



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO. 5 OF 2017

ESTHER WAMBUI NJENGA PLAINTIFF

VERSUS

HARRISON MWANGI NYOTA & 2 OTHERS..... DEFENDANTS

RULING

(Application by plaintiff to introduce additional documents and to call an additional witness after trial has commenced; the rules requiring that parties present the documents and statements that they would wish to rely on before commencement of trial; whether application should be allowed; filing of late documents and statements not to be encouraged but plaintiff's case not yet closed and defendants will have opportunity to rebut the evidence; application allowed subject to payment of costs).

1. This suit was commenced by way of a plaint filed in September 2006. The dispute in the matter is over the ownership of the land parcel Naivasha Municipality/Block 5/234 which is claimed by both the plaintiff and the 1st defendant. The 2nd and 3rd defendants are the Chief Land Registrar and the Attorney General respectively. Following the old Civil Procedure Rules, which were repealed in the year 2010, the plaintiff on 23 January 2008, filed a list of documents being

- (i) Letter of allotment ;
- (ii) Copy of a judgment dated 14 December 1993;
- (iii) Copy of a judgment dated 27 May 2005.

2. Copies of these documents were filed on 22 April 2008.

3. On his part, the 1st defendant filed his defence and counterclaim, fairly late on 3 August 2012, and with the defence, the 1st defendant filed a list of documents containing only one document, being a copy of ruling in Nairobi HCC No. 164 of 2004. By then, the 1st defendant was being represented by the law firm of M/s P.K Kamau & Company Advocates. Through a notice of change of advocates filed on 31 August 2015, the 1st defendant changed counsel to the law firm of M/s Waiganjo & Company Advocates, who on 19 May 2016, proceeded to file another list of documents on behalf of the 1st defendant, which list contained 14 documents. In the meantime, on 9 May 2016, the plaintiff filed a further list of documents containing 24 documents which was followed close to a year later by the defendant filing his witness statement on 9 March 2017. On 2 October 2017, counsel for the plaintiff and 1st defendant were present in court, but counsel for the 3rd defendant was absent, and I directed that the case proceed for hearing on 9 November 2011.

4. On 9 November 2011, the matter partly proceeded with the plaintiff giving evidence. After she had

testified, Mr. Korongo for the plaintiff, sought an adjournment to call a witness from the office of the Commissioner of Lands which was not objected to and the case was adjourned to today, 23 January 2018 for further hearing.

5. Today, the plaintiff has filed a further list of documents listing a surveyor's report dated January 2018, and has also filed a list of more witnesses being Erick Nduhiu and Samson Mwirigi Nkanata. I have seen that Erick Nduhiu is the one who prepared the survey report but it is not clear to me who Samson Mwirigi Nkanata is. The 2nd and 3rd defendants have on their part, also today, filed a witness statement of one Gordon Ochieng, a Senior Assistant Director, Land Administration in the Ministry of Lands and Physical Planning. Both the plaintiff and the 2nd and 3rd defendants, through their advocates on record, have sought to have the statements and documents admitted out of time and their witnesses allowed to testify. The two do not object to the late introduction of the other's documents but the plaintiff has objected to the same.

6. In his submissions, Mr. Waiganjo, learned counsel for the plaintiff, inter alia submitted that this was an ambush on his client, and that parties had been given ample time to comply with the provisions of Order 11 on discovery of documents before hearing. He also submitted that in her evidence the plaintiff did not make any reference to a survey report and the same cannot now be introduced. He submitted that the survey report has been prepared to fill in gaps exposed during cross-examination of the plaintiff. He further was of the view that the plaintiff and 2nd & 3rd defendants are colluding.

7. On their part, Mr. Korongo for the plaintiff and Mr. Eredi for the 2nd & 3rd defendants, inter alia submitted that it would be in the interests of justice to have the documents and statements allowed. They argued that the 1st defendant will have a chance to cross-examine the witnesses and will not be prejudiced as the 1st defendant is yet to start its case. Their view was that it would be in the interests of justice to have all the evidence tabled.

8. I have considered the rival submissions. The Civil Procedure Rules, 2010, require that the plaintiff, when filing the plaint, do file his list of witnesses, witness statements, and the documents that he will rely on at trial. The said provision is drawn as follows :-

2. Documents to accompany suit [Order 3, rule 2.]

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

(a) the affidavit referred to under Order 4 rule 1(2);

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

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

(d) copies of documents to be relied on at the trial including a demand letter before action:

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

9. On the part of the defendant, he is supposed file alongside his statement of defence, his list of witnesses, witness statements and documents that he will rely on at trial.

5. Documents to accompany defence or counterclaim [Order 7, rule 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.

10. Strictly speaking therefore, parties are supposed to avail their evidence in advance, before the commencement of trial. The purpose of these provisions is to prevent a litigant from continuing with the suit, without the knowledge of what evidence the other party intends to bring, and are aimed at preventing trial by ambush. However, these are trial directions in subsidiary legislation and it should not be forgotten that under Article 159 (2) (d) of the Constitution, the court is enjoined to ensure that justice is not sacrificed at the altar of procedural technicalities. The court does indeed have discretion in the interests of justice, to allow a party to rely on documents or statements which had not been discovered before. At the end of the day, the court has to weigh where the scales of justice tilt. Generally though, the more advanced the litigation, the more difficult it may be for the court to allow a party to introduce documents and new witnesses to the suit. I explained this in my decision in the case of ***Johana Kipkemei Too vs Hellen Tum (2014) eKLR*** where I denied a defendant leave to introduce new evidence at the defence stage.

11. In our instance, the case of the plaintiff's case is yet to close. It means that whatever evidence she will tender, the defendants will have an opportunity to rebut during defence hearing. What I am facing is more or less a similar situation that occurred in the case of ***Marclus Kiranga Nimrod & Another vs Nesity Kuthii Justus & Another, in Kerugoya ELC Case No. 737 of 2013***. In the said case, three witnesses had testified for the plaintiff and the plaintiff applied to introduce new evidence including a sale agreement which she had not referred to in her evidence. Olao J, permitted the introduction of the new evidence, his reasoning being that the defendants will have a chance to rebut the evidence at the defence stage.

12. I would, not on my part, wish to encourage parties to file their documents and/or statements other than is set down by the Civil Procedure Rules, but I think it is only fair to allow each party an opportunity to fully ventilate their case, if for no other reason, but so that the whole truth is revealed. There will indeed be some prejudice occasioned to the 1st defendant, but I do not think that it is the sort of prejudice which cannot be cured by him being allowed time to also file any additional statements and documents, in light of what the plaintiff and 2nd & 3rd defendants wish to introduce, and by an award of costs. The litigation herein is not so far advanced as only one witness has testified.

13. It is for the above reasons that I allow the plaintiff and the 2nd & 3rd defendants to introduce the fresh documents and witnesses that they seek to introduce. I will allow the 1st defendant, 14 days to file any additional statements and/or documents, given what has been served upon him today, and I will also award him today's costs to be paid before the next hearing date.

14. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23rd day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In the presence of :-

Mr. Korongo for the plaintiff

Mr. Waiganjo for the 1st defendant

Mr. Eredi for the 2nd & 3rd defendants

Court Assistant - Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT NAKURU