



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 170 OF 2008 (O.S)

ROSEBELLA NDUMI MBITHI.....PLAINTIFF/RESPONDENT

VERSUS

JONATHAN MBITHI NTHUKA.....1ST DEFENDANT/APPLICANT

ROSEVELLA MALINDA MBITHI.....2ND DEFENDANT/APPLICANT

ELIZABETH MUTHEU MUSYOKI.....3RD DEFENDANT/APPLICANT

SAMSON MUSYOKI KIVANGO.....4TH DEFENDANT/APPLICANT

RULING

1. In the Application dated 16th January, 2017, the Defendants are seeking for leave to file an additional list of documents out of time.
2. The Application is premised on the grounds that the Plaintiff has not closed her case; that the 1st Defendant came across crucial documents relating to the suit land; that the documents are absolutely necessary and that the Plaintiff will not be prejudiced by the grant of the prayers.
3. The 1st Defendant deponed that he discovered about the existence of the documents after the Plaintiff had commenced her case and that it is in the best interest of justice that the said documents be allowed on record.
4. In response, the Plaintiff deponed that the order being sought was canvassed on 26th October, 2016 and the court made a Ruling thereon; that the Defendants are seeking to introduce documents long after the Plaintiff had already testified and that the Plaintiff will be greatly prejudiced if the said documents are allowed on record.
5. The Plaintiff deponed that no good reason has been given as to why the said documents were not filed in the first place and that the documents that the Defendants are seeking to introduce are fabrications meant to mislead the court.
6. The Defendants/Applicants' advocate submitted that this court has the discretion to allow the adducing of additional documents by a party after the commencement of trial under Article 159 (2) of the Constitution; that the court ought to consider the nature, context and extent of the new material intended to be produced and that the current Application should be allowed.
7. The Defendants/Applicants' counsel submitted that the current Application is not *res judicata*; that the court's Ruling of 26th October, 2016 was that the Applicant should not have filed the documents without the leave of the court and that the Applicant is now seeking the leave of the court to file the documents. Counsel relied on several authorities which I have considered.
8. The Plaintiff's counsel submitted that the effect of the prayers being sought by the 1st Defendant is to have the Respondent re-open her case; that when the Respondent testified, the documents sought to be introduced were never in her contemplation and that she was never cross-examined on them.
9. Counsel submitted that the Applicant had the opportunity of filing all his documents upto 29th September, 2014 and that the court has already made a Ruling disallowing the filing of additional documents.
10. This suit was partly heard by Kariuki J. on 29th September, 2014. On the said day, the Plaintiff (PW1) testified and was cross-examined at great length by the Defendants' counsel. The Plaintiff's son (PW2) also testified on the same day. The matter was adjourned for the purpose of re-examining PW2.

11. When the matter came up for further hearing on 26th October, 2016, the Plaintiff's advocates asked the court to expunge from the record the Defendants' Further List of Documents that had been filed on 2nd September, 2016 without the leave of the court.

12. In response to the Plaintiff's advocate to have the Further List of Documents expunged from the court record, the Defendants' advocate informed the court that the documents will not prejudice the Plaintiff and that they should remain on record. In the Ruling of the same day, this court expunged the said documents because they had not been filed with the leave of the court. The court further stated that the said documents would be prejudicial to the Plaintiff who had already testified.

13. In my view, the oral Application that was made by the Plaintiff's advocate on 26th October, 2016 was for expunging of the Further List of Documents that had been filed by the Defendants without the leave of the court, which Application was allowed by the court. The current Application is seeking the leave of the court to have those documents filed out of time.

14. In the circumstances, I find that the current Application is not *res judicata* because the Defendants have never moved the court for leave to file their documents out of time.

15. I will now consider the merits of the Application dated 16th January, 2017. The Defendants are seeking to introduce in their bundle of documents a receipt dated 7th April, 1978 supposedly issued to the 1st Defendant and letters dated 8th January, 2005 and 21st October, 2004 supposedly authored by the Plaintiff and addressed to the 1st Defendant.

16. The receipt dated 7th April, 1978 is said to have been issued to the 1st Defendant. The 1st Defendant has not explained to this court why he did not file this document which was supposed to have been in his possession all along before PW1 and PW2 testified. Indeed, the 1st Defendant has also not offered any explanation as to why he did not file in good time the letters that have always been in his possession.

17. Considering that the documents that the Defendants are seeking to introduce now were never mentioned during the cross-examination of PW1, the production of the same would be prejudicial to the Plaintiff.

18. Having being in possession of those letters, the Defendants cannot wait, until after the Plaintiff has testified, to introduce receipts and letters purportedly authored by her without compromising the Plaintiff's right to a fair hearing that is enshrined in the Constitution.

19. The other reason that compels me to reject the Defendants' Application is the fact that this matter, having been filed ten (10) years ago, the Defendants had more than enough time to file all their documents before the Plaintiff testified in the year 2015. In the circumstances, the inordinate delay by the Defendants in filing the Application is inexcusable and prejudicial to the Plaintiff.

20. For those reasons, I dismiss the Application dated 16th January, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE