



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 204 OF 2017

THOMAS NGARACHU NGUGI.....1ST PLAINTIFF/APPLICANT
MARY NJAMBI NGUGI.....2ND PLAINTIFF/APPLICANT
SIMON KURIA KUNGU.....3RD PLAINTIFF/APPLICANT
DAVID MWAURA KANGETHE.....4TH PLAINTIFF/APPLICANT
JOSEPH GITAU WAITHERA.....5TH PLAINTIFF/APPLICANT
JOHN NDEGWA KANGETHE.....6TH PLAINTIFF/APPLICANT

VERSUS

JOHN WILFRED WANYOIKE.....1ST DEFENDANT/RESPONDENT
FRANCIS NJUGUNA KARANJA.....2ND DEFENDANT/RESPONDENT
JOHN IRUNGU WAWERU.....3RD DEFENDANT/RESPONDENT
DAVID NGIGE MWANGI.....4TH DEFENDANT/RESPONDENT
MBIYU MWAURA.....5TH DEFENDANT/RESPONDENT
COUNTY GOVERNMENT OF MURANGA.....6TH DEFENDANT/RESPONDENT
HON. ATTORNEY GENERAL.....7TH DEFENDANT/RESPONDENT

RULING

1. This ruling relates to the Notice of Motion filed on the 30/4/19 in which the Applicants sought the following orders;

a. Spent

b. Spent

c. That this honourable Court be pleased to make an order that witness summons do issue to the Public Health officer, Murang'a County, Managing Director, Murang'a South Water & Sanitation Company and the Executive Officer, Kandara District Magistrate Court to produce the documents held by them as per the attached witness summons.

2. The application is premised on the grounds that the attendance of the persons mentioned in Para 1c is required to produce the documents listed in the respective witness summons in their possession in support of the Plaintiffs' case.

3. The application is supported by the affidavit of Karanja Munyori, Learned Counsel sworn on the 29/4/19 in which he deponed that when the matter came up for hearing DR Kuria, SC, who had conduct of the matter on behalf of the Plaintiffs forgot to apply for witness summons to be issued for the hearing scheduled for the 6/5/2019 and hence the formal order. He attached the draft witness summons for each proposed

witness. As to the Public Health Officer; to give evidence in the suit and produce files in respect of approval of the building plans and the completed buildings in respect to LOC4/NGARARIA/908/20 as well as the approved sewerage plans of approval of Ngararia Market in Maragua Sub county as from 1996 as to the Managing Director, Murang'a South Water & Sanitation Company Limited, to give evidence and produce the file in respect to persons supplied with water from the borehole in Ngararia Market since the said borehole was installed, file in respect to supply of water to LOC 4/NGARARIA/908/20 and a letter dated the 9/9/15 addressed to Murang'a South Water & Sanitation Company Limited to Engen Kenya Limited concerning the supply of water to the 2nd Plaintiff between April and September 2014; As to the Executive Officer, Magistrate's Court Kandara; to give evidence in the suit and produce all documents relating to **Criminal Case No 33 of 2011 -Republic Vs Thomas Ngarachu Ngugi, Simon Kungu David Mwaura Kangethe, Joseph Gitau Waithera and John Ndegwa Kangethe**, that is to say copies of the proceedings and judgment.

4. The 5th Defendant opposed the application through grounds of opposition filed on the 6/5/19 for the reasons that; the documents cited for the Public Health Officer of Murang'a County and the Managing Director of Murang'a South Water & Sanitation Company Limited are not in the Plaintiffs' list of documents dated the 19/3/2012 and 11/2/19; The proceedings and judgement in the criminal case could be certified and produced in accordance with the provisions of section 80, 81, 82 and 83 of the Evidence Act and therefore not necessary to call the Executive Officer; the intended witnesses are not in the list of witnesses by the Plaintiffs and finally that the applicant took over 5 weeks to file the application in Court. He sought the dismissal of the application.

5. The 1st-4th and the 6th -7th Defendants did not file any response to the application. However, their counsels on record alongside those of the Plaintiffs and the 5th Defendants argued the application orally in Court on the 6/5/19.

6. The Plaintiffs submitted through learned Counsel Dr Kuria, SC, that the Public Health Officer is required to produce the two documents cited in the application as well as the letter dated 28/10/88 found on page 8 of the Plaintiffs' bundle of documents to address the issue as to whether the suit premises was compliant with the public health requirements as at 20/1/11 when the cause of action being nuisance arose. In respect to the Executive officer, to produce documents stated on pages 31-51 of the Plaintiffs' bundle. In respect to the Murang'a Water Company, the witness is to give evidence in relation to the supply of water to the suit premises between the months of April 2014 and October 2015.

7. The Plaintiffs further submitted that the Defendants will not be prejudiced as part of the evidence has already been tendered by the Plaintiff. That the general principle of amendment of pleadings apply to the application. That a party need to be allowed to amend pleadings no matter how late, no matter how careless that party may have been as long as it does not occasion injury to the other party and if any injury is occasioned the same may be remedied with costs.

8. In response to the grounds of opposition aforementioned, the Plaintiffs submitted and admitted that the list of witnesses did not include the said witnesses. That notwithstanding, he was of the view that these are public officers who should produce documents as and when required by a member of the public. Placing reliance on Art 50 and Art 159 of the Constitution, he asserted that the Constitution guarantees the right to be heard in a fair hearing and that the Courts are mandated to hear cases on merits and not dwell on technicalities.

9. Mr. Kimwere learned counsel for the 1st – 3rd and the 6th Defendants opposed the application on the ground that the Public Health Officer is their client's employee and is unprecedented that he would give evidence against his employer and that therein lies the prejudice. He argued that they would not have a problem if the summons related to the issue of production of documents but not to testify.

10. The Learned counsel for the 4th and 7th Defendants, Ms. Chilaka opposed the application on the ground that the witnesses being sought have not been identified and have not filed any witness statements. She disagreed with the Plaintiffs that the application is synonymous with an amendment of pleadings as no pleadings are being amended. That her clients stand to be prejudiced.

11. The learned Counsel for the 5th Defendant, Mr. Mbuthia while opposing the application urged the Court to find against the application for the reasons that the documents being sought to be produced are not in the list of documents and that the Plaintiffs by filing the application seeks to onboard new evidence without the applicants explaining to the Court the difficulty that may have been faced in bringing that evidence on record in the first instance. He argued that the new evidence seeks to fill up the gaps exposed in the testimony of the 1st Plaintiff. Further that these documents should have been sought during the pretrial, which closed. Similarly the proceedings and judgement in the criminal case could be produced in accordance to section 81-83 of the Evidence Act, that is to say certified copies are admissible in evidence and need not be produced, as it is a Court record. He argued that even if the witnesses are expert witnesses the rule of procedure requires that they be listed in the list of witnesses.

12. In rebuttal, Dr Kuria SC, submitted that the Public Health Officer is not one of the witnesses for the 1-3rd Defendants and that even if he was, he would have been expected to be neutral in disputes involving citizens and give evidence dispassionately as a Public Officer. The Plaintiff retains the burden of proving his case and to discharge that burden he is supposed to produce such documents within his power and where necessary where such documents are to be found in the custody of an institution or a public officer, he is entitled to call such public officer to avail such documents in their custody. That the Plaintiff seeks documents in the custody of the disclosed public officers. The documents have been identified as well as the person to so produce. He argued that the defense are yet to commence their case and in the event they wish to call a public officer, they are at liberty to do so.

13. First, I shall give a background preview to the suit. The Plaintiff avers that the 2nd Plaintiff, who is his wife, owns the suit property. On it stands a multipurpose storey building comprising of shops and residential apartments. It is their pleading that the 1st, 2nd and 5th Defendants too own buildings in the area. That each building is serviced by composite and soak pits for both solid and liquid waste. The suit was filed on 24/12/12 against the Defendants and amended with the leave of the Court on the 30/4/18. The Plaintiffs' cause of action is that the Defendants interfered with the sewerage system of the suit property denying the 1st and 2nd Plaintiffs' tenants the use of composite pit which was filled up by the Defendants. Further that the Defendants damaged the cover of the soak pit, the consequences of which the 1st Plaintiff's tenants vacated the suit property in favour of the 5th Defendants building to his detriment as to customers and rental income. They blame the defendants for their predicament. They sought permanent injunctions restraining the Defendants from, inter-alia, interfering with the suit

property and the use of their composite and soak pit in the suit premises, general damages as well as exemplary damages.

14. It is to be noted from the record that upon compliance with the pre-trial conference the parties on the 14/2/19 set the matter for hearing for the 19/3/19. The hearing commenced with the 1st Plaintiff through counsel on record informing the Court that he would present 3 witnesses for which witness statements had been filed and admitted on record. The 1st Plaintiff testified and concluded his testimony and the parties in concurrence sought a further hearing date scheduled for the 6/5/19. That was not to be as the Plaintiffs filed this application on the 29/4/19 as earlier stated.

15. It is not in dispute that the witnesses being sought to be called to testify and produce documents are not listed in the list of witnesses. The Plaintiffs at page 1 of their bundle sought to present 3 witnesses, namely the 1st – 3rd Plaintiffs who have duly filed their witness statements as shown in the Plaintiffs' bundle. The 3 witnesses sought to be summoned are not mentioned at all. It is on record that at the opening of the hearing the counsel for the Plaintiffs informed the Court that he would present 3 witnesses. The Plaintiffs have argued that the witnesses are expert witnesses whose evidence is relevant to the case and will assist the Court to determine the matter on its merits.

16. The question for this Court is whether it should allow the application and the production of the additional documents by the Plaintiffs. I make reference to case law which are persuasive to the case at hand.

17. In the case of **Aniket Investment Limited Vs Hamadi Mwakibibo (2018) EKLK**, the Court stated;

“In my view, and being guided by the provisions of Article 159 (2) (d) of the Constitution, the plaintiff can be allowed to adduce the additional documentary evidence. In my view, no prejudice will be caused to the defendants by the introduction of the documents as they will have an opportunity to cross-examine the witness on the same. There is therefore room for the defence to test their worth in cross-examination. Furthermore, 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 documents before a Court of law in furtherance of his case in a situation where the other side can be compensated by way of costs.

18. In the case of **Johana Too Vs Hellen Tum 2014 EKLK** the Court when confronted with similar application made the following observations;

“This however is not to say, that the Court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each Court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.

19. I take the view that each case must be considered on its own peculiar circumstances taking into account all the factors including the stage at which the trial has reached. It is always in the best interest of justice that parties be allowed to place before the Court all the evidence available so long as it is relevant. This is because the main duty of the Court is to do justice to the parties. At the same time however, the Court must be vigilant and guard against parties who attempt to steal a march on their adversaries in circumstances where such new evidence cannot be adequately rebutted.

20. The Hearing of the plaintiffs' case is at its infancy. The Plaintiffs have not closed their case. The Defendants will have the opportunity to call for such additional evidence and witnesses to rebut the evidence being adduced by the Plaintiffs. I see no prejudice that will be suffered by the defendants which cannot be remedied with for costs.

21. That said and having reviewed the Court record in totality, it occurs to me that the witness summons being sought against the Managing Director, Muranga South Water and Sanitation Company Limited to produce documents in respect to water supply at Ngararia market are misplaced. I say so because there is no mention of the water supply from the borehole at the market in the Plaintiffs' lists of documents. Neither is there any mention of the letter dated the 9/9/15. The Court is unable to comprehend the relevance of this document and the evidence in view of the cause of action and the pleadings of the Plaintiffs.

22. I am guided by the provisions of Article 50 and 159 of the Constitution and the overriding objectives of this Court which is to do deliver substantive justice to the parties and in the exercise of my discretion, given the circumstances of this case, to allow the application with the exception of the summons against the Managing Director, Murang'a South Water and Sanitation Company Limited, which are declined for the reasons given in Para 21.

23. In the interest of justice, I grant the application subject to the following conditions;

- a. The Defendants shall have the costs in the application.
- b. The Plaintiffs are directed to file and serve the documents within 14 days from the date hereof.
- c. The Defendants are granted the liberty to file and serve and or adduce such evidence that they may so desire within 14 days.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANGA THIS DAY OF 24TH DAY OF JUNE, 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Kinuthia HB for Dr Kuria for the 1st – 6th Plaintiffs

Wanjama HB for Kimwere for the 1st – 3rd Defendants

4th Defendant – AG is absent

Mbuthia for the 5th Defendant

Wanjama HB for Kimwere for the 6th Defendant

7th Defendant: AG is absent

Kuiyaki and Njeri, Court Assistants