



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 671 OF 2012

DAVID KIPKOSGEI KIMELI.....PLAINTIFF

VERSUS

TITUS BARMASAI.....1ST DEFENDANT

RULING

INTRODUCTION

This is the ruling in respect of an application dated 11th June 2017 by the plaintiff/applicant brought by way of a Notice of Motion for orders:

1. That the plaintiff's case be re-opened and the plaintiff and his other witnesses be allowed to adduce evidence and produce documents.
2. That costs of this application be in the cause.

This matter came up for the hearing this application on 20th July 2017 when Miss Kiplagat for the plaintiff/applicant argued the application.

By an originating Summons dated 2nd December 2010 the plaintiff sued the defendant claiming to be entitled to 4.3Ha in land parcel No. UASIN GISHU/KIPKABUS SETTLEMENT SCHEME/47 by way of adverse possession. The case came up for hearing of the main suit on 22nd March 2017 when the plaintiff and his witness testified and were cross -examined.

The matter proceeded for defense hearing when the defendant and one witness testified. Miss Kipsei for the plaintiff applied that DW2 be stood down for the court to visit the suit land. The same was fixed for site visit on 17th May 2017. On the said date, Miss Kipsei applied to court to be allowed to make a formal application to reopen the plaintiff's case. This is the application that I am dealing with now.

Plaintiff's Counsel's Submissions

Miss Kiplagat argued the application on behalf of the plaintiff. She relied on the grounds of the application together with the supporting affidavit sworn by DAVID KIPKOSGEI KIMELI. She submitted that the plaintiff inadvertently closed his case without calling some crucial witnesses. She attributed the confusion to a related case No. 213/13 where the defendant is a plaintiff.

Counsel stated that the 4 witnesses are crucial to the plaintiff's case and it would be in the interest of justice to reopen the case. She prayed for the application to be allowed.

Defendant's Counsel's Submissions

Mr. Kamau Counsel for the defendant vehemently opposed the application for reopening the plaintiff's case. He relied on the grounds of opposition filed in respect of the application. Counsel submitted that the application was an afterthought as the plaintiff was present in court on 22/3/17 with his witnesses and also on 29/3/17 when the defendant and his witnesses testified.

Counsel submitted that if the plaintiff was acting in good faith then he should have made the application before the defence case commenced. Mr. Kamau stated that this is a fishing expedition to fill in the gaps to his case after cross-examination. Counsel further submitted that parties had filed their statements and the case has been substantially heard.

Mr. Kamau further submitted that allowing the application would be prejudicial to the defence. He urged the court to dismiss the application as it lacks merit.

Issues and Determination

The issues in this application is as to whether the plaintiff has advanced a good reason to warrant reopening a case which has been substantially heard. Does the plaintiff want to adduce fresh evidence which was not within his knowledge at the time of testifying? What crucial evidence do these new witnesses have that was not within the plaintiff's reach when he filed his statements and testified in court. Are there gaps that he has realized that he needs to fill to beef up his case after cross examination and after hearing the evidence of the defence?

Kasango J. in the case of **Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR** referred to a Ugandan High Court, Commercial Division case of **SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98** which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred to an Australian case **SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256** where it was held that:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

It should be noted that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be an exercise in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative then the discretion should not be exercised in the applicant's favour.

In the current application, the plaintiff has not given a good reason why he had not filed the statements of these additional witnesses. I note that the additional witness statements were annexed to this application. They have not been filed in the court file. This matter had been fixed for directions and pretrial procedures and the counsels stated that they had complied with order 11 of the Civil Procedure Rules. They went ahead to fix the matter for hearing. On the date when the matter was fixed for hearing both counsels were ready to proceed and actually proceeded. This is the reason why order 11 of the Civil

Procedure Rules was introduced to help in preparation for trial.

Miss Kiplagat invoked the tired phrase that the mistake of a lawyer should not be visited on the client. 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.

I find that the application is an afterthought as submitted by Counsel for the defendant and it would be prejudicial to the defence who have already given evidence. This would be a way of filling gaps in the plaintiff's case if any.

In the circumstances and for all the above reasons, I find no merit in the plaintiff's application dated 15th June 2017 and the same is dismissed with costs to the defendant. Parties to fix this case for further hearing within 30 days.

Orders accordingly.

Dated and delivered at Eldoret on this 25th day of September, 2017.

M.A ODENY

JUDGE

In the presence of:

Miss Kiplagat for the Plaintiff

Mr. Omusundi holding brief for Mr. Kamau for the defendant.

C/A: Koech