



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 277 OF 2017**

**THE CHURCH COMMISSIONERS FOR KENYA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ST FRANCIS CHURCH,**

**ANGLICAN CHURCH OF KENYA, OLJORO OROK.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**THE BOARD OF MANAGEMENT**

**OLJORO OROK PRIMARY SCHOOL.....DEFENDANT/APPLICANT**

**RULING**

1. The Plaintiff herein filed the said suit on the 6<sup>th</sup> October 2016 wherein the Hon the Attorney General entered filed their Memorandum of Appearance on the 17<sup>th</sup> October 2016 on behalf of the Respondent. After the preliminaries and compliance with the provisions of Order 11 of the Civil Procedure Rules, the matter was certified ready for hearing on the 22<sup>nd</sup> February 2018.

2. Subsequently vide an application by way of Notice of Motion dated 3<sup>rd</sup> October 2016 and filed on the 6<sup>th</sup> October 2016, the Defendant/Applicants sought for interim injunctive orders against the Respondents. The application was heard and determined wherein the matter proceeded for the main hearing on the 19<sup>th</sup> March 2019.

3. It was in the cause of the hearing and after the Plaintiff had stated their case, and produced their exhibits and after cross examination, that during re-examination that the Defendant through its State Counsel Mr. Weche raised an objection to the exhibits that had been produced by the Plaintiff wherein the court gave parties an opportunity to be heard on the said objection.

**Submission by the Defence.**

4. It was the Defendants submission while objecting to the production of the documents by the Plaintiffs, apart from the letter of allotment marked as Pf exhibit 3 and the letter of the surveyor that has been marked for identification 17, that the defence was not afforded an opportunity to either look at the original documents to either object to their production or admit to their production, failure which would be regarded that defence had ceded on their production.

5. That failure to grant them an opportunity to cross examine the witness on the authenticity or otherwise of the said documents would prejudice the Defendant on the advancement of its case.

6. They prayed to be accorded the chance to examine the exhibits as a right to a fair trial guaranteed under Article 50 of the Constitution.

**Plaintiff's submission.**

7. In response, Counsel for the Plaintiff submitted that the objection raised by the State Counsel was misplaced. That they had had a pre-trial conference in the matter wherein on the 11<sup>th</sup> October 2018, an order had been made for compliance with the provisions of order 11 of the Civil Procedure Rules for the 17<sup>th</sup> January 2019 on which date Mr. Ondieki- State Counsel had been present on behalf of the Defendants and an order was issued to the effect that that parties had complied.

8. That at times all the documents attached to the plaint at the time of filing the suit had been brought to the knowledge of the Defendant

alongside the additional documents.

9. That throughout, the Defendant had never requested for examination of the documents. Further that thorough out the hearing of the matter, the State Counsel did not raise objection to the production of documents except the production of the report by the surveyor.

10. That the objection was now being raised during re-examination which was completely un-procedural. That the State Counsel had waived his right to raise objection to production of documents and it was false to state that the defence was not given an opportunity to look at the original documents and either object or to admit to their production.

11. That this was a court of record and that he believed it had recorded the evidence adduced in court as well as the documents produced by the witness.

12. That the documents produced by PW1 were properly produced where no objection was raised, and the court had made its observations. The documents produced should therefore remain admitted as produced. That there was no prejudice to the Defendant as they had been served with all documents.

13. That he had been referring to the pages the documents appeared and marking the same wherein the State Counsel had not objected to the same or that there were documents missing. The objection raised was therefore calculated to derail the case.

14. That where a party waived its right, it cannot turn round and say the rights were waived. He asked that the objection be dismissed and he be allowed to proceed to examine his witness.

15. In rejoinder, Mr. Weche -State Counsel submitted that the import of Order 11 of the Civil Procedure Rule was that that once a matter was certified for hearing, that the documents to be relied upon did not form part of the court record and they needed to be produced so as to form part of the court record. That during examination in chief, the witness was not led to the extent that the documents were being produced to form part of the court record. The documents were only referred to which did not lead to an assumption that they were being produced so as to enable the defence to object or admit to their production the same. He submitted that since this was not done, the defence would suffer great prejudice.

16. It was upon submission by counsel that the Plaintiff's witness was stood down for re-examination so that the court would retire to write its ruling.

#### **Determination**

17. Indeed the record is clear that on the 19<sup>th</sup> March 2019, when the matter came up for hearing, parties had been represented by their counsel. Whereas the Plaintiffs had been represented by Mr. Kariuki Advocate, the Respondent had been represented by Mr. Weche, State Counsel.

18. Indeed as the record would show, at all times during the testimony of PW 1, he was referred to documents that he had filed in his list of documents wherein he was asked whether he wished to produce them as an exhibit to which he had answered in affirmative and the documents had been marked as Plaintiff exhibits.

19. The hearing proceeded up to the point when the Plaintiff sought to produce the surveyor's letter as his exhibit 17, that the State Counsel objected to its production wherein the same was marked for identification-MFI 17.

20. Thereafter, the Plaintiff's witness proceeded with his testimony after which he was cross-examined by the State Counsel whereupon completion of cross examination and upon being re-examined, that the State Counsel raised the above captioned objection.

21. The Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** held as follows:-

How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

22. A reading of some extracts of the proceedings in the present case were as follows:

'The 1<sup>st</sup> plaintiff is registered. This is the copy of the registration which is annexed to my documents at page 31 – pf exhibit 1. It was registered on the 7/12/1957.....the application was made to the county council of Nyandarua. The application was considered in the same year and given to the church. I have the minutes at page 33 of our documents. I wish to produce them as evidence before this court – PF Exhibit 2. The meeting was held on 25/10/1990 at 12.20 pm.....there was a letter of allotment was issued to the church. I have the original copy with me. The same was issued on 5/12/1996. It is referenced no 76988/iv. Reference Ol jorok Township parcel 79. The letter was duly signed by P.M. Kariuki Mrs. for commissioner of lands. The letter of allotment is document is at

page 36 of our documents. I would like to produce a copy of the allotment letter as my evidence- PF exhibit 3..... The plot in question was to remain under ACK Oljoro orok Church. We subsequently obtained lease for the plot which was issued on 17/3/2016. This is the original lease. A copy is at page 57-PF exhibit 12. We paid stamp duty for the plot. It was registered on 6/5/2016. (Page 60).We then obtained a certificate of lease page 61 of the list of documents. This is the original certificate of lease. It was issued on the 12/5/2016 by the Nyandarua District Land Registry. I wish to produce a copy – PF Exhibit 13.....

23. And the evidence and production of exhibits went on with no objection from the State Counsel up to the re-examination stage, only for him to suddenly wake up from slumber and raise objection to the documents already produced and admitted as exhibits.

24. As seen from the proceedings, before the said documents were admitted as exhibits they had passed the stages as enumerated in the case of **Kenneth Nyaga (supra) I find no merit in the objection raised and proceed to overrule the same. The witness shall be recalled to proceed with the re-examination process.**

**Dated and delivered at Nyahururu this 3<sup>rd</sup> day of April 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**