



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 160 OF 2011

HIRAM BERE KINUTHIA.....1ST PLAINTIFF

ELIZABETH WANJIRU NGIGI.....2ND PLAINTIFF

ROBERT MATATHIA NGIGI.....3RD PLANITIFF

VERSUS

EDICK OMONDI ANYANGA.....1ST DEFENDANT

ANNE ANYANGA.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

COMMISSIONER OF LANDS.....5TH DEFENDANT

RULING

1. This is the notice of motion dated 16th May 2019 brought under order 51 rule 1 of the Civil Procedure Rules, 2010.

2. It seeks orders that:-

(1) That the 1st plaintiff be granted leave to file a list and bundle of further documents.

(2) The 1st plaintiff's list and bundle of further documents dated 16th of May 2019 filed herein and served be deemed to be properly filed.

(3) Costs of this application be in the cause.

3. The grounds are on the face of the application and are:-

(a) The 1st plaintiff has found 3 further documents which were not in their possession which documents are very crucial in evidence in this case.

(b) The documents are not new to the defendants as photocopies of the same have been included in the 3rd and 4th defendants list of documents.

(c) The issue of ambush or prejudice does not therefore arise.

4. The application is supported by the affidavit of Charles Gitonga Kinuthia, the 1st plaintiff/applicant herein sworn on the 16th May 2019.

5. The application is opposed. There is a replying affidavit sworn by Edick Omondi Anyanga the 1st defendant herein sworn on the 17th July 2019.
6. There are also grounds of opposition filed by the 2nd defendant, dated 21st June 2019.
7. The 3rd – 5th defendants did not file any grounds of opposition. However Mr. Motari did submit orally in opposition to the application.
8. I have considered the notice of motion, the affidavit in support, the replying affidavit and grounds of opposition. I have also considered the oral submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.
9. The first contention by the defendants/respondents is that this application is *res judicata*. That the 1st plaintiff on 1st April 2019 applied to have the said documents produced but the court on its directions of 15th May 2019 was of the view that the 1st plaintiff could not produce the documents then, as they were not in the list of documents. The court then was of the view that in order to avoid an ambush on the part of the defendants, the 1st plaintiff ought to have sought leave to file additional documents. In my view this did not amount to totally preventing the 1st plaintiff from relying on the said documents. This application is therefore not *res judicata*.
10. I have considered the circumstances of this case. The 1st plaintiff became a party to these proceedings after the death of his father, Hiram Bere Kinuthia. In his supporting affidavit, he has explained where he got those documents.
11. I am aware that parties ought to disclose their case at an early stage to avoid ambush, delay and increase of costs. However the circumstances of this case, warrant the court to exercise its discretion in favour of the 1st plaintiff. The plaintiffs have not closed their case yet. No prejudice will be suffered by the defendants as they will have an opportunity to present additional documents and/or cross examine the 1st plaintiff on these documents.
12. I have gone through the authorities relied on by the 2nd defendant, I find that they are distinguished from the circumstances herein as they all relate to a scenario where the plaintiff had closed his case.
13. In the case of the **Hon. Attorney General vs Torino Enterprises Limited [2018] eKLR**, the Court of Appeal stated that additional evidence could be admitted where the court is satisfied that the said evidence is not meant to bolster or fill gaps in the case. In the instant suit I am satisfied with the 1st plaintiff's explanation that he did not know where these documents were at the start of the case.
14. Article 50 (1) of the Constitution guarantees every litigant a fair trial while Article 159 (2) (b) of the Constitution provides that justice shall be administered without undue regard to technicalities. I am guided by the above provisions.
15. As stated earlier, no prejudice will be occasioned to the defendants who will have an opportunity to cross examine the 1st plaintiff on the said documents.
16. In conclusion, I find merit in this application and the same is allowed. The 1st plaintiff is hereby granted leave to file and serve a list and bundle of further documents within fourteen (14) days from the date of this ruling. The defendants shall have corresponding leave to file their list and bundle of further documents if any. The cost of the application be borne by the 1st plaintiff.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25th day of September 2019.

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant