



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO.84 OF 2017

MARGARET NYOKABI MBUGUA - 1ST PLAINTIFF
CATHERINE FELISTUS WAMBUI - 2ND PLAINTIFF
HUMPHREY MWAURA - 3RD PLAINTIFF
GEOFFREY KIBATHI MBUGUA - 4TH PLAINTIFF
EILEEN WANJIKU MBGUA - 5TH PLAINTIFF
GEORGE SIMON KAMAU - 6TH PLAINTIFF

VS

NGENDA NEW FARMERS CO. LTD - 1ST DEFENDANT
PETER NG'ANG'A KIBE - 2ND DEFENDANT
MONICA KABURA - 3RD DEFENDANT
BERNARD MUTURI - 4TH DEFENDANT
MICHAEL MBUGUA - 5TH DEFENDANT

RULING

1. The facts of this case are rather straight forward. The events culminating to the application at hand are enumerated below; -

a. On the 3/11/16 the Court directed the parties to comply with the provisions of Order 11 of the Civil Procedure Rules.

b. On the 15/12/16 the Plaintiffs' Lawyer Mr. Orina informed the Court that he had just been put on record and needed time to comply and further to enjoin the National Land Commission and Kenya Planters' Co-operative Union Limited (KPCU). Mr. Ngari the Learned Counsel for the Defendants however informed the Court that he had complied 98%. The Court directed the Plaintiffs to comply within 7 days and if they wished to file an application for joinder they were at liberty to so file. It is instructive to note that the application to enjoin the National Land Commission and the KPCU has never been filed to date, despite it procuring an adjournment in the case.

c. On the 15/2/17 only the Plaintiff was represented in Court and requested for more time to comply with Order 11 of the Civil Procedure Rules.

d. On the 27/2/17, on the application by the Defendants the Court granted a further 21 days to both parties to comply.

e. On the 10/04/17 an issue of representation of the Defendants arose when the firm of Kamau Kinga & Co. Advocates appeared for the Defendants whilst Mr. Ngari was still on record. The Court directed the parties and counsel to resolve the issue of representation. On the same day the Defendants Advocates Mr. Ngari requested for 14 days to comply with Order 11.

f. On the 29/5/17 the parties had for various reasons not complied and the Court noting the delay on both sides directed the parties to comply within 30 days with a rider that any party in default would not be allowed to call any witness or produced any documents on trial.

g. On the 12/7/17 Mr. Ngari informed the Court that the Defendant had complied as per directions of the Court on 29/5/17. The Plaintiffs represented by Mr. Amoro holding brief for the Learned Counsel Mr. Orina informed the Court that Mr Orina did not comply with the directions of 29/5/17 because he had difficulty in obtaining instructions from his clients. He informed the Court that they did file the documents that morning and pleaded with the Court to allow the documents to be admitted out of time to enable them serve the Defendants.

The Defendants Counsel opposed the application for admission. The Court noting that indeed the Plaintiff's had not complied with the Courts directions of the 29/5/17 ruled that the Plaintiffs were out of time. The hearing was then fixed for the 25/9/17.

h. On the 13/7/17 the Plaintiffs swiftly filed an application seeking to set aside the orders of the Court issued on 12/7/2012. This is the subject matter of this ruling.

2. The application dated 12/7/17 and filed on 13/7/17 has two prayers'-

a. Spent

b. That the orders issued on 12/7/2017 be discharged and/or set aside and the Plaintiffs/Applicants be granted leave to file their list of documents, list of witnesses and witness statements out of time.

c. That the Plaintiffs' list of documents, list of witnesses and witness statements filed on 12/7/2017 be deemed to be properly on record.

3. It is supported by the affidavit sworn by Mr. Geoffrey Orina Advocate. The application is based on the grounds *inter alia*; deponed in the affidavit. That on the 29/5/17 the Honourable Court directed the parties and file property paginated and bond comprehensive bundle of documents which were to include the witness statements, list of documents and list of witnesses in compliance with the provisions of order 11 of the CPR; That the Plaintiffs had already filed a list of witnesses, list of documents and witness statements on the 27/12/17 which are in the Court record; That the Plaintiffs were unable to obtain crucial witnesses on time hence the delay in complying with the 30 days period as directed by the Honourable Court; That they finally filed them on the 12/7/17; That the failure to comply within time was not intentional and or deliberate but experienced delay in tracing the witnesses.

4. In opposing the application, the Learned Counsel for the respondent Mr. Ngari deponed in his Replying Affidavit filed on 18/7/17 that the Applicant seeks to set aside the orders for the second time, the same had been addressed by the Court and declined. That the parties had by consent agreed to the compliance timelines of 30 days and the Applicant enjoying interim orders delayed and or refused to comply to occasion further delay in hearing of the matter. He admitted that he did not serve the Plaintiffs because they had not complied and therefore was not obligated to do so. In any event the Plaintiffs have never served him with any of their documents. Finally, that the application is incompetent, incurably defective

and should be dismissed with costs.

5. In his oral submissions before the Court Mr. Orina Learned Counsel for the Plaintiffs pleaded with the Court to allow the application. He relied on his affidavit aforesaid and stated that the Defendant will not suffer any prejudice if the application is allowed. He maintained that disallowing the application will adversely affect the Plaintiffs case to present his evidence in Court. Mr. Ngari Learned Counsel for the Defendants while relying on his Replying Affidavit filed on 18/7/17 submitted that the application is not in conformity to Order 10 Rule 11. Further that the Plaintiff has not complied with Order 11 since 2016 and the application is *resjudicata*.

6. It is on record that the parties consented to comply with Order 11 within 30 days that is to say they were to file and serve their bundle of documents by the 29/6/17 in readiness for pretrial conference on 12/7/17. The Defendant filed theirs on 27/6/17 within the stipulated time consented by the parties and directed by the Court. The Plaintiff did not. They only informed the Court on 12/7/17 that they did file that morning.

7. The Plaintiffs have insisted that the Defendants did not serve them with their bundle an admission which the Defendants Advocate made in his Replying Affidavit. With respect I disagree with the position taken by the Learned Counsel for the Defendant. It is trite law and procedure that any party must file and serve the other party with all the documents they wish to rely on at the trial to remove any ambush and allow the other party to prepare for the case. In that regard the defendants had not fully complied.

8. I have reviewed the Plaintiffs further list of documents dated 24/2/17 and filed at High Court Murang'a [I want to believe this meant ELC Murang'a] on 27/2/17 together with Plaintiffs list of witnesses on record. It is on record that the Plaintiff filed a joint witnesses statement on 17/5/16 which is duly signed by all the 6 witnesses who are also Plaintiffs. It would appear that the Plaintiffs did file partial witness statements on 27/2/17- see joint witness statements for the 6 plaintiffs. I have not sighted evidence of a receipt of that filing except what the counsel for the Plaintiffs have annexed to his Supporting Affidavit. I have also examined the Plaintiffs list of witness in the bundle filed on 12/7/17 and noted that it is composed of a list of 15 witnesses, out of which 6 are expert witnesses. 9 Witnesses have filed witness statements meaning that 3 are additional to the 6 Plaintiffs that had filed a joint witness statement on 17/5/16. It is therefore not true that the Plaintiffs had filed a complete bundle of documents by 27/2/17 nor had they fully complied with Order 11.

9. I agree with the Defendants Counsel observation that the Plaintiffs list dated 24/2/17 does not include the Plaintiffs. However, the inference I can give is that the list must have been a further list since the Plaintiffs had filed a joint witness statement on 17/5/16.

10. In regards to the Defendants allegation that the Plaintiffs are delaying the hearing of the case because they are enjoying interim orders, I have not seen any evidence to support that averment.

11. In respect to whether the Plaintiffs has tendered new evidence as the reason for delay in compliance, I note the Plaintiff stated that he experienced delay in tracing the witness whose statements took longer than expected to prepare. I am prepared though, grudgingly to accept the explanation in respect to the 3 additional witness statements which list had already been placed in the court record early in the year.

12. Order 11 rule 1 states that the order is applicable to all suits except small claims or such other suits as the Court may by order except from this requirement. Order 11 applies to this suit. Pretrial is designed to get the case completely ready for trial and crystalise all procedural issues so that time is not wasted on trial. If properly and efficiently done it saves valuable time for Courts and litigants by narrowing the focus of trial and resolving preliminary matters. It also assists the Court in the fair and impartial administration of justice by facilitating discovery and reducing the element of surprise at trial.

13. Order 10 rule 11 of the Civil Procedure Rules donates the power to the Court to set aside or vary the Judgement or Order upon such terms as may be just. In **Mbogo V Shah (1968) E.A 93** Sir Clement De Stang, V.P stated;

“... While the Court would exercise its discretion to avoid injustices or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person who has deliberately sought to obstruct or delay the course of justice...”

In applying the foregoing principles to the circumstances of this case, the sole issue for determination is whether there exists a reason or reasons to warrant the exercise of the court discretion in favour of the applicant. I have reviewed the reasons for the delay in complying with order 11 and am satisfied that the reasons are plausible excusable and inadvertent and have not come across any evidence that would show that the Plaintiffs intended to deliberately obstruct or delay the cause of justice.

14. In the interest of justice and in line with the overriding objectives of the Court under Civil Procedure Act cap 21 sections 1 A & 1B and to give the parties herein the opportunity to be properly heard and their case determined on merit, I am satisfied of the reasons given by the plaintiff for the delay in filing the documents out of time and that there exists a cause to allow the admission of the plaintiffs bundle of documents filed on the 12/7/17.

15. However, before I conclude I would like to condemn in the strongest terms the delay in compliance generally of which from my observation both parties are guilty of since 2016. Both parties are officers of the Court and are enjoined to facilitate the overriding objectives of the administration of justice. It is expected that deadlines consented/directed by the Court must be adhered to.

16. My final orders are as follows; -

- a. The application dated 12/7/2017 is hereby granted.
- b. The Plaintiffs bundle of documents filed on 12/7/2017 be and is hereby admitted to be properly on record.
- c. The parties to exchange the bundles of documents already filed in Court i.e. the Plaintiffs bundle filed on 2/7/17 and Defendants bundle filed on 27/6/17 within the next 7 days from the date hereof.
- d. Thereafter parties to fix the hearing dates at the registry.
- e. Costs shall be in the cause.

DATED AND DELIVERED AT MURANG'A THIS 12TH DAY OF OCTOBER 2017

J.G. KEMEI

JUDGE