**REPULIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.109 OF 2015**

**MICHAEL KIPLANGAT CHERUIYOT.....PLAINTIFF**

**VERSUS**

**JOSEPH KIPKOECH KORIR.....DEFENDANT**

**RULING**

***(Application to reopen the plaintiff's case and adduce additional evidence; plaintiff and defendant having testified and called witnesses and having closed their respective cases; suit only pending submissions and judgment; applicant stating that he has come across new critical evidence; the evidence being readily available all the while that the case was on-going; reopening of a case requiring special circumstances and is a discretion that should be exercised with considerable restraint for the rules do provide for the manner in which trial needs to be conducted; no special circumstances demonstrated; application dismissed with costs)***

1. The application that is the subject of this ruling is that dated 19 June 2019 filed by the plaintiff. The principal order sought is for the court to be pleased to re-open the plaintiff's case and allow him to file a supplementary list of documents, a supplementary list of witnesses, supplementary witness statements, and generally avail more witnesses and evidence. The context of the application is that both the case of the plaintiff and of the defendant have been marked as closed and the court had directed counsel to file their final written submissions before retiring to write the judgment.

2. By way of background, this suit was commenced by way of a plaint which was filed on 10 April 2015. In his plaint, the applicant contended that he is the registered owner of the land parcel Nakuru/Ngongongeri/1040 measuring 2.02 Ha. He mentioned that he got title on 21 July 1997 and that he has been resident on this land ever since. He complained that the defendant approached him purporting to be the owner of the said land and threatening him with eviction, yet he (the defendant) is the proprietor of the land parcel Nakuru/Ngongongeri/1026. He asserted that he is in occupation of his own land parcel No. 1040. In the suit, he has sought a declaration that he is the bona fide owner of the land parcel Nakuru/Ngongongeri/1040, a permanent injunction against the defendant restraining him from this land, and a further declaration that he has acquired title to the land parcel Nakuru/Ngongongeri/1040 by way of adverse possession.

3. The respondent filed defence and counterclaim wherein he pleaded that the applicant actually occupies the land parcel Nakuru/Ngongongeri/1026 and not the land parcel Nakuru/Ngongongeri/1040 as he claims. He also pleaded that the applicant has been resident on the land for only 7 years. He sought orders of eviction and mesne profits against the applicant.

4. So that it may be clear who occupies what land, I sent a surveyor to the ground and he came up with a report, which however was disputed by the applicant and the matter had to proceed for hearing. The plaintiff testified on 6 March 2019 and the case proceeded for further hearing on 20 March 2019 when the plaintiff closed his case. The defendant also testified on this day and called one witness. We then adjourned to 3 April 2019 for further defence hearing but no other witness was called and the defendant closed his case. I then invited counsel to submit and gave 21 days to each and directed that the case be mentioned on 20 June 2019 to confirm the filing of submissions and to take a date for judgment. It is on the eve of that date that this application was filed. Prior to this, counsel for the applicant had filed his final written submissions on 6 May 2019 and counsel for the respondent had filed his submissions on 15 May 2019.

5. In this application, the applicant avers that he has obtained further documentary evidence relating to the land parcels Nakuru/Ngongongeri/1026 and 1040, in issue in this case. In his supporting affidavit, he has deposed that the respondent has illegally, fraudulently and through crude means, obtained title to the land parcel No. 1026 and on the strength of the forged document, has laid claim to the land parcel No. 1040. He has deposed that on 12 June 2019, he obtained documents emanating from the office of the District Land Registrar which demonstrate the alleged fraud. He is thus of opinion that unless his application is allowed, this court may render its decision in absence of full and accurate disclosure. In a supplementary affidavit filed on 21 June 2019, he has annexed the said critical evidence. He has mentioned that he wrote a letter dated 3 June 2016 to the Minister of Lands for clarification of the respondent's title. He has annexed a letter from the Land Registrar, Nakuru, which states that the said office has no register for the land parcel No. 1026 and which letter further mentions that the parcels of land are under a Government caveat. He has also annexed the register to the land parcel No. 1040 bearing his name. In addition he has annexed a survey map with the aim of showing that the parcel No. 1026 does not exist.

6. In opposing the motion, the respondent has sworn a replying affidavit where he has deposed inter alia that the prayers sought are aimed at defeating justice. He has mentioned that the applicant had since 2015 to obtain the evidence and present it before close of trial. He has further pointed out that prior to the filing of the suit, the parties had appeared before the Directorate of Criminal Investigations where he presented his title. He has faulted the survey map annexed as not being complete and conveniently missing the parcel No. 1026.

7. I have assessed the application alongside the submissions of both Mr. Okiro for the applicant and Mr. Maragia for the respondent.

8. The manner in which a trial is conducted is laid down in Order 18 of the Civil Procedure Rules, 2010. Generally, the plaintiff starts by presenting his evidence, then the defendant follows. After they have presented their evidence, the parties may proceed to make submissions before the court renders judgment. There is provision for recall of a witness in Order 18 Rule 10, but this is recall of a witness who has already testified. In so far as pre-trial disclosure of evidence is concerned, Order 3 Rule 2 does provide that the plaintiff needs to disclose his evidence at the time that the plaint is filed, and for the defence, disclosure is made at the time that the defence is filed, pursuant to the provisions of Order 7 Rule 5. There is a window for disclosing additional evidence but this needs to be done before trial commences. Save for the above, I know of no other provision for recalling a witness or allowing a party to re-open their case to present new evidence not disclosed before. It would thus fall within the discretion of the court whether or not to allow a party to re-open his/her case to adduce additional evidence, but this is a power that needs to be used with lots of restraint for the reason that the rules do set out that parties need to disclose their evidence before trial commences, and it is the duty of a party to ensure that he/she is satisfied with the evidence they wish to present before trial commences. A trial should not be used as fishing ground for new evidence to fill in the gaps that the opposing party may have created, for this negates the very essence of pre-trial disclosure. It must be clear that the new evidence could not be available to the applicant even after exercise of due diligence. The position should not be for one party, after the other has tabled his evidence, to now start looking for evidence specifically to counter what the other party has said. That would be encouraging parties to go on a fishing expedition and a hearing will never end. Indeed, the structures in the Civil Procedure Act, and the Civil Procedure Rules, provide what would pass for a fair trial of a civil suit and it would need exceptional and/or extraordinary circumstances for a court to depart from them.

9. This is what the applicant asks me to do but I am not persuaded to exercise my discretion in his favour. It is not said that the evidence that the applicant now wishes to introduce could not be made available to him before the trial commenced. The applicant already knew what the respondent was going to present at the pre-trial stage, and if he thought that what he had was inadequate, or that it was necessary to present some additional evidence to counter that which the respondent proposed to present, he could have sought for time to find and adduce it. He never did. What is now sought to be introduced could certainly have been made available all this time and of course we are not dealing with a situation where it is said that the respondent had hidden this evidence so that it could never have been available to the applicant there before. It is clear to me that it is an afterthought by the applicant to seek the mentioned additional evidence after the respondent has already closed his case. Such practice should be frowned on and ought not to be encouraged.

10. Mr. Okiro referred me to the decision of Ohungo J, in the case of ***Joseph Ndungu Kamau vs John Njihia (2017) eKLR***, where the good judge allowed the plaintiff to adduce additional evidence just before the date of highlighting of written submissions. But the circumstances prevailing in that case are radically different from those in this case. In that case, the plaintiff wished to introduce a court file as an exhibit, which file he had previously made efforts to present to court as part of his evidence, but which file could not be traced. He was eventually informed that the file had been traced after the hearing of the matter had closed. First, there had been intention to adduce that file and the defendant was aware of that intention. Indeed, it would have been produced at the time the plaintiff presented his evidence if it was available. Secondly, the file could not have been made available for presentation and could not have been presented as an exhibit earlier because it had been misplaced. That is not the situation that we have here. All this so called “new evidence” that the applicant is alluding to has always been there and could have been presented if the applicant so wished before he closed his case. Nowhere have we been told that this evidence was lost and could not be traced but has now suddenly emerged.

11. I think I need to repeat that the Civil Procedure Rules lay out the manner in which civil trials are to be conducted, and the essence of those rules is to ensure a fair trial. The chances of leading to an unfair trial, barring exceptional circumstances, are very high, if the court departs from these rules.

12. It is for the above reasons that I am not persuaded that this application is merited and it is hereby dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 18th day of July 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. R.K Lang’at holding brief for Mr. Okiro for the plaintiff/applicant.

Mr. Maragia present for the defendant/respondent.

Court Assistants : Nelima Janepher/Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**