



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 737 OF 2013

MARCLUS KIRANGA NIMROD 1ST PLAINTIFF

NIMROD KIBUKU KIRANGA 2ND PLAINTIFF

VERSUS

NESSY KUTHII JUSTUS 1ST DEFENDANT

QUEKENDA HOLDINGS LTD..... 2ND DEFENDANT

RULING

I have before me the 1st plaintiff's Notice of Motion dated 25th January 2017 seeking the following orders:

1. Spent.

2. That this Honourable Court be pleased to grant leave to the 1st plaintiff to file a further list of documents and witness statement as per the attached list and also call an extra witness ZIPPORAH MUTHONI NIMROD as per the attached statement.

3. That costs of this application be provided for.

The application is premised on the grounds set out therein and is also supported by the affidavit of **MARCLUS KIRANGA NIMROD** the 1st plaintiff herein. The gist of the application is that although the time for filing documents has lapsed, the 1st plaintiff has now come across a very important document which is a sale agreement with respect to the land subject of this suit and which he did not have at the time of filing this suit. The said agreement which is annexed to the application (annexture **MKN1**) is relevant to this suit as it will prove that the 1st defendant sold land parcel No. L.R KIINE/RUKANGA/2336 to the 2nd defendant without the consent of the 1st plaintiff.

The application is opposed and in a replying affidavit filed by **JULIUS AUGUSTINE MAINA KUNGURU** the 2nd defendant's director, it is deponed, inter alia, that this suit having been filed on 30th September 2013 has proceeded to hearing and the 1st plaintiff has testified and at no time did he allude to any agreement dated 19th May 2008 nor give any reason for its absence. Further, there is no reference to such an agreement in the written statement of the 1st plaintiff. That the signatures appearing on the said agreement and those appearing on the statements of **TABITHA WATHONI** and **ZIPPORAH MUTHONI** are at great variance. That no sufficient reason has been shown to explain why the said witness has never been in Court and therefore, the application to introduce the document is an afterthought meant to delay these proceedings.

On 27th April 2017, this Court directed that the application be canvassed by way of written submissions with the applicant having the first ten (10) days within which to file and serve and the respondent seven (7) days thereafter. However, on 17th May 2017 when the matter came up for mention to confirm compliance, **MR. NJAGI** holding brief for **MR. KAHUTHU** for the plaintiffs informed the Court that defendant's advocate had been served with the plaintiffs submissions. As there was no appearance by counsel for the defendants to explain why they had not filed their submissions, the Court fixed a date for ruling.

I have considered the application by the 1st plaintiff, the replying affidavit by the 2nd defendant and the submissions on record.

In order to ensure orderliness in the trial and also to prevent trials by ambush, the **Civil Procedure Rules** require parties to furnish their evidence to the other side in advance before the commencement of the trial. **Order 3 Rule 2 of the Civil Procedure Rules** provides as follows:

“All suits filed under rule 1 (1) including suits against the government, except small claims, shall be accompanied by –

(a) the affidavit referred to under Order 4 rule 1 (2);

(b) a list of witness to be called at the trial;

(c) written statement signed by the witnesses excluding expert witnesses; and

(d) copies of documents to be relied on at the trial including a demand letter before action.

Provided that statement under sub rule (c) may with leave of Court be furnished at least fifteen days prior to the trial conference under Order II”

A similar provision applies to a defendant while filing a defence and counter-claim in **Order 7 Rule 5 of the Civil Procedure Rules**.

It is instructive to note that neither **Order 3** nor **Order 7 of the Civil Procedure Rules** prohibits the trial Court, upon application, from accepting late filing of statements or documents sought to be relied upon. In my view, and in keeping with **Article 50 of the Constitution** which provides for a fair hearing of any dispute, a trial Court is not barred from allowing a party, with leave, to introduce new statements and documents that were not previously filed and served as mandated by the provisions of **Order 3 and Order 7 of the Civil Procedure Rules** because the primary duty of the Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective claims. Each case will however be decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party.

Bearing the above in mind, it is clear that the plaintiffs have called three witnesses so far but have not closed their case. The trial is therefore in its early stage. The 2nd defendant's objection to this application appears to me to be that it is coming late, that no reasons have been given for the failure to avail the statement and agreement and also that the signatures thereon vary. It is clear from paragraph five (5) of the 1st plaintiff's supporting affidavit that the agreement sought to be produced was not available at the time of filing this suit. I think that is a good enough reason. As to the differences in the signatures on the documents, that is an issue regarding the veracity of the evidence which will be tested in cross-examination. No prejudice will be caused to the defendants who can file additional statements should they deem it necessary to do so. In the circumstances of this case, I find it proper to allow the plaintiffs to file and serve the further documents and also the statement of **ZIPPORAH MUTHONI NIMROD**.

The up-shot of the above is that the 1st plaintiff's Notice of Motion dated 25th January 2017 is hereby allowed in the following terms:

1. Leave is granted to the 1st plaintiff to file and serve a further list of documents and the witness statement of ZIPPORAH MUTHONI NIMROD within 15 days from today.

2. Similar leave is granted to the defendants, should they wish to do so, to file and serve any further statements within 15 days of service upon them of the said documents and statement.

3. The defendants shall have costs of this application.

B.N. OLAO

JUDGE

28TH JULY, 2017

Ruling delivered, dated and signed in open Court this 28th day of July 2017

Mr. Wambugu for 2nd Respondent present and also holding brief for

Mr. Macharia for 1st Respondent

Mr. Kahuthu for Applicants absent.

B.N. OLAO

JUDGE

28TH JULY, 2017

Mr. Wambugu: Could the Court grant us a hearing date.

COURT: Hearing 16th October 2017

Hearing notice to issue.

B.N. OLAO

JUDGE

28TH JULY, 2017