



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1201 OF 2016

(FORMERLY HCC NO. 115 OF 2009)

VINCENT MOSETIPLAINTIFF

VERSUS

CHARLE SOMOKE ONSASE.....1ST DEFENDANT

ZABLON GISEGE ABUGA2ND DEFENDANT

R U L I N G

1. The plaintiff in the present suit commenced the instant suit by a plaint dated 24th June 2009 filed in court on the same date. The plaintiff testified before Okong'o, J. on 10th April 2013 and was cross examined and re examined after which the plaintiff closed his case on the same day.

2. The defendant's case opened on 29th June 2015 before **Hon. Okongo, J.** when one Zablun Mahaga Okari (DW1) testified and was duly cross examined and re-examined. Following the transfer of **Hon. Okong'o J.** the defence hearing continued before me on 18th May 2016 when one John Omwando Tinga (DW2) gave evidence in chief and during cross examination by Mr. Momanyi advocate for the plaintiff, the advocate sought to refer the witness to certain documents which had not been discovered and which were not part of the documents submitted by either party in their bundles of documents filed in court. Mr. Nyamurongi advocate for the defendant objected to any reference to any documents which were not on record. The court upheld the objection by the defendant's counsel and granted an adjournment of the hearing to enable the plaintiff to review his position and determine how he wished to proceed. DW2 was stood down and the matter was fixed for mention on 27th September 2016 for further directions.

3. Before the date fixed for the mention of the matter, the plaintiff on 19th September 2016 filed the Notice of Motion dated 15th September 2016 expressed to be made under Section 1A, 1B and 3A of the Civil Procedure Act and Order 11 Rule 3 (1) (a) and (2) of the Civil Procedure Rules 2010. The plaintiff/applicant sought the following orders in the application:-

(i) That this honourable court be pleased to order that this case start afresh.

(ii) That this court be pleased to grant leave to the plaintiff/applicant to file and serve a fresh list of documents and copies thereof.

(iii) That the costs of the application be provided for.

4. The application is supported on the grounds set out on the face of the application and on the affidavit sworn by the plaintiff in support of the application dated 15th September 2016. Inter alia the plaintiff states that his former advocate by mistake filed a list of documents without copies of documents; that the mistake was not discovered during the case conference and that though the plaintiff testified and closed his case the mistake was not discovered until during the defence hearing. The plaintiff further avers that Order 3 Rule 2 (d) provides that copies of documents to be relied on during the trial be filed with the pleadings and additionally Order 11 Rule 3 (1) (a) directs parties to ensure compliance with Order 3 Rule 2 and Order 7 Rule 5 which relate to filing of pleadings and defence respectively. The plaintiff further avers the mistake is excusable and that the mistake of counsel at any rate ought not to be visited on a party.

5. The plaintiff deposes that he gave all documents to his deceased former advocate Mr. C. O Minda and he trusted the advocate would do all that was required in regard to the filing and production of the documents. The plaintiff admits when he testified he was only referred to four documents which were produced as exhibits. The plaintiff states that the bundle of documents annexed to his affidavit as “VMO001” are vital to his case and unless he is permitted to produce them he will be prejudiced.

6. The defendants filed grounds of opposition dated 22nd September 2016 in opposition to the plaintiff’s application. Inter alia the defendants averred that:

(i) The plaintiff’s application is misconceived and bad in law.

(ii) The plaintiff was represented by counsel when he testified and that he voluntarily closed his case.

(iii) That there is no basis for the court to order the hearing to be started de novo.

(iv) That the suit is an old matter and the same is substantially heard and the defendants will be prejudiced if the orders sought are granted.

(v) That the plaintiff has not been diligent in the prosecution of his case and there has been inordinate delay in bringing the instant application considering the plaintiff’s current advocates came on record for the plaintiff on 25th November 2014.

7. The parties argued the application by way of written submissions. The plaintiff/applicant filed his submission on 3rd November 2016 while the defendants’ submissions in response were filed on 20th December 2016. The plaintiff through his submissions has reiterated the grounds set out in support of the application and the facts deposed in the affidavit in support of the application. The plaintiff submits that all the documents he wishes to have admitted are crucial to the plaintiff’s case and urges the court to invoke Order 18 Rules 10 and 11 to either have the witnesses who have testified recalled and/or to order inspection and discovery of the documents in the possession and custody of the plaintiff. The plaintiff submits that the court should in the interest of justice see it fit to have the case start afresh so that the plaintiff is accorded the opportunity to produce the documents arguing that no prejudice will be occasioned to the defendant if the plaintiff’s case is reopened.

8. The plaintiff further submits Sections 1A, 1B and 3A Civil Procedure Act and Section 19 of the Environment and Land Court Act, 2011 gives the court powers to do substantive justice. The plaintiff argues that the court ought to invoke the provisions of Article 159 of the Constitution and the aforesaid legal provisions to do substantive justice in the matter by allowing the application by the plaintiff to enable the ends of justice to be met.

9. The defendant submits that the plaintiff is undeserving of the discretion that he is inviting the court to exercise in his favour. The defendant argues to grant the application by the plaintiff would result in causing injustice to the defendants. The defendants submit that the invocation of the overriding objectives set out in Sections 1A, 1B of the Civil Procedure Act and Section 3 of the Environment and Land Court Act, 2011 would be inappropriate as the plaintiff has not shown the same would result in the

just determination, efficient disposal and/or timely disposal of the proceedings before the court. To the contrary the defendants submit the net effect of granting the plaintiff's application would be to allow the plaintiff to fill the gaps in his evidence and to delay the conclusion of the case to the prejudice of the defendants. The defendants in support of their submissions rely on the following authorities: **Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR** and **Grace Achieng Ogot –vs- Sukari Co-operative Savings & Credit Society Ltd [2013] eKLR**.

10. In the case of **Grace Achieng Ogot –vs- Sukari Co-operative Savings & Credit Society Ltd** (Supra) **Lady Justice Hellen Wasilwa** held that re-opening of the claimant's case to allow for cross examination on new evidence would not fall under the realm of a procedural technicality as it went to the core of substantive issues and involved introduction of new evidence. She did not find Article 159 (2) (d) which the claimant invoked would have any application. In refusing the respondent/applicant's application the learned judge stated:-

“I decline to allow the re-opening of the claimant's case and introduction of fresh evidence as it is prejudicial to the claimant's case. In any case, such evidence would only be possible if the claimant had not closed her case.”

11. In the case of **Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & Another** (Supra), Hon. Lady Justice Mary Kasango considered an application similar to the one before me and in dismissing the application stated as follows:-

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

12. I agree with the Hon. Judge's observations that an application to reopen a party's case for any purpose must be made timeously and the same must not be to plug any gaps that may have been exposed by the evidence by the opposing party or gaps that may have become apparent in the party's case as the hearing progressed. In other words, if granting the application would prejudice the other party, then the same ought not to be granted. It is the duty of every party to plead and present the whole of his/her case. In the instant case the plaintiff has given evidence and closed his case. In the course of giving his evidence the plaintiff who was led by his counsel produced the documents that he deemed material and relevant as **“PEx1-4”**. The documents that the plaintiff now wants to have produced were all the time available and in the possession and custody of the plaintiff. The plaintiff's counsel and the plaintiff must have evaluated the plaintiff's case and deemed them not material to the plaintiff's case when the plaintiff testified. The present counsel on record for the plaintiff came on record in November 2014 and did not make the present application until 19th September 2016. From the record Mr. Momanyi advocate for the plaintiff participated in the proceedings on 29th June 2015 when DW1 testified before Hon. Justice Okongo. It is expected that when the current plaintiff's advocate on record took over the brief on behalf of the plaintiff from the previous plaintiff's advocate he had acquainted himself with the pleadings and evidence in regard to the plaintiff's case. No explanation has been offered why the application was not made before, the closure of the plaintiff's case or before the defence hearing commenced. The conduct of the plaintiff and his advocates points to a lack of diligence in the conduct of the case. There appears to have been casualness and sloppiness in the manner the plaintiff's case was conducted.

13. In the case of **Odoyo Osodo –vs- Rael Obara & 4 Others [2017] eKLR** this court recently considered a somewhat similar application where after the closure of the plaintiff's and defendants' cases the defendants made an application to have the case reopened to enable the defendants to present evidence in support of the counterclaim which they had omitted to present during the hearing. In the case I delivered a ruling dismissing the defendants/applicants application. In the ruling I inter alia made the following observation:-

“Counsel urges the court not to visit the mistake of counsel on the litigant and to, in the

interest of justice, allow the application and have the case reopened. While I have sympathy for the litigants (defendants in this case), I fail to understand how it could be an oversight to adduce evidence which was always available. The defendants must all along been aware of the case they were facing from the plaintiff and in that regard filed a defence and counter claim..... It defeats logic how the defendants who all along were represented by counsel could overlook evidence that was necessary for their case. There is no case of genuine mistake or error on the part of counsel which perhaps could invite sympathy of the court. The defendants and their counsel appear to have treated the matter with a lot of casualness such that they only realized the lacuna in their case when the plaintiff served upon them the plaintiff's written submissions.”

14. In the same matter (ruling), I rendered myself as follows as regards the conduct of lawyers and their clients:-

“...Lawyers time and again will plead with the courts not to punish litigants for their mistakes. When it is a genuine mistake or error on the part of the lawyer the court may overlook in the interest of justice. However, in the instant matter, I am not persuaded there was any genuine mistake and/or error. Lack of diligence and/or casualness or sloppiness cannot be equated to genuine mistake or error. They are conduct for which the counsel and his client should take responsibility and bear the consequences. Not even the overriding objective principles under Sections 1A and B of the Civil Procedure Act in my view can come to the aid of the applicants. The cardinal tenets of the overriding objective principle are justice delivered in an efficient and expeditious manner. The conduct of the applicants herein run counter to these tenets as it is evident the conduct militates against the efficient and expeditious finalization of the present matter.”

15. My above observation in the **Odoyo Osodo** case (Supra) would apply with equal force in the present matter and I do not wish to say more. To allow the plaintiff/applicant's application would be prejudicial to the defendants. I decline to allow the same. Consequently, the plaintiff's application dated 15th September 2016 is dismissed with costs to the defendant.

Ruling dated, signed and delivered at Kisii this 31st day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the 1st and 2nd defendants

Milcent Court assistant

J. M. MUTUNGI

JUDGE