



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 134 OF 2012

ANIKET PROPERTY & INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

1. HAMADI JUMA MWAKIBIBO

2. VENTURE HOLDINGS LIMITED

3. DAVID K. KANDIE

4. DRIEDRICK ALFONS JOSEY BRINKMAN

5. AMINA ABDALLA

6. KHALFAN MLAI

7. THE LAND REGISTRAR – Kwale

8. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. On 12th March 2018, the hearing of this case commenced when the Plaintiff's first witness testified and made reference to various documents in the bundle of documents filed on 11th July 2012. However, before he concluded giving his evidence-in-chief, Counsel for the Plaintiff, Mr. Khagram applied to have PW1, Mr. Vijay Lakhani, stood down to enable him get the Original documents for production by the witness as exhibits. PW1 was then stood down and the matter was fixed for further hearing on 19th and 20th September, 2018. On 19th September, 2018 the Plaintiff filed a supplementary list of documents. In the course of his evidence, PW1, sought to introduce as part of his documentary evidence some documents that were not in the original plaintiff's list of documents filed on 11th July 2012 nor in the supplementary list of documents filed on 19th September, 2018. Among the documents sought to be introduced is a stamp duty declaration form dated 27th February, 2009.

2. Counsel for the 1st defendant Mr. Kounah objected to the production of those documents arguing that the documents were being unprocedurally produced from the bar and were not part of the discovery carried out by the court. He pointed out that the 1st Defendant categorically stated and pleaded in the amended defence that the said documents were missing from the purported transfer and the plaintiff had the opportunity to reply to the defence and in effect make production and disclosure if they were in existence but did not do so until now. He submitted that to allow the production of the documents at this juncture will amount to an ambush and a miscarriage of justice.

3. Mr. Ndambiri, Counsel for the 2nd, 4th and 5th Defendants also objected to the production of the said documents and specifically pointed out that the re-amended plaint and witness statement made no reference to payment of stamp duty in respect to the suit property. Mr. Ndambiri added that in the Plaintiff's list of documents filed on 11th July 2012, there was no reference and no indication that the Plaintiff intended to produce in evidence any document in respect to payment of stamp duty. He submitted that when directions were given and the suit was confirmed for hearing, there was no indication that any of the parties intended to produce further documents either in support or in opposition to the issues agreed on. He argued that given that this is the factual position, it is prejudicial and indeed an abuse of the court process for the witness to make reference and to rely on documents the 2nd, 4th and 5th defendants were never made aware of. He added that when the 2nd, 4th and 5th defendants filed their defence to the re-amended plaint, they did so on the basis of the claim and the averments made by the plaintiff which never made reference to payment or non-payment of stamp duty on the suit property. That an issue may arise relating to the author and source which may then delay the finalization of the case which is fairly a very old matter.

4. Mr. Siminyu, learned counsel for the 3rd and 6th Defendants associated himself with the submissions of Mr. Kounah and Ndambiri and objected to the production of the said documents.

5. On his part, Mr. Makuto, Counsel for the 7th and 8th Defendants submitted that it may be prejudicial to his clients' case to have the documents in question produced before he has had a chance to interrogate them and seek instructions from his clients. He argued that to allow the production would amount to a trial by ambush.

6. Mr. Khagram, learned Counsel for the plaintiff argued that pleadings are allegations of facts which have to be proved by evidence. Citing Section 22 of the Civil Procedure Act, Counsel submitted that the court has power to make a decision on admission of documents at any time. He also relied on the cases of Paul Kingoo Kioko –v- Afro Train (Tz) Ltd & Another (2008)eKLR; George Maina Michael –v- Vitalis Kabita (2018)eKLR; and Moses Warui Gatimu –v- Douglas Mwai Machuru & Another (2018)eKLR. He added that the plaintiff should not be shut out from producing the documents as no prejudice will be suffered by the defendants who may be compensated by costs.

7. This suit was commenced through a plaint filed on 11th July 2012 but was subsequently amended and re-amended. At the time of filing the plaint on 11th July, 2012, the Plaintiffs filed a list of documents namely;

- 1) **The original title and Government issued lease and all relevant documents relating to Kwale/Diani Beach Block/203.**
- 2) **Copy of pleadings and relevant correspondence in respect of Mombasa HCCC No.211 of 2006 (Seaview Investments Limited –v- Hamadi Juma Mwakibibo & the Attorney General).**
- 3) **Copy of pleadings and relevant correspondence in respect of Mombasa HCCC No.315 of 2008;**
- 4) **Copy of pleadings and relevant order in respect of Mombasa High Court Constitutional Petition Number 57 of 2012; and**
- 5) **Copy of letter dated 14th June 2012 from Messrs Stephen Oddiaga & Company, Advocates to the plaintiffs and Advocates response thereto.**

All the above documents were stated to be annexed to the affidavit of Vijay Lakhani filed herein.

8. On 19th September, 2018 the Plaintiff filed a Supplementary list of documents. In the course of his evidence on 19th September, 2018, PW1 made reference and sought to introduce as part of his documentary evidence documents that were not in the Plaintiff's original list filed on 11th July 2012 and the Supplementary list filed on the same date, that is on 19th September, 2018. Before this suit was listed for hearing, parties had confirmed that they had complied with the provisions of Order II of the Civil Procedure Rules. 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.

9. In the case of Moses Warui Gatimu (supra), Olao, J stated as follows; "The purpose of a pre-trial conference provided 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 attempt to steal a march 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".

10. In the instant case, the documents sought to be introduced are not contained in the Plaintiff's list of documents, including the supplementary list filed on the same day the document was to be introduced. Indeed the documents are being introduced in the proceedings for the first time. They are new evidence. No reason has been given why the said documents were not filed in the original list of documents or in the supplementary list of documents which was in fact filed on the very day the documents were sought to be introduced. The court, however takes note that the trial is still on and the plaintiff is yet to finish testifying. In my view, and being guided by the provisions of Article 159 (2) (d) of the Constitution, the plaintiff can be allowed to adduce the additional documentary evidence. In my view, no prejudice will be caused to the defendants by the introduction of the documents as they will have an opportunity to cross-examine the witness on the same. There is therefore room for the defence to test their worth in cross-examination. Furthermore, admitting the documents does not mean that they will be taken as gospel truth by the court especially where there is evidence to the contrary. It is the opinion of this court that a litigant should not be barred from laying all he has in terms of documents before a court of law in furtherance of his case in a situation where the other side can be compensated by way of costs.

11. The upshot is that I overrule the objection and allow the discovery of the stamp duty declaration Form dated 27th February 2009. The plaintiff is directed to file and serve the defendants forthwith with the said document, and in any event before PW1 proceeds with his evidence.

The defendants will have costs of this objection in any event.

DATED, DELIVERED and SIGNED at MOMBASA this 9TH day of October, 2018

C. YANO

JUDGE