



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 63 OF 2015**

**TENNYSON NYINGE CHILYALYA & 60 OTHERS.....PLAINTIFFS**

**VERSUS**

**THE KENYA ELECTRICITY TRANSMISSION COMPANY LTd.....DEFENDANT**

**RULING**

1. Before me for determination is a Notice of Motion application dated 12<sup>th</sup> October 2017. By the said application Kenya Electricity Transmission Company Ltd, the Defendant herein, prays for an order that this Court be pleased to grant them leave to file a Supplementary List of Documents as per the draft Supplementary List of Witnesses and a Further Supplementary List of Documents annexed to their Supporting Affidavit.

2. The application is supported by an Affidavit sworn by one Samuel Rambo, the 2<sup>nd</sup> Defendant's Senior Legal Officer and is premised on the grounds inter alia that:-

***i) The applicant is a large organization with a wide national mandate and as such tracing documents to be used in this trial took them some time due to the sheer volume involved;***

***ii) Upon execution of the documents sought to be relied on by the Plaintiffs/Respondents, the documents for Grant of Wayleave had to be registered at the Land Registry in Mombasa between April 2015 and April 2016;***

***iii) This suit commenced on 24<sup>th</sup> April 2015 before the documents were lodged at the said Registry;***

***iv) Even though the Plaintiffs have so far called five witnesses who have already testified before this Court, they have yet to close their case and hence will still have an opportunity to comment on the documents sought to be introduced;***

***v) The documents will enable the Court to effectively and conclusively deal with and determine all issues in contention.***

3. In a Replying Affidavit sworn on behalf of the 61 Plaintiffs by Paul Charo Mukoka, they oppose the grant of the orders sought and accuse the Defendant of being guilty of laches. It is the Plaintiff's case that this suit was filed on 24<sup>th</sup> April 2015 and the Defendants filed their Statement of Defence on 20<sup>th</sup> June 2015. The Defendants have therefore had ample time to file the documents they wished to rely on.

4. The Plaintiffs further contend that on 20<sup>th</sup> February 2017, the Defendants were granted 30 days within which to file any further documents but they did not do so. Subsequently the Plaintiffs commenced their testimony in Court on 4<sup>th</sup> May 2017 and it is too late in the day for the Defendants to introduce the documents.

5. I have considered the application and the response thereto. I have equally considered both the written and oral submissions made before me by the Learned Advocates for the Parties, Mr. Kiarie for the Defendant/Applicant and Mr. Shujaa for the Plaintiffs/Respondents.

6. By this application, the Defendants herein have called upon me to decide whether I should exercise my discretion to the end that they should be allowed to call one more witness and to produce a Supplementary List of Documents after the time when they were supposed to have done so has lapsed. The 61 Plaintiffs/Respondents are vigorously opposed to the application.

7. A Court's discretion for purposes of extension of time is wide and unfettered. Like any other Judicial discretion however, it must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim or sentiment. I think, some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the

possible prejudice, if any, that each party stands to suffer depending on how the discretion is exercised, the conduct of the parties and the need to protect a party's opportunity to fully agitate its case, against the need to ensure timely resolution of disputes.

8. The suit herein was filed on 24<sup>th</sup> April 2015. The Defendant entered appearance on 18<sup>th</sup> May 2015 and filed Written Statements of Defence on 20<sup>th</sup> June 2015. From the record, the parties appeared before the Honourable Deputy Registrar for directions on 16<sup>th</sup> September 2015 when the parties confirmed that they were ready for hearing.

9. According to the Defendants, they have since realised that they need to call a Surveyor to testify in respect of a Wayleaves trace report and to produce other documents which will help the Court to effectually and completely adjudicate upon and settle the issues in dispute. At paragraph 4 and 5 of the Supporting Affidavit of Samuel Rambo, the Defendants explain the failure to file these documents as follows:-

***“4. That upon execution of the grants of wayleave and easement documents by some of the Plaintiffs/Respondents herein, the same had to be registered at the District Land Registry in Mombasa. The registration of the said grants of wayleave and easement documents was done on various (dates) between April 2015 and April 2016.***

***5. That as witnessed by the Plaintiff on record, this suit was instituted before the aforementioned registration process commenced and as such the grant of wayleave and easement documents could not form part of the Defendant/Applicant's initial list of documents filed.***

10. That explanation in my view would be acceptable if immediately after the said registration of the documents in 2016 (whichever the date), the Applicant moved the Court as appropriate and filed their documentation. As the record would reveal however this matter first came before me for hearing on 20<sup>th</sup> February 2017. On the said date, Mr. Kiarie Kariuki, Learned Counsel for the Defendants applied for an adjournment on the basis that they had only been served the previous week with documents that the Plaintiff had filed in Court on 14<sup>th</sup> February 2017. That being the case, this Court granted an adjournment and gave the Defendant 30 days within which to file any further documents in response to what the Plaintiff had served them with.

11. The Defendants did not however file any documents. On 4<sup>th</sup> May 2017, the trial herein commenced and the Plaintiff called their first witness who testified and was cross-examined by the Counsel for the Defendants. The matter was thereafter adjourned to 17<sup>th</sup> July 2017 for further hearing. On that date the Plaintiff called five more witnesses who testified and were cross-examined by the Defendant's Counsel.

12. The application before me was filed on 13<sup>th</sup> October 2017. This was after six witnesses for the Plaintiff had testified. I have gone through the bundle of documents sought to be produced and it is evident to me that they were all registered between April and July 2015. While indeed this Court is entitled to take into account the best evidence available, no proper explanation has been given as to why the Defendant waited until after several Plaintiff witnesses had testified before seeking to introduce the same. The inescapable conclusion can only be that the Defendants having listened to the Plaintiff's testimony now want to address the defects in their own case by calling a new witness and producing additional documents.

13. In this context, I think the application dated 12<sup>th</sup> October 2017 is an afterthought and is meant to pull the rug from under the Plaintiffs' feet. I will not allow Defendants to do so. Accordingly the said application is dismissed with costs to the Plaintiffs/Respondents.

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of September, 2018.**

**J.O. OLOLA**

**JUDGE**