



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 17 OF 2014**

**RICHARD TOROITICH.....PLAINTIFF**

**VERSUS**

**MIKE K. LELMET**

**ELISHEBA C. LELMET.....DEFENDANTS**

**PAULINE J. LELMET**

**ESTHER J. LELMET (*suing as administrators of the estate of***

***WILLIAM CHERUIYOT LELMET*)**

**RULING**

1. The application dated 22/1/2018 seeks that leave be granted to the plaintiff to file and serve a further list of documents, a further list of witnesses and a further witness statement out of time. It also seeks orders that the plaintiff's further list of documents, and further list of witnesses filed herein on 22/11/2017 be deemed as properly filed and served.
2. The application is made on the basis that at the time the matter was filed certain documents now sought to be availed, were not available as the file containing the said documents was mislaid and despite the plaintiff exercising due diligence, those documents were not traced until a few weeks before the hearing date on 22/11/2017.
3. Further, the plaintiff has been able to trace the witness who knows about the matter and who is now willing to give evidence on the plaintiff's behalf at the hearing. That witness is said to have been ailing for a long time and efforts to get him to travel earlier to meet the counsel on the record were not successful. These grounds are reiterated in the supporting affidavit of the plaintiff sworn on 22/1/2018, which is annexed to the application.
4. In her submissions the plaintiff's counsel cites the case of *Florence Ngosia Masieyi -vs- George Gitau Mungai & 2 Others [2015] eKLR*, and *Marclus Kiranga Nimrod & Another -vs- Nesy Kuthii Justus & Another [2017] eKLR*. The plaintiff also invokes **Section 3** of the *Environment and Land Court Act (Act No. 19 of 2011)* regarding the overriding objective of this court. Facilitation of the "just" resolution of dispute governed by that Act comes first among the other issues such as expectation, proportionality and accessibility.
5. The defendant filed grounds of opposition dated 31/1/2018. He states the application is incompetent for want of disclosure of legal provisions under which the orders are sought, which in my view is a

technicality, that **Article 159 1(d)** and **Order 51 Rules 10 (1) And 10(2) of the Civil Procedure Rules** would frown upon.

6. The defendant also protests that the application is an abuse of the court process as it has been made after unreasonable delay and after directions were taken and the pleadings closed. It is also urged that the defendant's right to a fair hearing as enshrined by **Article 50 of the Constitution** shall be prejudiced. The defendants raise the possibility that the new documents sought to be filed may necessitate the amendment of the defence at this late stage in the proceedings.

7. Finally they urge that such an application ought to have been made under **Order 7 Rule 5** (of the Civil Procedure Rules) at least 15 days to the mention at which directions were made.

8. While this court sympathizes with the defendant's apparent worry at the probability that the orders that may be issued may affect its case, it is noteworthy that the hearing in this matter has never taken off. When a party comes to court before the hearing date and makes certain disclosures, such as the discovery of new documents and new witnesses which may aid its case, and probably aid the court in dispensing substantive justice the court should, subject to costs, allow an application such as the one before it now.

9. In the case of **Kuloba -vs- Oduol NBI HCCC No. 1 of 2000 eKLR** the court therein cited the case of **Copper -vs- Smith 1884 26 CHD 700** as hereunder:-

**“I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have seldom if ever, been unfortunate enough to come across an instance where a party has made a mistake in his pleadings which has put the other side to such a disadvantage that it cannot be cured by the application of the healing medicine”.**

That application I refer to in the cited case related to amendments to a pleading.

10. In this case the plaintiff has cited things and events common to mankind. Loss of documents, illness of a potential witness and so on. This court cannot be blind to such things as inadvertence, or frailties of “the mortal coil” as the human body as referred to by the playwright Shakespeare and the possible consequences these may have on the course of litigation.

11. It is necessary to therefore consider that if substantive justice will be served in regard to the plaintiff's case by the grant of the application, and that the defendant would be left with the option of responding to the new situation created once the orders are granted, then in the end, justice will have been done to all parties.

12. It is observed that the plaintiff has come by way of a formal application this time round and the defendants have been able to answer it, though in my view, not sufficiently to demonstrate that the said application is entirely devoid of merit.

13. For the above reasons, I find that the application dated 22/1/2018 has merit. The same is granted in terms of **prayer 1** and **2** thereof. The documents mentioned therein having been served in advance, I also grant the defendants leave to respond to such documents as may be appropriate but subject to this courts supervision. The plaintiff shall meet the costs of this application.

**Dated, signed and delivered at Kitale on this 1<sup>st</sup> day of February, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**1/2/2018**

Coram:

Before: Mwangi Njoroge, Judge

Court Assistant - Isabellah

Mr. Analo holding brief for Chebii for plaintiff/applicant

N/A for the respondents

**COURT**

Ruling read in open court in the presence of counsel for the applicant.

**MWANGI NJOROGE**

**JUDGE**

**1/2/2018**