



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 404 OF 2017

JULIA WAMBUI MWANGI.....PLAINTIFF

VS

FAMILY BANK LIMITED.....1ST DEFENDANT

RUTH NJERI KARANJA.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 12/2/18 the Applicant(1st Defendant) sought the following orders;

- a) The Honourable Court be pleased to grant leave to the 1st Defendant to file a further list of documents and witness statements.
- b) The costs of this Application be provided for.

2. The application is based on the following grounds interalia:

- a) These documents are very crucial to the 1st Defendant's case and will help this Court come to a just and fair determination of the issues at hand.
- b) It is in the interest of justice that these documents be allowed as allowing them would accord the 1st Defendant an opportunity to be heard.
- c) The witnesses will testify in Court and it will defeat the purpose if the witness statements that they are to rely on are not on record.
- d) The Plaintiff on 15th January 2018 made an oral Application to have two more witnesses testify and the same was allowed and it would only be fair if the Defendant is granted the same latitude.
- e) That it is only fair for the 1st Defendant to be granted leave to file the documents.
- f) No prejudice incapable of being compensated by costs, will be suffered by the Plaintiff should these documents be allowed on record.

3. The application is supported by the affidavit of the Kelly Malenya, Counsel for the Applicant. He avers that at the time of filing the list of documents and witnesses statements the Applicant did not have in its possession all the materials relevant to the cause. That subsequently the Applicant obtained the said documents to wit; the consent to charge. That the issue of consent to charge is one of the contentious matters in the case. In addition that they are in receipt of witnesses statements from the Advocates who registered the charge in question over the property which he wishes to have the Court admit in evidence. That the Court allowed the Plaintiffs' Advocates upon an oral application to file further witness statements and it is only fair that the Applicant is accorded the same latitude. Finally that no prejudice shall be occasioned, that is incapable of being compensated by costs to the Plaintiff. He has annexed the following documents: undated application for Land Control Board consent dated 10/11/15, witness statements for Moses Kibathi and Dennis Juma marked KM-1, 2(a) & 2 (b) respectively.

4. The application is opposed by the Plaintiff/Respondent vide a Replying Affidavit sworn by Julia Wambui Mwangi and filed on 28/2/18. She deposed that the application is bad in law and is an abuse of the process of Court. That she stands to suffer prejudice as she has already

testified and or given evidence. That she will not have the opportunity to interrogate the 1st Defendant's witnesses. That the application should be disregarded since the Court had given directions under Order 11 of the CPR. That the application is in contravention of the Court's directions given on 4/12/17. She urged the Court to disallow the application.

5. The 2nd Defendant/Respondent did not oppose the application. On the 12/4/18 the parties through Counsel appeared before me and agreed to canvass the application by way of written submissions.

6. I have read and carefully considered the written submissions as filed on the Respondent on record.

7. On the 21/11/17 the parties were directed to comply with order 11 and by consent of the parties pretrial was scheduled for 4/12/17 when the Plaintiff informed the Court that it had fully complied but the 1st Defendant had not complied with order 11. The Court granted leave to the 1st Defendant to comply by 7/12/17 and in default shall not be allowed to call any witness or produce any evidence on trial.

8. From the record it would appear that the Applicant filed its defence on 4/12/17, list of witnesses on 7/12/17, list of issues on 7/12/17 and list of documents on 7/12/17. Against the list of witnesses are listed 3 witnesses. The Applicant filed only one witness statement, that of Winnie Otieno. Those of Moses Kibathi and Dennis Juma were omitted and are the subject of this application.

9. On the 4/12/17 the Plaintiff testified. At the close of the testimony the Counsel for the Plaintiff applied orally to adjourn the hearing in order to call 2 witnesses to testify in the case. The 1st Defendant's Counsel having no objection the Court allowed the Plaintiff to file and serve the witness statements by 13/2/18. The witnesses are an area Chief and a Doctor. They are to present the reports already listed in the Plaintiffs list of documents dated 30/10/17.

10. Order 3 Rule 2 and Order 7 Rule 5 stipulate the documents to accompany both the plaint and the statement of defence respectively. The above two procedural rules mandates parties to file all their documents that they wish to rely on at the time of filing pleadings. The Court is allowed to exercise discretion and allow filing of witnesses statements with leave of the Court at least 15 days prior to the pretrial conference.

11. In the instant case the application has been brought after the hearing has begun. One witness has testified. Both parties are seeking to file documents after the commencement of the hearing. The Plaintiff has presented one witness and seeks to file 2 witness statements.

12. The Applicant has explained that the documents it wishes to be admitted in evidence were not in its possession at the time of complying with Order 11 on 7/12/18. The Court does not have any reason to disbelieve them. The trial is at its early stages and no prejudice will be caused to the Plaintiff. The Plaintiff has the opportunity to interrogate the said evidence at the trial. No prejudice will be caused to the Applicant who can file additional statements should she deem it necessary to do so. The Court has considered and weighed the matter of prejudice to the Plaintiff and finds that no prejudice will be suffered because the hearing of the Plaintiff has not closed and in any event, they have also sought to file 2 witness statement.

13. In the interest of justice and guided by Article 50 of the Constitution read together with Article 159 (2) (d) of the Constitution and to maintain fair play in the hearing of the case, the orders issued on 4/12/17 the Court be and are hereby varied to the extent that the Applicant is allowed to file the two witness statement together with application and Land Control Board consent as prayed in the application. In the circumstances I find it proper to allow the 1st Defendant to file the Land Control Board consent and witness statements for Moses Kibathi and Dennis Juma.

14. The upshot in the 1st Defendant Notice of Motion is allowed as follows;

a) Leave is granted to the 1st Defendant to file list of documents and witness statements for Dennis Juma and Moses Kibathi within 15 days from today.

b) Similar leave is granted to the Plaintiff and 2nd Defendant (should they wish to do so) to file and serve any further statements within 15 days of service upon the said documents and statements.

c) The Plaintiff shall have the costs of the application.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF JULY, 2018.

J G KEMEI

JUDGE

Judgment read in open Court in the presence of;

Mr Wandaka HB for Mr Mugo for the Plaintiff.

Ms Okello HB for Mr Malenya for the 1st Defendant

2nd Defendant – Absent

Ms. Irene and Ms Njeri, Court Assistants.