



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 103 OF 2013

MICHAEL KIPCHUMBA..... PLAINTIFF

VERSUS

FESTO ASANGO.....DEFENDANT

RULING

1. The plaintiff's application dated 11/12/2018 seeks an order that the court be pleased to call the Chief Officer, Lands Housing and Urban Development and the County Physical Planner Trans-Nzoia County to give evidence and/or produce the original map or documents in respect of Cypus Trading Centre.
2. The grounds upon which the application is brought are that the applicant was allocated a plot at Cyprus Trading Centre, Kapomboi; that the evidence of the two officers will aid the court in arriving at a fair decision, and that the application has been timeously brought. The application is supported by the affidavit of the plaintiff dated 11/12/2017.
3. I find that the applicant having intimated to court of the need to have the officers called as witnesses and having been given a limited time of 14 days with effect from 4/12/2017 to file any application if need be, filed the application within the stipulated period.
4. The defendant opposed the application vide grounds of opposition dated 11/12/2017 in which he stated that the application lacks merit, is contrary to the mandatory provisions of the Civil Procedure Act and that the plaintiff had the opportunity to make the application - presumably earlier but failed to do so.
5. The parties argued the application before court orally on 14/2/2018 when the applicant reiterated the contents of his application. The applicant submitted that the evidence of private surveyors should not be relied on and so he needed the officers to attend court and testify. The defendant's opposition to the application is principally based on the prescribed order of the proceedings as required by the Civil Procedure Act: That the plaintiff is to begin and then call his witnesses and close his case, and then the defendant follows suit. It is the position of the defendant that an order to reopen the case can only be made by the consent of the parties, and there is currently no such consent.
6. It is the defendant's case that where there are specific provisions of the Civil Procedure Rules, such orders of exercise discretion as are sought by the plaintiff cannot issue under **Section 1(A)** and **Section 1(B) of the Civil Procedure Act**. He prays that the application be dismissed.
7. I have considered the rival submissions on the application of the plaintiff. It may be the correct position that the plaintiff normally begins his case, calls his witnesses and then closes it, and paves the way for the defendant to follow suit. This is provided for in the Civil Procedure Rules. However those Rules, in my view, are handmaidens of justice and undue observance thereof should not be considered an end in itself especially in the current case where one litigant acting in person, may not have had sufficient guidance on legal procedures. Besides **Article 159(2) (d)** provides that justice shall be administered without any undue regard to procedural technicalities. Though the defendant's counsel has submitted that the court has no discretion in the matter, I think allowing or disallowing the plaintiff's application is subject to the court's perception of not whether rules have been followed to the letter in this special case but in which course of action the essence of justice lies.
8. In my view, the records held by the officers in question on behalf of the government are crucial in this matter. If the proposed witnesses appear in court they will be taking an official position and will be subject to cross-examination by either party. I therefore find that there is no prejudice that would be occasioned to the defendant save the loss of some time period to the judgment date, which inconvenience may be compensated for by way of costs. This is a quest for the truth and justice and I find that such values will be supported if an order issues summoning the proposed witnesses to court. I also note that one of the overriding or principle objective of the Environment and Land Court Act is to enable the court, to facilitate the just resolution of disputes governed by the Act and this court is called upon to give effect to that principal objective by **Section 3(2) of the Act**. In **Section 13(7) of the Act** this court is mandated to make any order that it deems fit. **Section 19(a)** empowers the court to act expeditiously without undue regard to technicalities of procedure.

9. I therefore find that it is in the greater interest of justice to grant the orders sought in the application dated 6/12/2017. I therefore grant **prayer No. (1)** in that application and order that the officers so named in that prayer shall be served with summons to attend court in their official capacities to testify and produce any proper documents in their possession regarding the suit land that will aid this court in the determination of the dispute between the parties herein. Further hearing of the suit will proceed on the **24/5/2018** when both officers shall be required to attend. Summons shall issue and be served upon them. The plaintiff should extract and serve those summons.

Dated, signed and delivered at Kitale on this 23rd day of April, 2018.

MWANGI NJOROGE

JUDGE

23/4/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for the Defendant

Plaintiff in person (present)

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

23/4/2018