



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 51 OF 2012

DESHPAL OMPRAKASH.....PLAINTIFF/APPLICANT

VERSUS

HABIB ALI MOHAMED.....1ST DEFENDANT/RESPONDENT

ABDALLA MWARINGA MAYE.....2ND DEFENDANT/RESPONDENT

IBRAHIM MUKHTAR ABASHEIKH.....3RD DEFENDANT/RESPONDENT

TAUHIDA TAHIR SHEIKH SAID.....4TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 13th April 2017, the Plaintiff prays for the following orders:-

1. THAT pending the hearing and determination of this application, the further hearing of this suit be stayed.

2. THAT an order be issued deeming as having been properly filed and served and admitting on record for the purposes of trial, the Plaintiff's further Supplementary List and Bundle of Documents filed on 6th April 2017.

3. THAT an Order be issued that the Plaintiff's Suit be commenced de novo for purposes of hearing.

4. THAT the Honourable Court be pleased to issue witness summons to Mr. Joseph Y. Bao, Land Registrar Kilifi to attend Court on a date to be fixed by the Court for purposes of producing the entire parcel file relating to the property known as Kilifi/Jumba/441 including the green card, all transfer documents in the file as well as stamp duty payment receipts counterfoils and any and all other documents in the file.

5. THAT this Honourable Court be pleased to issue witness summons to Mr. P. Adipo to attend Court on a date to be fixed by the Court for purposes of producing before the Honourable Court the original parcel and/or correspondence file in relation to the property known as Kilifi/Jimba/441.

6. THAT Mr. Joseph T. Bao, the Lands Registrar, Kilifi, be compelled to produce within thirty(30) days from the date of this order, a certified copies of all documents contained in the parcel file for Kilifi/Jimba/441 together with ALL its contents including the full and complete green card for Kilifi/Jimba/441, transfer documents evidencing change of ownership of the property since 1986; and counterfoils and or original; receipts of stamp and other payments made in respect of any and all transactions relating to the property known as Kilifi/Jimba/441.

7. THAT the travel and accommodation expenses of the witnesses from the Ministry of Lands and physical Planning who attended Court on 2nd February 2017 already expended by the Plaintiff be met and reimbursed to the Plaintiff by the 5th Defendant within 60 days from the date of this Order.

8. THAT the travel and accommodation expenses of the government witnesses Mr. Joseph Y. Bao to be summoned for purposes of appearing in Court to give evidence at the hearing of the suit to be met by the 5th Defendant.

2. The Application is based on a number of grounds that may be summarized as follows:

a. That 5th Defendant-the Honourable the Attorney-General had opted not to file any documents or statements despite being granted ample time and the Plaintiff thereupon took it upon himself to summon a number of officers from the Kilifi Land Registrar's office and the Ministry of Lands and Physical Planning (the Ministry) to attend Court and produce relevant documents.

b. That on 2nd February 2017 when the matter came up for trial, all the Defendants objected to the witnesses summoned and the 5th Defendant in particular sought and was granted leave to file documents and then witness statements after the hearing of the suit had already commenced and the Plaintiff had already given evidence.

c. That suspicious that the 5th Defendant did not actually intend to file witness statements and documents, on 8th February 2017, the Plaintiff wrote to the Ministry giving a background of the Court dispute and requesting for certified copies of documents relating to the suit property. The Ministry responded and supplied the Plaintiff with the documents and information vide two letters dated 27/2/17 and 6/3/2017 respectively.

d. That as at 6th April 2017, the 5th Defendant was yet to file anything and the Plaintiff proceeded to file without leave, a Further Supplementary List of Documents containing the correspondence received from the Ministry.

e. That the said documents which were not in the Plaintiff's hands at the pre-trial stage are relevant to the matters in issue and are necessary for purposes of enabling this Honourable Court arrive at a just determination of this dispute.

f. That in the meantime, the trial Judge has been transferred and since only one witness had testified, it is prudent and in the interest of efficient administration of justice for directions to be given for the further hearing of the case.

3. By Grounds of Opposition filed on 22nd May 2017, the 5th Defendants are opposed to the Plaintiff's application on the following grounds, inter alia:-

1. That the Application is filed in bad faith, is frivolous, vexatious and an abuse of the Court Process.

2. That pursuant to the provisions of Article 159(2) (d) the Court has to do justice to parties in a case without undue regard to the technicalities of procedure.

3. That in tandem with the provisions of Sections 1A and 1B of the Civil proceedings Act, this Court exercised its Judicial discretion and granted leave to the 5th Defendant herein to file Witness Statements and the instant application is calculated to exert undue pressure upon the Court and the 5th Defendant herein.

4. That the principle of fair hearing demands that the 5th Defendant be given a chance to defend his case.

5. That the introduction of the Plaintiff's further Supplementary List and Bundle of Documents without leave of Court amounts to sharp practice to occasion undue advantage to the Defendants.

4. On their part, the 3rd and 4th Defendants also jointly filed Grounds of Opposition on 31st May 2017 in which they state among other things:-

1. That the Orders sought by the applicant are not tenable as the effect is to have the Plaintiff testify afresh after having testified on 2nd November 2016 so as to cure the gaps which had been made during cross-examination by the Respondents;

2. That the application is illegal and time-barred as it is made after pre-trial directions had been taken in accordance with Order 11 of the Civil Procedure Rules. Allowing the application will amount to this Court giving undue advantage to the Plaintiff, who will thereby be allowed to introduce new documents after having testified;

3. That this application is a delaying tactic meant to further delay this matter which has been in Court for about 6 years.

4. That the Orders sought to summon the respective officers from the Ministry of Lands are not tenable and have been overtaken by events as this Court did issue summons to them on 2nd November 2016 to attend Court and give evidence. In any event the said officers are witnesses of the 5th Defendant; and

5. That there is no justifiable reason espoused why the Plaintiff did not file the said documents before conclusion of the pre-trial directions. The application is therefore misguided, illegal and ought to be dismissed with costs.

5. I have considered the Plaintiffs application and the various responses thereto by the 3rd and 4th Defendants on the one hand as well as the 5th Defendant on the other. I have equally considered the written and oral submissions as filed and canvassed before me by the respective Learned Advocates for the parties herein.

6. Order 3 Rule 2 of the Civil Procedure Rules provides as follows:

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

7. Order 7 Rule 5 of the Rules gives similar requirements where parties file their Defences and/or a counterclaim. Under Order 11 Rule 3 of the Rules, parties are required 10 days after the closure of the pleadings to complete; file and serve the pre-trial questionnaire as provided in Appendix B to the Rules. Under the broad provisions of Order 11, the Court can also make directions to ensure that parties comply with procedural requirements to enable a smooth take off of hearings and effective and efficient disposal of cases.

8. A perusal of the records herein reveals that on or about 22nd March 2016, this matter went for pre-trial before the Honourable J. N. Wandia, Deputy Registrar. On that date, only the Advocates for the Plaintiff and the 1st and 2nd Defendants attended Court. Having heard the parties, the Honourable Deputy Registrar ordered that the Plaintiffs serve all the parties with necessary documents within 7 days and that “the Defendants to comply with Order 11 within 30 days”. Parties were then asked to take a date to confirm compliance from the Registry.

9. Subsequently, the matter was again placed before the Deputy Registrar on 30th May 2016 when the Defendants Advocates did not attend. The Court then gave an order as follows:-

“This date was given in Court in the presence of the Defendants advocates. The Defendants are hereby all given 14 days to comply with Order 11 of the Civil Procedure Rules failure to which a hearing date will be given. Mention for compliance on 13th June 2016.”

10. From the record, nothing is shown as having taken place on the said 13th of June 2016. Instead on 30th June 2016, representatives of the Plaintiffs Advocates and those of the 3rd and 4th Defendants appeared in Court and proceeded to fix the matter for hearing on 2nd November 2016. It was on this date that the matter proceeded before the Honourable Justice Angote with one witness (PW1). At the conclusion of PW1’s testimony, the Plaintiff requested for and was allowed to have summons issued to a number of persons as stated in the application presently before this Court.

11. The Defendants do not dispute the fact that on 2nd February 2017 when this matter subsequently came up for hearing, they objected to the testimony of the witnesses who were present in Court ostensibly on the basis that they were the 5th Defendant’s witnesses and that they would later testify as such.

12. As borne from the record, the 3rd to 5th Defendants had as at the time the trial herein commenced, not complied fully with the requirements of Order 7 Rule 5 and Order 11 of the Civil Procedure Rules. Indeed, to-date and inspite of the Orders of this Court, issued on 2nd February 2017 granting the 5th Defendant’s time to file statements and documents, the 5th Defendant has not filed the same.

13. It is the Plaintiff’s case that he was subsequently able to obtain documents which were not in his hand at the time of pre-trial and he now prays that he be allowed to introduce the same on the basis that they are relevant to the matters in issue in this suit and are necessary for purposes of enabling this Court to arrive at a just determination of this dispute. On the other hand, the Defendants’ would hear none of it and accuse the Plaintiff of trying to steal a match and thereby to have an opportunity to fill-in the gaps left during cross-examination.

14. The dispute herein revolves around the ownership of a parcel of land. It is the Plaintiff’s case that he is the owner of a leasehold interest thereon having been issued with a title thereto in 1992 and that the Defendants titles were issued through fraud. A perusal of the documents that the Plaintiff seeks to introduce herein show that they emanate from the Ministry of Lands and Physical Planning. If they are established to be true, then they would form part of Government records in respect of the land in question. The Government is represented in these proceedings by the 5th Defendant-the Honourable the Attorney General who is the principal legal adviser to the Government.

15. I think, that this being a matter in which fraud is being alleged against Government officers, the 5th Defendant who is yet to comply with the requirements of Order 7 Rule 5 and Order 11 of the Civil Procedure Rules will have an opportunity to call its officers to comment on the authenticity or otherwise of the documents sought to be produced by the Plaintiff in regard to the impugned parcel of land.

16. As was stated by the Honourable Justice Kanyi Kimondo in **Steven Kariuki –vs- George Mike Wanjohi & 2 Others(2013) eKLR:-**

“Once seized of the dispute, the Court is enjoined by Article 159(2) (d) of the Constitution to do substantial justice to the disputants expeditiously and without undue regard to technicalities. Rules of procedure have aptly been described as

handmaidens of justice: not mistresses. See Edward Steven Mwiti –vs- Peter Irungu & 2 Others(No. 2) Nambi High Court ELC 105 of 2011(2012)eKLR. This overriding principle is a guiding beacon of the Court.

“The principal aims of the overriding objective includes the need to act justly in every situation; the need to have regard to the principal of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable, to place the parties on equal footing.”

17. As it were, I am unable to see what prejudice the Defendants shall suffer as they will still be able to cross examine the authors of the documents listed in the Further Supplementary List of Documents. That will actually afford them, more so, the 5th Defendant, an opportunity to put in their list and/or statements to rebut the contents thereof.

18. Dealing with a similar application as the one before me in *Anne Mumbi Hinga –vs- Gaiho Oil Limited(2013)eKLR*, Nyamweya J stated as follows:-

“...I would like to add that the provisions of the Civil Procedure Rules are not cast in stone and the Court is enjoined by Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act to ensure that in implementing the rules we dispense substantive justice, and ensure that there is just, expeditious proportionate and affordable resolution of civil disputes. To this end, this Court is given inherent power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice.

This Court cannot therefore prevent the Plaintiff from stating its case, even if the effect as alleged by the Defendant is to fill holes that may have arisen from cross-examination. It is the Plaintiff’s right to fill such holes as she seeks substantive justice from this Court. The only limitation to the exercise of this right would be if there was prejudice to be caused to the Defendant in allowing the Plaintiff to file additional witnesses and documents. It is my view that as the Plaintiff is yet to close her case, the Defendant will have the opportunity to cross-examine any additional witnesses she calls, to recall any witnesses who have already given evidence for further cross-examination, and to file any additional statements and documents in response.....”.

19. Similarly in the matter before me, the Plaintiff had only called one witness and was yet to close his case. The further Supplementary List and Bundle of Documents would therefore not be prejudicial to the Defendants’

20. Arising from the foregoing, I am equally of the view that a fresh trial de novo would be the most efficient in the circumstances. As I had stated earlier, only PW1 had testified before the Honourable Justice Angote on 2nd November 2016 before the Learned Judge was subsequently transferred. That would give the said PW1 an opportunity to comment on the new documents which were not in his hand when the trial commenced before pre-trial directions were fully complied with. It will also enable this Court to make a final, efficacious and effective determination of the matter in dispute herein.

21. Accordingly, I find merit in the Plaintiff’s application dated 13th March 2017. I am satisfied however that the issue of summons to various individuals listed under Prayers 4, 5 and 6 of the application can be dealt with at the appropriate time by the trial Court that shall be seized of the matter.

22. I do not also find a basis to condemn the 5th Defendant to pay the witness expenses incurred on 2nd February 2017 as sought by the Plaintiff under Prayers 7 and 8 of the Application. A Prayer for determination on these costs ought to have been made on that day before Judge Angote who heard the parties. Since the Court was not requested for and did not make a determination on the issue of costs, I shall not make any determination thereon at this stage.

23. Otherwise and for the avoidance of doubt, the Application dated 13th April 2017 is allowed in terms of Prayers 2 and 3 thereof. The Defendants have 21 days from today to file any further List and Bundle of Documents as they may deem appropriate in response to the Plaintiff’s List and Bundle now deemed to have been properly filed.

24. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE