



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO.259 OF 2014

JONES ALAKA KIMATU.....PLANTIFF

VERSUS

JOSEPH KIMATU.....RESPONDENT

RULING

1. By a Notice of Motion dated 31st October 2016, made under Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Order 18 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya, the plaintiff/applicant seeks orders: -

1. THAT this Honourable Court be pleased to grant leave to the plaintiff to file a supplementary list of documents and the supplementary list of documents filed herein on 6th May 2016 be deemed as duly filed/properly on record.

2. THAT the Honourable Court be pleased to direct that the plaintiff be recalled to lead further evident in respect of the filed supplementary list of documents.

3. THAT costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and is also based on the affidavit of Jones Alaka Kimatu, the applicant sworn on 31st October 2016 and supplementary affidavit sworn on 20th February 2017. The applicant depones inter, alia that he has obtained crucial documents in support of his case that had inadvertently not been produced and is desirous of having them filed, produced and considered by the court at the trial. Among the documents not produced during the hearing are a sale agreement dated 18th September 2013, copy of a title deed, certificate of postal search and an order issued on 16th October 2014. The applicant states that the said documents were not in his possession at the time of filing suit and during the trial.

The applicant further deposes that the said documents are very crucial to his case and the defendant will not suffer any prejudice if the documents are admitted as the same will be subjected to cross-examination.

3. The application is opposed by the defendant who filed a Replying Affidavit sworn by himself on 30th January 2017 and a further affidavit sworn on 11th April 2017. The defendant deposes that the application is an afterthought aimed at stealing a march on him as the plaintiff had already testified and closed his case. He further deposed that no sufficient explanation has been given by the plaintiff why it

took almost two years for him to avail those documents.

4. Parties filed written submissions in arguing the application.

5. I have carefully considered the plaintiff's application dated 31st October, 2016 together with the affidavits in support as well as the defendant's affidavits in response to the same. I have also considered the submissions and authorities by both the advocates for the applicant and the respondent.

6. I note from the court record that this matter is part heard before Hon. A. Omollo, J. The plaintiff and one other witness have testified. The plaintiff had indicated that he still has one more witness to call. Therefore, the plaintiff's case had not closed as alleged by the defendant in his replying affidavit.

7. The plaintiff has now filed an application to be permitted to introduce documents that were not available at the time he gave evidence or at the time of filing the suit. He has explained that the said documents were inadvertently left out.

8. Under the provisions of Order 3 Rule 2 (d) a party is required to file copies of documents to be relied on at the trial. It is evident from the record that the plaintiff filed a list containing three documents and "any other documents to be adduced with leave of the court". The plaintiff later on filed a supplementary list of documents and has now filed an application for leave to file another supplementary list of documents and for him to be recalled to lead further evidence in respect of those new documents.

9. It is clear from the provisions of the Civil Procedure Act that discovery of documents is a requirement of the law and a party is required to file and serve before trial to enable the opposite party know what case to face and prepare and to avoid ambush when parties are prosecuting their cases. It allows parties to analyze what their opponent's case is and hence adduce evidence to rebut such a case. In this case, the plaintiff had testified and had been cross-examined. The plaintiff has explained that the documents he seeks leave to file were not available at the time he gave his evidence. The plaintiff is also willing and is seeking leave to be recalled to lead evidence in respect of these new documents.

10. Order 18 Rule 10 of the Civil Procedure Rules provides that: "The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit". Section 146 (4) of the Evidence Act provides that:

"The court may in all cases permit a witness to be recalled either for further evidence-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

11. It is clear from the foregoing provisions of the law that the law allows the recall of a witness who has previously testified. I am not persuaded that the defendant will suffer any prejudice if the plaintiff is recalled as he would be accorded the right to subject him to cross-examination. Moreover, if the plaintiff is granted leave to file the supplementary list of documents, their production or otherwise will still be subject to the rules of evidence at the trial.

12. Consequently, I exercise my discretionary power and invoke the overriding objective in the circumstances and allow the Notice of Motion dated 31st October, 2016 in terms of prayers 1 and 2 thereof. Costs of the application shall abide the outcome of the main suit.

Dated, signed and delivered at Mombasa this 15th day of June 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE