

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 494 OF 2013

GIDEON TERER.....PLAINTIFF

VERSUS

ABRAHAM KIPRUTO CHUMO.....DEFENDANT

RULING

On the 18.7.2016, this court made a decision that the evidence of the plaintiff Gideon Terer be taken under Order 18, Rule 9(i), of the Civil Procedure Rules 2010 where the court has the power to examine witness immediately. The Order provides that where a witness is about to leave the jurisdiction of the court or other sufficient case is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon the application of any party or of the witness at any time after institution of the suit, take the evidence of such witness in the manner herein before provided.

After hearing both parties, the court found that the plaintiff intends to leave the country for New York, where he is based on 19.7.2016 at night and therefore, found the application sound and ordered that the evidence of the plaintiff be taken on the said date at 2.30 p.m. Immediately after the ruling, the defendant filed an application seeking for leave of the court to be allowed to file supplementary list of documents and that further proceedings to be stayed and the orders dated 18.7.2016 to be varied or set aside.

The application is based on grounds that the matter was scheduled for highlighting of submissions on 18th July, 2016 touching on defendant's preliminary objection dated 27th April, 2016. That for ulterior motives the plaintiff failed to notify the applicant of the presence of the plaintiff in the country or its intention to concede to the preliminary point of objection dated 27th April, 2016 or its intention to seek to proceed on a mention date with hearing of the main suit. That the applicant was not notified nor served of the intention to proceed with hearing to enable him prepare in advance for his case or file his documents. The application is further supported by the defendant's affidavit wherein he states the plaintiff herein for ulterior motives/reasons failed to notify him completely or his counsel of its intention to proceed with hearing of the main suit on 18th July, 2016 despite the matter being scheduled for highlighting of submissions. He is surprised that the matter is now scheduled for hearing on 19th July, 2016 whereas he is yet to file supplementary list of documents in support of his defence and counterclaim. That the conduct of the plaintiff amounts to trial by ambush and that he deserves a chance to avail all documents in court. He is informed by his Advocate on record, which information he verily believe to be true and correct that under Article 50(2)(c) of the Constitution 2010, he is entitled to be accorded ample opportunity to time to prepare for his case. That he does not see any prejudice that the respondent will suffer if he is accorded a chance to in the very least file supplementary list of documents and allow the court to determine the matter on merits.

That the plaintiff/respondent has not written to him and has never contacted his counsel on his intention to proceed with main hearing on short notice and he believes that he is out to ambush him and evict him using the police which would likely cause untold suffering to him. That unless the prayers sought are granted, his fundamental rights shall be violated and he shall be greatly prejudiced.

The plaintiff filed a replying affidavit stating the application is frivolous, made in bad faith, meant to abuse the court process. That the defendant filed his documents in 2014, the suit cannot be stayed to await anticipated documents. That the defendant has had the pleading and the documents he intend to rely on for a period exceeding 3 years now, and even responded to it. That this matter has been fixed for hearing before, and it is expected that the defendants and his counsel are versed with their file and if not, their

failure to do so should not be visited upon the plaintiff.

That he is full time resident of New Jersey, United States and travelling to Eldoret, Kenya for trial is very expensive, over and above the fact that it is jeopardizing his residence there.

That he is informed by his advocates on record which information he verily believes to be sound that as the application is in its present form, does not raise any constitutional issue for determination and in response to the affidavit, the present application and application do not meet the threshold for such a determination and further that the fundamental right so said.

That he is further informed by his advocates on record which information he verily believe to be true that it is legislation that gives breath and meat to the constitution and that where a statute provides for mechanism of resolving a dispute under the said Act, it is incumbent on the aggrieved to seek statutory remedies in the first instance.

I have considered the application and rival submissions and do find that the applicant filed his defence and counterclaim on the 20.11.2013. Order 7, rule 5(d) provides that the defence and counterclaim filed under Rule 1 and 2 shall be accompanied by copies of documents to be relied on at trial. The defendant seeks to introduce a further list of documents more than one year after the court had given the parties leave on 21/7/2014 to file the same documents and after the court has made an Order that the plaintiff proceeds under Order 18, Rule 9. The question that the defendant should answer is, where has he been since the date of filing of the defence and counterclaim? Why make the application after the court has rendered its decision?

The defendant points out the Article 50 of the Constitution, which provides for fair hearing thus; that the defendant's right to fair hearing is likely to be breached. He has pointed out the provision of Article 50(2) (c) and argues that he has the right to have adequate time to prepare a defence. The defendant herein was given adequate time and prepared his defence and even filed a list of documents but omitted certain documents. The parties filed separate statements of agreed issues on 28.3.2014. The plaintiff filed a supplementary list of documents without the leave of the court and out of the time on the 16.3.2016. The defendant filed a preliminary point of objection on 27.4.2016.

Directions in this matter were taken on 25.11.2014 and a hearing taken. The matter was slated for hearing on 6.5.2015. On the scheduled date, none of the parties appeared. Again, the matter was slated for hearing on the 21.1.2016 but on the said date, the defendant's son was murdered hence he could not proceed. The matter was again stated for hearing on the 27.4.2016. Mr. Kibii filed a preliminary objection on the hearing date hence the matter could not proceed.

A glance at the preliminary objection shows that the defendant is challenging the power of Attorney donated by the plaintiff to a 3rd party and therefore, can be abandoned in the presence of the plaintiff.

The upshot of the above is that the application is an abuse of the court process misconceived and frivolous having been filed after the court rendering its decision. The defendant has been given adequate time to prepare for his defence. The matter has come thrice for hearing and therefore, the seeking of more time to file a supplementary list of documents is intended to delay the hearing of the matter. The court notes that the preliminary objection and the application were filed on the respective hearing dates. Any party who files an application or a preliminary objection on date scheduled for hearing of the suit is presumed to be seeking for adjournment. This court should not allow such applications or preliminary objections to delay the hearing of the suit. I have said enough. I dismiss the application with costs to the plaintiff.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE