



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 130 OF 2017(OS)

GRACE NJERI WARUKENYA.....1ST PLAINTIFF

MARGARET NYAKIRU WAWERU.....2ND PLAINTIFF

MARY WANGECI MWANGI.....3RD PLAINTIFF

FLORA NJOKI THUO.....4TH PLAINTIFF

VS

JOSEPH MUTIGA.....1ST DEFENDANT

JANE NYAMBURA MWANGI (Sued as the Legal Representative of the late

JOHN MWANGI).....2ND DEFENDANT

RULING

1. The Plaintiff filed and served a Notice to produce documents dated 3/4/17 to the Defendants interalia;
 - a. The Petition for grant of letters of administration of the estate of late Karogi Gathira;
 - b. Grant of letters of the estate of the late Kirogi Gathira
 - c. Certificate of confirmation of grant of the said letters of the said deceased
 - d. The transfer instrument from the deceased estate to the Defendants in respect to the suit property.
2. On the 27/4/17 the Defendant through counsel on record informed the Court she needed time to respond to the said notice to produce documents served to them by the Plaintiff. The Court granted time and when the matter came up on 2/10/17 for pretrial, the counsel for the Defendant Mrs. Kimani informed the Court that the documents that the Plaintiffs sought in the production notice were not in the possession of her client and therefore not in a position to so produce. At that point the Learned Counsel informed the Court that she had complied with Order II the matter was certified ready and the parties through for learned counsels on record proceeded to fix the matter for hearing by consent.
3. At the hearing the 1st Plaintiff informed the Court that despite his advocate issuing a notice to produce the said documents were not produced by the Defendants. Upon Cross-examination by Mr. Tumu, learned counsel for the Plaintiff, the 1st Defendant admitted that he did not comply with the production order. He

stated that upon requesting for the documents orally at Kangema Law Courts he was informed that the same were not available.

4. The hearing closed on 6/12/17 and both parties elected to file written submissions.

5. However, the Defendant filed an application on 20/11/17 seeking to reopen their case on grounds that they now had in their custody the documents listed in the Notice to produce dated 3/4/17. That they were unable to obtain the documents by the close of the hearing of the case as they had been informed that the documents had been destroyed. That the Plaintiffs had sought production of the same and therefore no prejudice will be occasioned on them and in any event, they will have the opportunity to cross-examine on the same. The application has been supported by the 1st Defendant who deponed inter alia that it is at the close of the hearing on 6/11/17 that his advocate on record proceeded to Kangema Law Courts whereupon she was supplied with the documents in request to Succession Cause No. 91 of 1997.

6. In resisting the application, the Plaintiff filed grounds of opposition inter alia;

a. The Plaintiff neglected to avail the documents at the trial dispute due notice to produce having been issued on 13/4/17.

b. In their submissions the Plaintiffs argue that application is meant to patch up the defence of the Defendant and cover up its weakness. The defence having informed the Court that they were not going to produce any documents.

7. I have reviewed the application rival affidavits, submissions and together with the legal authorities presented and the following are not disputed; That the Plaintiff served the Defendant with notice to produce which it did not comply. It is also on record that the Defendant proffered reasons for non-production of the documents both at the pretrial and the trial of the suit. That the reason in both instances were that the documents had been apparently destroyed and therefore unavailable at the Kangema Registry. It is also common knowledge that the Defendant did not produce any communication requesting for the documents nor the response in that regards to support Defendant's averments.

8. In the case of **Crown Paints (Kenya) Limited v Dry Associates Limited [2015] eKLR**. The Court held that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. See the case of **Oracle Productions Limited v Decapture Limited & 3 others [2014] eKLR** where Kimondo J rendered himself thus;

“.....Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the Court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the **Concord Insurance case (supra)** that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided. **Halsbury's Laws of England (supra) paragraph 38**. See also **Kahumbu Vs National Bank of Kenya Limited [2003] 2 E.A 475, Oluoch Vs Charagu [2003] 2 E.A 649.**”

9. Be that as it may the Court must satisfy itself that the documents that the Defendants seeks to introduce/produce will not be for purposes of altering the cause of action for which the parties have already adduced evidence, repair the Defendants case or are documents which do not further the cause of neither the Defendant nor the Plaintiff in arriving at a just end and that the Defendant took diligent steps to trace the documents and were unable to find.

10. In **Halsbury's Laws of England, Volume 13 at para 38**, the Court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state:

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the

pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”

11. In this particular case it is clear from the evidence that the documents were indeed available at the registry contrary to the previous allegations by the Defendant and his counsel that they had been destroyed. It then follows that the Defendants did not take pretrial and notice to produce documents seriously. That conduct is regrettable and the Court is reluctant to so exercise its discretion in favour of such a party. The Court concurs with the holding of Hon Lady Kasango in **Samuel Kiti Lewa Vs Housing Finance Co Limited of Kenya Ltd & Anor HCCC NO 37 of 2008 – Mombasa EKLR** when declining a similar application pronounced herself as follows;

“The Court retains discretion to allow reopening of a case. That discretion must be exercised judiciously. In exercising that discretion, the Court should ensure that such reopening does not embarrass or prejudice the opposite party. Reopening a case should not be allowed where it is intended to fill the gaps in evidence.....”.

Given that the Defendant had without good reason not complied with the production of documents before the trial of the case commenced, the only reason they readily want to reopen the case for the very purpose of producing documents with elated enthusiasm would appear is to repair their case. No other plausible reason can be attributed to this.

12. Further the Court has perused the pleadings as well as the documents that the Defendants seek to produce. They relate to activities in succession cause undertaken in 1977 pursuant to a law then existing. I have seen the basis of the decision of the Learned Magistrate in the judgement and the evidence given on trial. These actions having been undertaken under a law then existing the rights of the parties were properly determined with finality. Even if the documents were to be admitted in this case it is doubtful that they will further the cause of either the Plaintiff not the Defendant to its logical conclusion.

13. In the end the Court declines the orders and the application is dismissed.

14. Costs shall be in favour of the Plaintiffs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH 2018.

J G KEMEI

JUDGE