would be unfair to reopen the case. That the application is an abuse of Court process and bereft of merit and prays for it to be dismissed.

5. Order 18 rule 10 of the Civil Procedure Rules provides as follows;

“the Court may at any stage of the suit recall any witness who has been examined and may, subject to the law of evidence for the time being in force put such questions to him as the Court thinks fit”.

6. The issues being raised by the Applicant in respect to obtaining titles in the 1st Respondent's name are grave. I note that the 1st Respondent has not expressly denied the allegations made against her in her response thereto. I consider this is a proper case for the Court to exercise its unfettered discretion in order to meet the ends of justice.

7. The application is allowed with costs in the cause.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Harun Gitonga holding brief for Kaumbi for 1st and 2nd Plaintiff

J.G Gitonga for 1st Defendant