



REPUBLIC OF KENYA

IN THE ELC OF KENYA AT NYAHURURU

ELC NO 5 OF 2017

(CONSOLIDATED WITH JR 14 OF 2017)

(FORMERLY NAKURU ELC 37 OF 2012)

LAIKIPIA UNIVERSITY COLLEGE.....PLAINTIFF

VERSUS

REGISTERED TRUSTEE OF CHILD WELFARE

SOCIETY..... DEFENDANT/RESPONDENT

RULING

1. Briefly the above captioned matter proceeded for hearing with the Plaintiff's case wherein after taking the evidence of PW3, Counsel for the Plaintiff sought to file a supplementary list of documents.
2. Counsel submitted that the kind of document they sought to tender was a report sent to the Vice Chancellor of the Plaintiff from the National Land Commission which report had also been copied to the Defendant, the Child Welfare Society of Kenya, the County Surveyor Laikipia, the County Commissioner Laikipia well as the Governor Laikipia County.
3. That the document dated 19th February 2019 was not within the knowledge of the Plaintiff at all times but according to it, the National Land Commission took the initiative of investigating this matter in view of the fact that the parties herein were both organs of the Government.
4. That the report they intended to adduce explained under what circumstances the allotment letter held by the parties was issued, which was the issue before the court. Counsel submitted that the said document would help the court in determining the real issues of the case so as to come to a just determination.
5. The Plaintiff's Counsel relied on the case of **Johana Kipkemei Too vs Hellen Tum [2014] eKLR** where the learned judge analyzed factors to be considered by the court before allowing a party to put in additional documents. That the grounds included the discovery of the new document, the stage of the proceedings, whether any party would suffer prejudice and lastly whether it would be in the best interest of justice. That the application had been dismissed because both parties had closed their case.
6. In the present matter, the parties had not closed their case and the defense would be able to cross examine on the said document. He submitted that there would be no prejudice to the Defendant. That since this was a matter of public interest, the judgment coming from the court ought to address the said interest which could only be achieved after considering all the available evidence. That a party should be given an opportunity to avail all evidence that can assist the court.
7. Counsel also submitted that it is trite law that documents and additional evidence could be filed even at the stage of an Appeal if they are necessary to assist the court. He prayed that the application to file an additional document to be allowed.
8. The application was opposed to by Counsel for the defense who submitted that the same did not meet the threshold of procedural propriety or the threshold of legality.
9. Counsel submitted that on the first threshold, the application was made in the middle of the hearing of the Plaintiffs case when all documents relied upon by the Plaintiff had been produced.
10. That the suit had been certified ready for trial on the 15th of January 2018 after parties had complied with the provisions of Order 11 of the Civil Procedure Rules

11. On the 15th March 2018 the hearing commenced where three witnesses testified on behalf of the Plaintiff and were cross examined, leaving the two witnesses. That the application by the Plaintiff had caught the defence by surprise having already cross examined the three witnesses based on their evidence. That the introduction of the new document would prejudice the Defendant and their case. That they had not seen the document that the Plaintiff intended to introduce but had only seen the letter dated 19th February 2019 which document was prepared in the course of the trial and after witnesses had testified.

12. This was a clear manifestation of evidence by a party in the course of a trial. That the case of **Johnathan Kipkemei (supra)** was similar to this case where the court refused to allow the introduction of new evidence because it would ambush the party.

13. That the National Land Commission had already introduced the document in court as Pf exh 7(d) a letter dated 29th September 2015 which stated clearly the position of the National Land Commission in respect to the suit property. That the witness had already been cross examined on this letter and therefore no new document should be allowed by the same witnesses. The defence Counsel relied on the decided case of **Mwangi Stephen Muriithi vs National Land Commission & 3 Others [2018]eKLR** and submitted that the application to introduce new evidence ought to be dismissed and the matter proceeds for further hearing on a date scheduled.

14. In rejoinder, Counsel for the Plaintiff submitted that the document they sought to introduce was not within the knowledge of the Plaintiff who was not the originator of the same. The fact that the National Land Commission prepared the report in the pendency of the matter and without knowledge of the parties was not enough to keep it away from the court.

15. That the Plaintiff was not changing the character and nature of the case. That the introduction of document after the matter had been certified ready for hearing was at the court's discretion which discretion ought to be exercised judiciously based on the circumstance of each and every case.

Determination

16. The background of the application in this matter is that the Plaintiff in the course of giving evidence, sought the leave of the court to file an additional the statement in the form of a report by the National Land Commission on the ground that the Plaintiff had *discovered new evidence which is the National Land Commission report that was not available and/or accessible as at the time the Plaintiff filed its documents.*

17. In the case of **Britania Sacco v Jambo Biscuits Limited [2018] eKLR**, the court held that

A Court of Law should always be concerned with substantive justice and the main hearing of a matter the golden opportunity for a party to a dispute to put forward all the evidence it can marshal. From the practice of this Court, it is to be expected that the evidence will have already been filed prior to the Case Management Conference. But as is sometimes the case, either out of oversight or for other reason, this does not happen. So as to give parties the furthest opportunity of presenting their case, a Court will allow introduction of new evidence if the failure to include it in the first place was bonafide and does not prejudice the adversary or where prejudice can be mitigated by allowing the adversary to file fresh evidence. Invariably therefore whether to allow fresh Statements and Documents will turn on the circumstances of each case.

18. Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial. Though the court no doubt has jurisdiction to allow a party to introduce a new document or evidence, yet the same should be done judiciously keeping in mind that it should not be prejudicial to the other party. In the instance case the application was made by the Plaintiff before they had closed their case and therefore the defence would be at liberty to cross-examine the said evidence which in my view is a level playing field and not prejudicial to the Defence.

19. The court was informed that the additional and/or new evidence sought to be introduced by the Plaintiff was directly relevant to the matter in this Court and if given, it would remove any vagueness or doubt on the issues before this court. Further the court was informed that the said evidence was not within the knowledge of, or could not have been procured at the time of the pre-trial by the Plaintiff. I think it is only fair that the leeway given to the Plaintiff.

20. For the foregoing reasons, I allow the Applicants application to adduce the proposed additional evidence, he shall file and serve the new witness Statement and additional evidence within 14 days upon the delivery of this ruling. The Defendant is at liberty to file and serve further witness statements in reaction to the new evidence within an equal 14 days, and to recall the Plaintiffs witnesses for further cross-examination if need be. I make no orders as to costs.

Dated and delivered at Nyahururu this 29th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE