



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 113 OF 2015

EMFIL LIMITED.....PLAINTIFF

-VERSUS-

THE HONOURABLE ATTORNEY GENERAL & 423 OTHERS.....DEFENDANTS

RULING

1. The Application for consideration is the Notice of Motion dated 29th April 2019 and stated to be brought under Order 12 Rule 7, Order 18 Rule 10 and Order 51 Rules 1 and 4 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. In the application, the Attorney General for the applicants seeks order for the applicants and all parties to be allowed to participate fully in the trial process including cross-examination of the 1st Respondent's witnesses, calling of defence witnesses and production of documents in court.

2. The application is based on the following grounds:

1. That judgment was delivered on 20th July 2017 against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants/applicants.
2. That the 1st Respondent's counsel indicated orally in court that the applicants herein shall not have a right to cross examine during formal proof.
3. That the matter is to be fixed for formal proof during the Judicial Service Week and there is a likelihood that the Applicants shall not be allowed to examine the 1st Respondent's witnesses.
4. That the matter is to be fixed for formal proof during the Judicial Service Week and there is a likelihood that the applicants shall not be allowed to bring their own witnesses and tender evidence in court.
5. That it would be a great injustice if the 1st respondent's witnesses testimony is un-rebutted.
6. That the applicants are apprehensive that if they are not allowed to participate fully in the trial process including cross-examination of 1st Respondent's witnesses calling of defence witnesses and production of documents in court, a great injustice will be occasioned.
7. That this application has been made without unreasonable/inordinate delay.
8. That the aspect of justice shall not be met if the orders sought are not granted.
9. That in view of the courts overriding objective we pray that the orders sought be granted.
10. That it is only fair and in the interests of justice that the orders sought herein be granted.

3. The application is supported by the affidavit of Dick Safari, the County Land Registrar, Kwale County sworn on 29th April 2019 in which he reiterates the grounds in support of the motion. He further deposes that the issues to be determined by this court are the subject of Mombasa Appeal No.14 of 2019 and the Court of Appeal shall grant a hearing date anytime soon and have a hearing for the judgment delivered by Hon. Justice A. Omollo set aside. That because the matter has been fixed for formal proof and it involves land, the defendants/any party should not be denied an opportunity to cross-examine any witness that is produced by the plaintiff and that it will be an injustice to the other parties if the evidence of the plaintiff is not put to test.

4. I have considered the application and the submissions filed. The only issue for determination is whether the defendants whose defences have been struck out have the right, at formal proof, to cross examine witnesses and to call and lead evidence. In the Black's Law Dictionary, evidence is defined as something that tends to prove or disprove the existence of an alleged fact. Under Section 3 of the Evidence Act Cap 80 Laws of Kenya, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved. Under Section 107, 108 and 109 of the Evidence Act, a party must allege a fact before mandated and obligated to prove its allegations. In other words, the defendants/applicants have no duty to prove or disprove anything unless there be filed by the pleadings that allege facts which fact then crystalize into an issue for determination by the court.

5. In the instant case, where the Applicants' defence has been struck out, I am not convinced that there is a right on the applicants to disprove the plaintiffs allegations which stand uncontroverted by reason that there is no defence on record. However, I am in agreement with the applicants that even at formal proof, the defendants retain the right to participate at trial. Nobody bars a defendant at trial by formal proof merely because the plaintiff holds an interlocutory judgment. The defendants are at all times parties to the proceedings save that their right to call or lead evidence has been waived by the striking out of their defence. Their participation is only limited to ensuring the law is complied with as far as evidence led is availed in compliance with the law. In my considered view, the applicants have a right to test the credibility and authenticity of the plaintiff's evidence by cross-examination and can guide the court by citing to the court why the claim may be bad in law, say by way of being statute barred or that the court has no jurisdiction or just that an aspect of the prayer is forbidden by law. However, in my view the applicants cannot be allowed to lead evidence based on no pleading and they cannot purport to prove a fact that has not been alleged as their defence has been struck out. It is therefore my finding that there is no foundation or legal justification to allow the applicants to call witnesses to lead evidence where there is no defence on record.

6. In the result, I allow the Notice of Motion date 29th April 2019 only to the extent that the applicants and all parties who have entered appearance to participate fully in the trial process by cross-examination of the 1st respondent's witnesses. The applicants cannot however call witnesses and produce documents. Costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 9th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mkok holding brief for Wachira for AG Defendants

Singh for Plaintiff

Apollo for 12th, 142nd, 145th, 147th, 14th 239th 241st, 29th, 306th and 308th defendants and holding brief for Asige for the 154th, 157th, 158th 161st, 166th and 167th defendants.

Yumna Court Assistant

C.K. YANO

JUDGE