



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.472 OF 2013**

**MARGARET MUTHONI WANYEE.....PLAINTIFF**

**VERSUS**

**MUKENIA CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT**

**RULING**

***(Application by defendant to substitute a deceased witness, to call secondary evidence and introduce a new document; trial already at defence stage; one of the witnesses passing on; application to substitute this witness allowed; application to call secondary evidence to be determined at the hearing following the rules of evidence; application to introduce the new document allowed on special grounds as plaintiff had produced a similar document not hitherto disclosed).***

1. This is a partly heard matter and the plaintiff has already closed his case. Before the commencement of the case for the defence, the defendant filed an application dated 26 October 2016 seeking the following orders :-

*(i) That pending the hearing of the defendant's case, this Honourable Court be pleased to grant leave to the defendants to file a supplementary witness statement for witness number 13 on the defendant's list of witnesses (one Pauline Wambui Waitiki).*

*(ii) That pending the hearing of the defendant's case this Honourable Court be pleased to grant leave to the defendant to file a supplementary List of Documents to include a Government forensic documents examiner's report made by the Government forensic document examiner on 18th day of August 2016.*

*(iii) That this Honourable Court be pleased to grant leave to the defendant to produce in evidence secondary evidence of the following documents :-*

*(a) The defendant's certificate of registration.*

*(b) Letter dated the 24th day of June 1994 addressed to M/s Muritu & Associates by the defendant's chairlady.*

*(c) Receipt dated the 19th day of May 1993 issued by Muritu Land Surveyor.*

*(d) A request for an overdraft from M/s Cooperative Bank dated the 21st June 1993.*

*(e) Identification report of Cheni Lubule Luliru.*

*(f) identification report of Margaret Muthoni Wanyee.*

2. The application is founded upon the following grounds :-

*(i) That production of the said documents is necessary to enable the court effectually and conclusively determine all the issues raised and/or may arise during the hearing of this case.*

*(ii) That the supplementary witness statement by Pauline Wambui Waitiki is necessary in view of the fact that Ruth Wanjiru Shadrack the then chairlady of the defendant when this suit was filed passed on.*

*(iii) That Pauline Wambui Waitiki is the current secretary of the defendant and that at the time the land parcel subject matter of this suit was purchased by the defendant, she was a member and an official of the defendant and therefore she is seized with the facts of this case.*

*(iv) That the defendant has discovered new evidence i.e a Government forensic expert report that was not available and/or accessible as at the time the defendant filed its documents.*

*(v) That the supplementary witness statement contained in the statement filed by Ruth Wanjiru Shadrack (deceased).*

3. The application is supported by the affidavit of Pauline Wambui Waitiki the treasurer of the defendant company. She has deposed inter alia that the Chair of the company, Ruth Wanjiru Shadrack died on 28 May 2015. She (Ms.Shadrack) was among the witnesses that the defendant had listed and had prepared a statement. She (Ms.Waitiki) has averred that she was an official of the defendant when the land, which is the subject matter of the case, was purchased and she is therefore seized with the facts of the case. She has stated that since the Chair who was to be a witness has died, it is only fair that she be allowed to testify. She has deposed that the defendant has come across a document made by the Government forensic document examiner which relates to the subject matter of the case, and which was prepared on 18 August 2016, which document was not available to the defendant at the time of filing its documents. She has deposed that the offices of the defendant have been broken into on several occasions and original documents relating to the transaction stolen, thus the need to adduce secondary evidence of the documents that she has mentioned.

4. The application is opposed by the plaintiff. The affidavit in opposition is sworn by Benny Kanyi Waweru, who holds a power of attorney on behalf of the plaintiff. He has basically given his view on the documents appointing him to hold the power of attorney and has deposed that they are true.

5. I invited counsels to file written submissions which they did. I have considered these in arriving at my ruling.

6. I think there are three limbs to this application. The first is that seeking leave to have Pauline Wambui Waitiki as a witness for the defendant in place of one Ruth Wanjiru Shadrack who is deceased. The second limb seeks to produce secondary evidence, I assume copies of documents, in place of the originals. The third is to introduce new evidence, that is a document from a document examiner.

7. On the first limb of the application, I see no problem if Pauline Wambui Waitiki is called as a witness. She of course was not listed by the defendant in its list of witnesses which bears 19 witnesses. However, it has been explained that one of the listed witnesses, the Chairlady of the defendant, Ms. Shadrack, is deceased, and the intention is to call Ms. Waitiki to testify in place of the said deceased. It could not have been foreseeable that Ms. Shadrack would pass on in the course of the proceedings. I see no prejudice which will be caused to the plaintiff since it has already been made clear that Ms. Waitiki will give evidence on the matters that Ms. Shadrack was to testify on. Whether or not Ms. Waitiki is competent to give evidence on all matters that Ms. Shadrack wished to testify upon will of course still be subject to the

rules of evidence as provided in the Evidence Act, Cap 80, Laws of Kenya.

8. On the second limb of the application, that is whether to produce secondary evidence in form of copies of documents, I am afraid I cannot make a determination through this application. The issue of production of secondary evidence is adequately covered by the Evidence Act, Cap 80, Laws of Kenya, which has elaborate provisions on the production of secondary evidence. The applicant is advised to ensure that the conditions for the production of secondary evidence are met, as the issue will be determined when the applicant's witnesses testify.

9. The last limb of the application is on introduction of new evidence. It will be observed that the defendant now proposes to call a witness who was not noted in its list of witnesses dated 9 September 2013. This witness is said to be a document examiner and the new document sought to be produced is a document examination report.

Order 7 Rule 5, is relevant in the instance of the matter before me. It is drawn as follows :-

***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.*

10. It will be observed from the above that the defence is supposed to be accompanied by a list of witnesses together with their statements and also copies of documents to be relied upon by the defence during trial. There is an exception with regard to expert witnesses who need not make witness statements but they must be listed in the list of witnesses to be called. Order 7 Rule 5 mirrors the provisions of Order 3 Rule 2, which obligate the plaintiff to also file together with the plaint, the same documents, that is, the list of witnesses, witness statements excluding expert witnesses, and copies of documents.

11. Thus strictly speaking, the defendant, if it intended to call a document examiner as a witness, and the document examiner's report as one of its documents, ought to have filed these together with the defence. There is nowhere in the defendant's list which was filed alongside the defence, which indicates that there will be a document examiner's report nor a document examiner who will be called as a witness. It follows therefore that when the plaintiff gave evidence, and when he called his witnesses, he had no idea that there was a document examiner's report which would be relied upon by the defendant.

12. The essence of having the rule that parties table their evidence in advance, is so as to ensure a fair trial. All factors held constant, I would have denied the application to introduce this new piece of evidence. However, I also do note that the plaintiff called as one of his witnesses a document examiner, one Mr. Mackenzie Mweu, who testified as his third witness. Mr. Mackenzie was not listed by the plaintiff in the plaintiff's list of witnesses and neither was his document listed in the plaintiff's list of documents filed alongside the plaint. I have not seen any supplementary list of documents or witnesses filed thereafter. It follows that Mr. Mackenzie was allowed to testify without the defendant having advance notice that he would be called as a witness.

13. I am of the view that the court should be extremely slow and cautious before admitting evidence that was not earlier disclosed as provided for by the rules. In fact, my own take is that the court should incline

towards denying such application since it is an ambush on the other party.

14. However, I am of the opinion that there are special circumstances in the manner in which this trial has been conducted so far, that would allow me to use my discretion to permit the defendant to admit its document examiner's report and call the document examiner as a witness in as much as there was no prior indication that they would be called as witnesses. I have already explained that the plaintiff was permitted to proceed to call a document examiner and produce a document examination report which was not hitherto disclosed as required in the rules. I think it is only fair that the leeway given to the plaintiff, also be granted to the defendant.

15. It is on the above special reasons that I do allow the application by the defendant to call as a witness the document examiner and avenue adduce his report as as exhibit during the defence case.

16. Since I am giving leeway to the defendant to rely on this during trial, and given that the plaintiff had no notice of these before hand, I will permit the plaintiff an opportunity to rebut this evidence, if it is tabled before court.

17. On costs, I make no orders as to costs.

18. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 31<sup>ST</sup> day of March 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

Mr. Kabaiko for the plaintiff

Mr. Olonyi for the defendant

Court Assistant : Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**