



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.334 OF 2016

ANTHONY KAMAU NJERI (Suing as the Administrator of the

Este of the late MARY GATHONI KANYINGI.....PLAINTIFF

VERSUS

EUNICE MUTHOBNI KAHENIA.....DEFENDANT

RULING

(Application by defendant to be allowed to adduce additional evidence after commencement of trial; application allowed).

1. This is a part-heard matter, and the defendant has now applied to be allowed to be granted leave to file a further list of witness statements and a further list of documents to supplement what had earlier been discovered before trial commenced. This has been opposed by the plaintiff.

2. By way of background, this suit was commenced through a plaint which was filed on 26 August 2016. In the plaint, the plaintiff pleaded that he has "always been one of the beneficiaries and legal representative of all that parcel of land known as Nakuru Municipality Block 21/309" (sic). He pleaded that the defendant encroached into his land and constructed semi-permanent structures thereon. In his suit, he asked for orders of eviction and permanent injunction against the defendant. Together with the plaint, the plaintiff filed his list of documents and list of witnesses as required by the provisions of Order 3 Rule 2. I note that in his list of witnesses, the plaintiff has mentioned that he will call three other witnesses apart from himself.

3. The defendant filed a defence and counterclaim on 23 November 2016. She averred that she is the registered owner of the land parcel Nakuru Municipality Block 21/307 and has been occupying the same from the year 1985 and has developed the land with permanent and semi-permanent structures. She stated that she lawfully purchased the land and has obtained title thereto. In her counterclaim, she pleaded that the deceased (of whom the plaintiff is legal representative), was registered as proprietor of the land parcel Nakuru Municipality Block 21/309 while the defendant was registered as proprietor of the land parcel Nakuru Municipality Block 21/307. She averred that the occupation on the ground is however vice versa. She pleaded that the ground status be maintained and sought orders inter alia that the defendant do surrender the ground to the land parcel Nakuru Municipality Block 21/307, eviction from the land parcel No. 307, and a permanent injunction to stop the plaintiff from interfering with her occupation of the land parcel No. 307.

4. On 28 November 2016, the defendant filed her list of witnesses where she listed herself and one Joseph Njuguna Ndung'u as witnesses. She also listed the following documents :-

(a) Copy of title deed for Nakuru Municipality Block 21/307

(b) Copy of search certificate for Nakuru Municipality Block 21/307.

(c) Copy of map of the land area.

(d) Copy of transfer of land parcel Nakuru Municipality Block 21/307.

(e) Green cards for parcels Nakuru Municipality Block 21/307 and 309.

5. A further list of witnesses was filed on 20 November 2017, vide which the defendant added one more witness, namely Margaret Nanjala, whose statement is to the effect that she is tenant to the defendant and that the defendant has constructed several rental houses in the land parcel Nakuru Municipality Block 21/307.

6. The hearing of the matter commenced on 10 May 2018 when the plaintiff gave his evidence in chief and was cross-examined by Mrs. Mukira, learned counsel for the defendant. His evidence was that some years after the demise of his late mother, he was informed that she had left a title deed to land that she owned. This title deed happens to be the title deed to the land parcel Nakuru Municipality Block 21/309, and he stated that on going to the ground, he found the defendant in occupation, having developed some structures on it. He testified that what the defendant is entitled to is the land parcel Nakuru Municipality Block 21/309 and not 307. It also emerged in cross-examination that the plaintiff has actually transferred the land to himself. The matter was then adjourned to 12 June 2018 for further hearing of the plaintiff's case. It is on this day that it emerged that the defendant has filed the further list of documents and witnesses without leave of court, which Mr. Simiyu, learned counsel for the plaintiff, objected to.

7. Mrs. Mukira, submitted that the additional evidence is critical and asked me to permit her client to rely on the same.

8. I have looked at the additional list of witnesses and documents. The defendant now proposes to call 5 more witnesses being John Waweru Githa, Lucy Wangari, Dinah Kemunto Ogero, Charles Ariemba Nyaigoti, and the District Land Registrar, Nakuru. In her statement, Lucy Wangari proposes to adduce evidence to the effect that the plaintiff is not a son of the late Mary Gathoni Kanyingi, and that Mary, left 6 children who do not include the plaintiff. She proposes to further adduce evidence to the effect that the late Mary Gathoni sold her land parcel No. 309 to one Samuel Ogero Marori. Dinah Kemunto Ogero, is wife to Samuel Ogero Marori, and proposes to adduce evidence that her late husband, purchased the land parcel No. 309 from Mary Gathoni Kanyingi. Charles Ariemba Nyaigoti is married to a daughter of Samuel Ogero Marori, and also proposes to give evidence that the late Mary Gathoni sold the land parcel No. 309 to Samuel Ogero Marori. John Waweru Githa proposes to adduce evidence to the effect that he is the one who brokered the sale to Samuel Ogero Marori. In the further list of documents, the defendant wishes to adduce evidence of the conveyance, evidence of payment of land rates, and copies of Certificates of Death.

9. It is the law that parties need to avail their evidence to the opposing party when they file their pleadings. Under Order 3 rule 2, the plaintiff is supposed to be accompanied inter alia by a list of witnesses, their written statements, and copies of documents to be relied on at trial. The said law is drawn as follows :-

2. Documents to accompany suit [Order 3, rule 2.]

All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—

(a) the affidavit referred to under Order 4 rule 1(2);

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses excluding expert witnesses; and

(d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.

10. For the defendant, Order 7 Rule 5 applies, and the same is drawn as follows :-

5. Documents to accompany defence or counterclaim [Order 7, rule 5.]

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial; (c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11

11. It will therefore be discerned from the above, that issues of documents and witnesses who will testify at trial, are issues that are supposed to be settled at a fairly early stage of the proceedings. That is the scenario contemplated by the Rules. However, courts have allowed and have given leeway to parties to sometimes avail additional evidence after trial has commenced. This leave depends on the particular case and its surrounding circumstances and cannot be taken to be automatic and neither should it be lightly invoked. It is however generally more difficult to be granted leave to adduce additional evidence where the trial has gone far, say, during defence hearing.

12. In the case of **Marclus Kiranga Nimrod & Another vs Nesy Kuthii Justus & Another, in Kerugoya ELC Case No. 737 of 2013**, three witnesses had testified for the plaintiff and the plaintiff applied to introduce new evidence including a sale agreement which she had not referred to in her evidence. Olao J, permitted the introduction of the new evidence, his reasoning being that the defendants will have a chance to rebut the evidence at the defence stage. In the scenario at hand, it is the defendant who wishes to be allowed to call additional evidence, and from what I can see, the aim is to demonstrate that the deceased, Mary Gathoni Kanyingi, had sold her interest and therefore the plaintiff cannot claim what his mother (although this appears to now be contested) had sold.

13. I would have preferred if this evidence had been availed much earlier in the proceedings before the plaintiff testified and I not think that I

would have allowed this application if the plaintiff had closed his case; but as matters stand, any prejudice to the plaintiff can be cured by allowing the plaintiff leave to present additional evidence if he feels it necessary. The plaintiff has not closed his case and he can be recalled to adduce additional evidence or be given leave to call more witnesses and rely on additional evidence before the defence commences its case. That to me, in the circumstances of this case, is the most justiciable order to make.

14. Given the above, I do allow the defendant to rely on the additional evidence comprised in the further list of documents and further list of witnesses filed on 11 June 2018.

15. The plaintiff will however have the costs of the proceedings relating to this application.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 10th day of July 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Simiyu for the plaintiff.

Ms. Ngugi holding brief for Mrs. Mukira for the defendant.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU