



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 786 OF 2013

IN THE MATTER OF L.R. NO. MWERUA/BARICHO/1634 AND 1635

AND

IN THE MATTER OF THE LIMITATION OF ACTION CAP 22 OF THE LAWS OF KENYA

MOSES WARUI GATIMU PLAINTIFF

VERSUS

DOUGLAS MWAI MACHURU 1ST DEFENDANT

DANIEL KARIMI WANJOHI 2ND DEFENDANT

RULING

In the course of his evidence, the plaintiff **MOSES WARUI GATIMU** sought to introduce as part of his documentary evidence the following documents:

- 1. A map showing the location of land parcels No. MWERUA/BARICHO/224 and MWERUA/BARICHO/236.**
- 2. An agreement dated 25th August 1981 by which the 1st defendant acknowledged a sum of Ksh. 50,000 being price of three (3) acres out of land parcel No. MWERUA/BARICHO/224.**

Counsel for the defendants **Mr. NGIGI** objected to the production of those documents arguing that it was not clear who had written the agreement dated 25th August 1981 and the maker should be the party to produce it. And with respect to the map, counsel objected to its production on the basis that it was not the original.

In reply, counsel for the plaintiff **Mr. NDANA** stated that both documents were served upon **Mr. NGIGI** way back in December 2013 and no objection was raised. He added that the agreement was infact drawn by the 1st defendant who signed it.

That objection is the subject of this ruling. On 16th December 2014 before this suit was listed for hearing, the Court directed the parties to comply with the pre-trial directions under **Order II of the Civil Procedure Rules** and on 3rd November 2016, the parties confirmed that they had complied. Under **Order 3 Rule 1 of the Civil Procedure Rules**, the plaintiff is required to file, among other documents, copies of all the documentary exhibits that will be relied upon during the trial. A similar requirement is provided for under **Order 7 Rule 5 of the Civil Procedure Rules** with respect to the defence and counter-claim. I have looked at the record herein and it is clear that the plaintiff did not include the agreement dated 25th August 1981 or the map as part of his documentary evidence. The purpose of a pre-trial conference provided for under **Order II of the Civil Procedure Rules** is to confirm, inter alia, that the parties have exchanged the relevant documents that they will adduce as part of their evidence. The rules however do not bar a party from adducing additional evidence that was not filed earlier. In my view, and guided by the provisions of **Article 159 (2) (d) of the Constitution**, the Court can allow a party to adduce additional documentary evidence particularly where no prejudice will be caused to the other party. Each case must be considered on its own peculiar circumstances taking into account all the factors including the stage at which the trial has reached. In this case, the plaintiff had not even finished testifying when the objection was raised. It is always in the best interest of justice that parties be allowed to place before the Court all the evidence available so long as it is relevant. This is because the main duty of the Court is to do justice to the parties. At the same time however, the Court must be vigilant and guard against parties who may attempt to steal a match on their adversaries in circumstances where such new evidence cannot be adequately rebutted. After all, **Article 50 (1) of the Constitution** guarantees all persons a fair hearing and there can be no fair hearing if one party is ambushed late in the trial with new evidence.

Having said so, the agreement dated 25th August 1981 and the map, though not contained in the plaintiff's list of documents, are not really

being introduced in those proceedings for the first time. They are not what one can claim to be new evidence. Those documents are in fact already part of the record as they were annexed to the plaintiff's further supporting affidavit dated 9th December 2013 and filed herein on 10th December 2013 in support of his application for injunction dated 1st November 2013 and are marked as **MWG 2** (the map) and **MWG 3** (the agreement). Being part of the record therefore, they are documents which this Court will be obliged to consider in its judgment even if they are not on the list of documents earlier filed by the plaintiff. It can only be out of abundance of caution that the plaintiff now wishes to formally produce them as part of his documentary evidence. In the circumstances, I see no good reason to reject them.

The Court also takes note that the trial has only commenced and the plaintiff is yet to finish testifying. He can be cross-examined on both documents and in my view, the defendants will not be prejudiced by the production of the two documents as they will have an opportunity to cross-examine the plaintiff on the same. Justice will best be served if the documents are produced as part of the plaintiff's documentary evidence.

Ultimately therefore, I overrule the objection on production of the agreement dated 25th August 1981 and the map. The same shall therefore be produced as the plaintiff's additional list of documentary evidence and since they already form part of the record, there will be no need to serve the defendants again. The defendants' objection is therefore dismissed. No order as to costs.

B.N. OLAO

JUDGE

7TH MAY, 2018

Ruling signed and dated at Bungoma this 7th day of May 2018.

To be delivered at Kerugoya on notice.

Ruling read and Signed on 26th June 2018

S.N.MUKUNYA

JUDGE

26TH JUNE, 2018