



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 667 OF 2009

GEORGE KURIA MWAURA.....PLAINTIFF

VERSUS

JOYCE GATHONI KIARIE.....1ST DEFENDANT

(Sued as the Legal Administrator of the Estate of Joseph Wanyoike Kiarie)

THE PRINCIPAL REGISTRAR OF TITLES.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

RULING

1. This ruling relates to an objection raised by the plaintiff, the 2nd defendant and the 3rd defendant against the 1st defendant's introduction of two fresh witness statements and two new witnesses. The two witnesses are Corporal Silvester Mango and Mr Jacob Oduor. Their respective statements are both dated 30/9/2019 and were filed in court on 3/10/2019. The objectors contended that they were handed the two statements today in court before the court convened for further hearing of the defence cases. The plaintiff called four witnesses and closed his case on 4/2/2019.

2. The plaintiff, the 1st defendant and the 2nd defendant through their counsel, Mr Langat and Mr Kuria, objected to the introduction of the two witness statements and admission of evidence by the two new witnesses on the ground that it would be prejudicial to the plaintiff who had already closed his case. The objectors argued that the plaintiff had already closed his case and would not have the opportunity to evidentially challenge what is contained in the new witness statements and the evidence by the two new witnesses. They faulted the 1st defendant for filing new witness statements after the plaintiff had closed his case and for doing so without leave of the court. They contended that the two witnesses were involved in Nairobi Chief Magistrate Court Criminal Case Number 1444/2013 which was stayed by the High Court pending the hearing and determination of the ownership dispute in this suit. They contended that the 1st defendant was trying to reintroduce the criminal case which the High Court had stayed. They further argued that the parties to this suit were constitutionally entitled to a fair hearing and allowing the 1st defendant to introduce the two witness statements and two witnesses after the plaintiff had closed his case would be an ambush and would violate Article 50 of the Constitution.

3. Mr Wawire, counsel for the 1st defendant submitted that on 4/2/2019, he applied for witness summonses and therefore the objectors were aware that the two witnesses were going to testify. He added that the objector would not be prejudiced because the documents they intended to produce were put to the plaintiff during cross examination. Counsel added that the High Court Judgment rendered by Justice Odunga stayed the criminal case but did not bar the 1st defendant against calling specific witnesses and leading specific evidence. Mr Wawire further submitted that Order 7 rule 5 (c) of the Civil Procedure Rules allowed filing of statements by expert witnesses after the filing of defence. He argued that the two witnesses were expert witnesses. Counsel argued that they were willing to discard the written witness statements and focus on what was already in the 1st defendant's bundle of documents duly served on the parties should the two new witnesses be allowed to testify. He urged the court to dismiss the objection. Submissions on the objection closed at 12.30 p.m. I have had hardly thirty minutes to consider the objection and write this brief ruling.

4. I have considered the tenor and import of the objection. I have also considered the 1st defendant's response. Order 7 rule 5 of the Civil Procedure Rules sets out the mandatory documents which a defendant is required to file together with the defence and counterclaim. It provides as follows:-

“5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial:

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

5. My interpretation of the above legal framework is that, where a defendant wishes to call an expert witness and he fails to file the witness statement of the expert witness at the time of filing the defence and counterclaim, he is allowed to apply for leave of the court to file and serve the expert witness's written statement at least 15 days prior to the date of trial conference. By the time actual trial commences each party's list of witnesses and their respective statements should have been filed and served.

6. Trial in this suit commenced on 1/3/2018 after parties had exchanged trial bundles. The plaintiff called four witnesses and closed his case on 4/2/2019. DW1 commenced testifying on 2/7/2019 and was stood down on the same day. The case of the objectors is that the plaintiff who had already led evidence and closed his case will be prejudiced if the 1st defendant was allowed to introduce fresh witness statements and lead evidence by two new witnesses who were not listed and whose witness statements were not availed to the plaintiff at the time the plaintiff was leading evidence.

7. There is no gainsaying that the right to a fair trial is a constitutional imperative secured under Article 50 of the Constitution. The plaintiff having led evidence and closed his case, it would be against the letter and spirit of Article 50 of the Constitution if this court were to allow the 1st defendant to introduce new witness statements and lead new evidence which the plaintiff will not have the opportunity to rebut by way of controverting evidence. The rationale for the requirement that the defendant files statements by expert witnesses at least 15 days prior to the date of trial conference is to give the plaintiff the opportunity to know the defence evidence he faces and prepare to evidentially rebut it.

8. In the present suit, the plaintiff has closed his case and will not have the opportunity to evidentially rebut the evidence which the 1st defendant seeks to introduce through the two new witness statements and new witnesses. I am therefore in agreement with the objectors that there will be prejudice to the plaintiff who has closed his case. Indeed, had the fact that the said two witnesses were not in the 1st defendant's list of witnesses been drawn to the attention of the court at the time of applying for witness summons, the court would not have granted the request for the witness summonses relating to the two witnesses.

9. It is therefore my finding that the objection raised by the plaintiff, the 2nd defendant, and the 3rd defendant has merit. The objection is accordingly upheld.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2019

B M EBOSO

JUDGE

In the presence of:-

Mr Langat Advocate for the plaintiff

Mr Wawire Advocate for the 1st defendant

Mr Kuria – state counsel for the 2nd and 3rd defendant

Court Clerk - June Nafula