



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

HCCC No. 86 OF 2002

DOUNE FARM LIMITED.....PLAINTIFF

VERSUS

RICHARD SOI.....1ST DEFENDANT

JOSEPH RUNYA CHUMA.....2ND DEFENDANT

JACKSON MUTAL.....3RD DEFENDANT

CHRISTINE LABOSO.....4TH DEFENDANT

RICHARD K. SITIENEL.....5TH DEFENDANT

AND

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY LTD.....INTERESTED PARTY

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 23rd November 2017. The date of the application appears to be erroneous since it was filed on 23rd November 2018. Even the supporting affidavit was sworn on 23rd November 2018. The following orders are sought in the application:

1. Spent.

2. That this honourable court be pleased to file and serve additional document in terms of the attached draft list of documents (sic).

3. That this honourable court be pleased to give any such further orders as it may deem fit and just for the protection of the plaintiff's interest in the property pending the hearing and determination of the suit.

4. That the cost of this Application be provided for.

2. The application is supported by an affidavit sworn by Richard James Kay Muir, a director of the plaintiff company. The defendants oppose the application through a replying affidavit sworn by Richard Soi (the 1st defendant) while the interested party equally oppose it through a replying affidavit sworn by John K. Rotich, its chairman. Parties did not make any submission. They relied on the material on record and urged the court to render a ruling.

3. The applicant seeks to be allowed to file an additional list and bundle of documents. The List runs into 45 items. It contends that it needs to produce the said documents to demonstrate *bona fides* of the process of purchase and transfer of the suit property. That when this suit was filed, the claim against the defendants was that of trespass and the applicant was of the view that it needed to only produce the sale agreement and title to prove ownership. However, following the entry of the interested party into the proceedings and considering the position the interested party took in its statement, it has become necessary for the applicant to demonstrate the entire process of the conveyance. The applicant further contends that the documents sought to be introduced are not strange to the parties and that their inclusion will assist the court reach a just and informed decision.

4. The defendants' case is that the proposed additional documents amount to an afterthought and an ambush; that the application is prejudicial since the main director of the plaintiff has testified and the defendants missed the opportunity to cross examine him on the

documents and that allowing introduction of the documents will be an affront to their right to a fair hearing.

5. On its part, the interested party also took the position that the documents ought not to be admitted on record since the plaintiff's witness had testified on 6th May 2003 without producing the said documents, that the interested party filed its documents in the year 2003 and that there is no explanation for the inordinate delay of 15 years that it took the plaintiff to seek to file the additional documents, that pleadings had closed and the documents should not therefore be accepted, that the plaintiff is seeking to litigate in instalments.

6. I have carefully considered the application and the affidavits on record. The applicant seeks to be allowed to file an additional list and bundle of documents running into 45 items.

7. This matter was initially filed in the High Court where the hearing partly proceeded. On 20th March 2015, directions were given that proceedings be typed and that hearing proceeds from where it had reached. The matter was later transferred to this court on 21st February 2017. Despite the order on typing of proceedings, there are no typed proceedings in the file. The handwritten proceedings prior to 8th October 2014 are in tatters. Additionally, none of the pleadings filed prior to 23rd November 2018 are in the file. All I see in the file is the bound volume containing plaintiff's Notice of Motion dated 23rd November 2017, interested party's replying affidavit filed on 10th December 2018 and defendants' replying affidavit filed on 13th December 2018. I have therefore agonised whether I should go ahead and write this ruling in view of the sorry state of the record. Ultimately, considering that the ruling is in respect of an interlocutory application, that the record in so far as the application is concerned is intact and further considering the need to expeditiously dispose of the matter, I have decided the material is adequate for purposes of this ruling. I will therefore proceed and conclude the ruling. The deputy registrar of this court should however locate and put together the missing part of the record.

8. Although this matter is partly heard, the plaintiff's case is yet to be closed. As such, the defendants and the interested party still have adequate opportunity to respond to whatever case that the plaintiff may put before the court. The mere fact that the plaintiff's case is partly heard or that pre-trials had been done is not a bar to the plaintiff being allowed to file an additional list and bundle of documents. The defendants' and the interested party's fears can be fully addressed by affording them a chance to file further list and bundle of documents as well as witness statements. Additionally, considering the state of the record, hearing herein should start *de novo*. Indeed, I note that parties had on 21st February 2017 attempted to record a consent to that effect.

9. Ultimately, the mission of the court is to do substantive justice. That can only be achieved by giving the parties a chance to fully plead and prosecute their respective cases. I see no prejudice to the defendants and the interested party beyond that which can be compensated by an award of costs, if the applicant is allowed to file further documents. Regarding prayer 3 of the application, no basis has been laid for the order sought therein and I will therefore not grant it.

10. In the end, I make the following orders:

- a. The plaintiff is hereby granted leave to file and serve, within 14 days from the date of delivery of this ruling, a further list and bundle of additional documents in terms of the draft attached to Notice of Motion dated 23rd November 2017, further list of witnesses and witness statements.
- b. The defendants and the interested party are hereby granted leave to file and serve, within 14 days of service of the plaintiff's aforesaid documents, further list and bundle of documents, further list of witnesses and witness statements.
- c. Hearing of the suit shall start *de novo*.
- d. The plaintiff shall bear costs of Notice of Motion dated 23rd November 2017.

11. It is so ordered.

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

D. O. OHUNGO

JUDGE

In the presence of:

Mr Okiro holding brief for Mr Ogolla for the plaintiff/applicant

No appearance for the defendants/respondents

No appearance for the interested party/respondent

Court Assistants: Beatrice & Lotkomoi