



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 138 OF 2015

CLEOPHAS NGEYWA.....PLAINTIFF

VERSUS

DINAH NAFULA SEME.....DEFENDANT

RULING

1. This is a ruling on an objection raised during the hearing of the main suit in this matter by Mr. Nyamu Counsel for the plaintiff. He objected to the production of Deposit Slip of Kshs. 28,000/= as evidence.

2. Mr. Nyamu submitted that the deposit slip was not part of the defendant's documents filed in this matter in preparation for trial and that the plaintiff will not have the benefit of interrogating that document if it were produced. Mr. Nyamu pointed out that the plaintiff has closed his case and a ruling which is in the court record expressly bars the production of other evidence not filed in the record earlier. It is submitted that the production of banking slip would circumvent the earlier orders of this court and it is clearly an afterthought.

3. Prof. Sifuna, Counsel for the defendant in reply stated that the reply to the amended defence and counterclaim did not deny that the amount of Kshs. 28,000/= was deposited in plaintiff's wife's account and that in the law of evidence if any fact asserted by one party is not denied by the other it is deemed as accepted. He pointed out that the plaintiff's wife did not testify in this suit. He submitted that the deposit slip does not qualify as "further evidence" and that a party cannot be allowed to benefit from their own wrong doing. He urged that this is a court of equity, that "equity deems as done that which ought to have been done" and that this court should ignore procedural technicalities. Prof. Sifuna submitted that the payment of Kshs.28,000/= vide deposit slip is part of the same transaction and the objection should be overruled as a technical objection. He relied on Article 159 of the Constitution.

4. Mr. Nyamu, in exercise of his right of reply stated that the defendant had the document but failed to file it in court as required and this court would be sitting on an appeal in its own earlier decision in the same matter if it allowed the document to be produced. He further submitted that **Article 159** should not be applied to condone breaches by parties and that the right to a fair hearing should be observed. He urged that various provisions of the constitution be balanced against one another. He specifically referred to **paragraph 3** and **paragraph 5** of the amended reply to amended defence. That paragraph states as follows:

"The plaintiff in further reply to paragraph 5 in the defence maintains that Kshs.300,000/= remained as at the time of filing this suit."

5. Paragraph 5 states as follows:

"The defendant's defence is not in line with the contents of the agreement dated 5/12/2014 as the balance of Kshs.300,000/= was to be cleared on or before 5/3/2015 and no payment has ever been made to the plaintiff from the defendant to date and the plaintiff is properly entitled to the remedies sought in the plaint."

6. Those paragraphs signify that the plaintiff is denying any payment purported to have reduced the Kshs.300,000/= balance and it goes to the core of the dispute between the parties.

7. A perusal of the record of the proceedings shows that on 23/10/2017 the defendant's counsel applied for leave to file a statement and a supplementary list of documents and Mr. Nyamu feeling ambushed objected strongly to the move stating that a formal application for the purpose should have been filed since the plaintiff had already closed his case and that under **Order 11** the defendant was obliged to disclose all evidence before the hearing without any provision for introduction new evidence in the middle of the trial. He submitted that the plaintiff would not have any opportunity to comment on the new material if it was produced and that the defendant should rely on what she had filed in court. This court considered that objection and delivered a ruling on the same day in which it stated as follows:

"I must agree with the plaintiff's counsel that in such circumstances any other expression of interest to file further

documents or evidence can only be an afterthought or worse which I do not think is applicable in this case an intent to fabricate evidence. Further if such trend were allowed there would be no end to many cases as parties would have time to file documents ad infinitum. That is contrary to public interest engendered in the *latin maxim "interest reipublicae ut sit litium finis"*. I find it is contrary to the interest of justice to allow the defendant's application and I hereby dismiss it and order the case to proceed with the evidence on the record."

8. The latter part of this passage is the apparent source of Mr. Nyamu's contention that this court has already ruled out the filing of new evidence in the matter and that it would be sitting in appeal on its own orders. I must therefore consider the instant objection in the light of that ruling delivered on 23/10/2017.

9. The document sought to be produced now is a bank deposit slip that was not availed by the other side by the time the plaintiff closed his case. I have not heard Prof. Sifuna assert that that document had been availed to the plaintiff before or that the defendant did not have it in her possession before the plaintiff closed his case. The same concerns raised by Mr. Nyamu on 23/10/2017 are still valid in the current objection to the deposit slip's production. For the same reasons given on the ruling read by this court on 23/10/2017 the objection by the plaintiff is upheld. Hearing to proceed with the documents on the record only.

Dated, signed and delivered at Kitale on this 30th day of July, 2019.

MWANGI NJOROGE

JUDGE

30/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Nyamu for plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/7/2019