REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 262 "A" OF 2012

HASHAM LALJI PROPERTIES LIMITED….....1ST PLAINTIFF

DIAMOND HASHAM LALJI.....2ND PLAINTIFF

AHMED HASHAM LALJI….....3RD PLAINTIFF

VERSUS

HASSAN K. KOSKEY alias JASSAN K. KOSKEY.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE DISTRICT LAND REGISTRAR,

UASIN GISHU DISTRICT.....3RD DEFENDANT

THE COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

By application dated 2.12.2016, **Hassan Koskey** ***(hereinafter referred to as the 1st defendant)*** seeks orders that his supplementary and further supplementary lists of documents dated 18.8.2016 and 13.10.2016 and filed on 23.10.2016 and 13.10.2016 respectively be admitted into the record of these proceedings and deemed properly filed and duly served upon the plaintiff, the 2nd and 3rd defendants. The 1st defendant seeks further that the Government Document Examiner, E. K. Kenga as he then was (PW4) be recalled and examined on his examination report dated 26.3.2007 and his letter dated 8.2.2007 comprised in the 1st defendant's further supplementary list of documents dated 13.10.2016. Furthermore, that the 3rd plaintiff, Ahmed Hasham Lalji be recalled and examined on the correspondence exchanged between him and his siblings Sultan Lalji Bahadurali H. Lalji and Sultan Lalji comprised in the 1st defendant's supplementary list of documents dated 18.8.2016.

The application is premised on grounds that the 1st defendant has recently come-by documents and letters which are relevant to the just and fair determination of the issues for determination in this suit. The documents and letters were not in the possession of the 1st defendant. He could not have included them in his list of documents already filed herein. The documents were in the possession and knowledge of the plaintiffs but they have intentionally concealed them and failed to include them in their list of documents. That It is in the interest of justice and fair hearing that the documents and letters be included in the record of these proceedings and the said witnesses be recalled. The plaintiffs will not suffer any prejudice if the named witnesses are recalled and the documents and letters included in the record of these proceedings.

It is asserted that this Honorable Court has previously held in other matters that even concluded cases where submissions have been filed can be reopened. A court of law has a duty to find out the truth and will readily admit additional evidence to remove mysteries and to enable the court to fairly dispense justice on the merits of the case.

The application is supported by the affidavit of Hassan Koskey who states that he is the 1st defendant in these proceedings filed sometimes in the year 2006. He filed his list and bundle of documents on the 23rd February, 2011. That directions have been taken in the proceedings and the case is now part-heard. He states that during the pendency of the proceedings, he has painstakingly sought and obtained documents and evidence which are relevant and material herein. The evidence will assist the Honourable Court to fairly determine the dispute between the plaintiffs and himself. The evidence obtained have not been in his custody. He would have produced them long time ago if he had them in his possession. The plaintiff's main claim against him is that he forged documents and signatures and consequently appropriated the suit property to himself.

The applicant claims that the document examiner's report dated 26th March, 2006 which is comprised in his filed list of documents is important and relevant to the above allegation as it provides new evidence on the issue of the alleged forgery. That the correspondence being introduced relate to complaints by the 2nd and 3rd plaintiff's siblings to the effect that the 2nd and 3rd plaintiffs were selling the 1st plaintiff's property (including the suit property) behind their back. That those correspondences are important and relevant to these proceedings because the plaintiffs have claimed that he did not purchase the suit property from them. The plaintiffs have at all material time been in possession of the correspondence and documents sought to be produced but they have concealed the same from all the parties to these proceedings.

The applicant states that as late as 8th February, 2007 the document examiner was still seeking more exhibits to be forwarded to his office so that he could prepare a third document examination report on the alleged forgeries. The outcome of this request is unknown. It is therefore, crucial and important that the document examiner be recalled to be examined on the various reports which he has made and the one he intends to make on the alleged forgeries. That he is advised by his advocate on the record herein that even concluded cases can be re-opened and new evidence adduced, so long as the opposite party is given an opportunity to confirm or rebut the same. Articles 25(c), 48, 50(1) guarantees a litigant's right to a fair hearing and access to justice. Any denial to recall the witnesses and to adduce new and relevant evidence would be an affront to the constitutional guarantees.

Article 159(2) of the Constitution mandates courts of law to dispense substantial justice without entertaining technicalities. The plaintiffs have not closed their case. It is therefore not too late in the proceedings to allow a recall of witnesses and the introduction of new evidence which were not in his possession when he filed his bundle of documents in these proceedings. That in the interest of justice and balancing the interests of all parties, the court should allow the recall of witnesses and the introduction of new and relevant of evidence. That the reasons adduced herein are not frivolous, they are cogent and they should enable the court to exercise its discretion in favour of the 1st defendant.

The plaintiff filed a replying affidavit stating that the application is an afterthought and it is intended to waste precious judicial time since the documents sought to be introduced in the matter have no relevance to the instant suit. That the application by the 1st Defendant is intended to take litigation of this matter in circles and that the orders sought are intended to help the 1st Defendant to keep creating and/or soliciting evidence as the case proceeds so as to defeat the cause of justice. The 1st Defendant had time to fully comply with the filing of documents before the trial began and cannot be allowed to continue filing documents endlessly.

The plaintiff states that litigation is no longer by ambush as the rules were put in place to ensure that certain steps are taken before a matter is set down for trial are not for decorative purposes but ought to be adhered to. Parties are under duty to comply fully by filing documents, list of witnesses and witness statements they intend to rely on before trial. The 1st defendant wasted his chance and cannot be allowed to delay this matter any longer. The plaintiff opines that before trial begun, the 1st Defendant did not at any time give an indication of the need to file other or additional documents in future in this matter. It is therefore obvious that the 1st Defendant move is an afterthought.

The plaintiff further states that there is no disclosure in the application by the 1st Defendant/Applicant when he learnt of the existence of the purported documents he seeks to introduce and from whom and when and where he obtained the purported crucial documents. The importance and/or relevance of the documents to warrant the grant of the orders sought is not demonstrated and the particular person in the Plaintiff's company and/or a particular Plaintiff that had possession of the said documents sought to be introduced. It is the Plaintiff position that the introduction of the documents sought to be brought on record will not only be unfair to the Plaintiff but will amount to the promotion of forgery and/or furthering creation of documents with the intent to mislead the court and defraud the Plaintiff of its land.

The plaintiff believes that recalling a witness should ordinarily be allowed, but the purpose of such recall of the witness must be clearly stated to enable the court to consider the importance and relevance of the witness intended to be recalled. That nowhere in the application has the 1st Defendant/Applicant stated the relevance of the persons sought to be recalled in relation to the document purported to be brought on record to warrant the court to exercise its discretion to allow the request. The Plaintiffs have already given evidence in the matter and are not ready to incur more or other expenses for travelling. The 1st Defendant had the chance to put questions to the Plaintiffs witness during hearing and having failed to utilize that opportunity, cannot be heard to complain but should blame himself for his own mistake. That in the unlikely event, the court is inclined to grant the orders sought.

It is the Plaintiffs' position that the travelling and accommodation expenses for the witnesses to be recalled be assessed and be fully paid and/or met by the 1st Defendant/Applicant before the hearing date. The 1st Defendant/Applicant has not demonstrated that the evidence sought to be adduced is critical to the case, authentic and clearly addresses the matter under dispute. any of the above grounds to warrant the justification of the orders sought.

The Plaintiff stands to suffer should the orders sought issue due to the imminent delay in determination of this matter as justice delayed is justice denied and that he is informed by his advocate on record, Mr. A.K. Nyairo, which information he verily believes to be true that Articles 48 and 50(1) of the Constitution are not applicable to the instant matter and should be ignored as no state organ has prevented the 1st Defendant/Applicant from being heard and that the 1st Defendant/Applicant is not an accused person within the meaning of Article 50 of the Constitution.

That he is informed by his advocate on record, Mr. A.K. Nyairo, which information he verily believes to be true that rules of procedure set in place to give guidance to proceedings are not and cannot be said to be technicalities. In fact, it is the 1st Defendant/Applicant who is breaching Articles 159(2) of the Constitution by causing delay in the determination of this matter. That he is informed by his advocate on record, Mr. A.K. Nyairo, which information he verily believes to be true that the discretion of the court can only be invoked for good reasons and not on frivolous

The 1st defendant submits that the evidence sought to be introduced is relevant as they relate to the sale of the property in dispute. Moreover, that no prejudice will be suffered as the plaintiff has not closed his case and that the court should dispense substantive justice. He submits that courts have a duty to find out the truth and will readily admit additional evidence to remove mysteries and to enable the court to fairly dispense justice on the merits of the case.

The plaintiff submits that the applicant has not shown cogent reasons why the witness should be recalled or why new documents should be admitted on record to warrant the court to exercise its discretion to the 1st defendant's benefit. Moreover, that the recall of witnesses and introduction of documents is intended to fill gaps in the defendant's case. The plaintiff submits that the application is an afterthought and an ambush. Last but not least, the documents sought to be introduced are an afterthought.

I have considered the application by the 1st defendant and do find that it is made almost five years after PW4 and PW5 had testified and do find that the applicant slept on his own rights to make such an application. Moreover, the 1st defendant appears to be on a mission to fill gaps in his case after realizing that he did not bring out a proper defense after cross examination of the plaintiff's witnesses. Moreover, it will be prejudiced to recall the plaintiffs and his witnesses after a period of five years. The documents sought to be produced were or ought to have been in the 1st defendant's possession and no good reason has been given why they could not be produced during hearing.

In the case of ***Smith Vs New South Wales (1992) HCA 36; (1992) 176 CLR 256***, it was held:

> ***"If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."***

In the Uganda case of ***Simba Telecom Vs Karuhanga & Another***, it was held:

> ***"I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not."***

In this matter, I do find that it will be prejudiced to recall witnesses and admit further evidence as a lot of time has passed after the plaintiff testified and called witnesses. Furthermore, I do find that the 1st defendant merely wants to fill gaps in his case. I do exercise my discretion by dismissing the application with costs.

Dated, signed and delivered this 11th day of May, 2018.

ANTONY OMBWAYO

JUDGE