



IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 351 OF 2008

AURIEL MARIE JOY KIMEMIAH..... PLAINTIFF

VERSUS

JACOB JUMA 1ST DEFENDANT

MARY WANJIRU CHEGE 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

WILLIAM TUMATE SIALALA SANO..... 4TH DEFENDANT

SUAKEI OLE PARKIRE 5TH DEFENDANT

LATOO ENE PRIAKANGA NCHEPAI 6TH DEFENDANT

RULING

Mr. Havi Advocate for the 1st Defendant after he completed his cross-examination of pw2 **Mr. Wambugu Gitonga** and after the witness had been cross-examined by **Mr. Motari**, state counsel for the 3rd Defendant made an application for several original documents produced by the witness to be released by the court to the 1st Defendant as he wished to have them examined by a handwriting expert to verify their authenticity.

He identified the documents he wished to be submitted for examination as –

- i. **Letter dated 27/2/1998 to Daniel**
- ii. **Letter dated 29/11/1990 by Dr. S.G. Kimemiah (deceased) to Steve by Daniel Kimemia.**
- iii. **Letter dated 29/5/84 addressed to Commissioner of Lands.**

Mr. Havi contended that the said original documents were only produced by the witness during the hearing and the 1st defendant had not had the opportunity to review and scrutinize them and now having done so the 1st Defendant has suspicion that the documents may not be genuine. **Mr. Havi** further submitted that under order 3 Rule 2 the statements of expert witnesses need not be filed with the other witness statements and documents and there is nothing that would preclude the taking of expert evidence at any stage of the proceedings. He urged the court to apply the overriding objective under sections 1A, 1B of the civil Procedure Act that enjoins the court to endeavour to do justice in all disputes before it in a

expeditious and just manner arguing further that the court should embrace the principle of doing substantial Justice as embodied under Article 159 (2) of the constitution by allowing the release of the aforementioned documents to the 1st Defendant for examination.

Mrs. Shaw Advocate for the Plaintiff opposed the application arguing that discovery in this matter was done in 2008 and that the 1st Defendant has since that time been in possession of the copies of the documents he now seeks to have examined. **Mrs Shaw** argued that it was too late in the day for the 1st defendant to make the application as he had had almost 6 years since the copies were supplied to him to request for discovery and thus he forfeited that opportunity. At the time the plaintiff testified it was on the basis that all the parties' documents were admitted and thus it would be prejudicial at this stage for the issue to be raised. The plaintiff contends there is no basis for the present application by the 1st Defendant to have any documents forming part of the plaintiff's documents submitted for examination by a handwriting expert.

I have reviewed and considered the application by the 1st Defendant and the opposition thereto by the plaintiff. The plaintiff in her examination in chief in her recorded evidence stated-

“I request the court to adopt my filed witness statement as my evidence in court. I request the court to admit my bundle of documents in evidence to form my secondary evidence in this suit”.

No objection at that point was taken by the 1st defendant or any other party in the suit and henceforth the plaintiff proceeded with her testimony on the basis that none of the documents, particularly any of those the 1st Defendant wishes to have submitted for examination was disputed. The essence of conducting discovery before the commencement of the hearing is so as to avoid situations such as the present one where a party makes an application in the middle of the trial that precludes the expeditious conclusion of the trial.

I have perused the record of the court and I note that **Hon. Justice Mbogholi Msagha** on 1/3/2011 directed the parties to make compliance with order 11 of the Civil Procedure Rules and on the same date that Judge made a specific order that the Defendants were to make discovery before the dates of hearing which had been given as 15th, 16th June 2011 and 22nd June 2011. The hearing did not take place on these dates and while adjourning the matter on 15th June 2014 **Hon. Lady Justice Okwengu** (as she then was) directed that a new date be fixed in the registry after parties have complied with order 11 of the Civil Procedure Rules 2010.

I have carefully reviewed the application by the 1st Defendant and I am not persuaded it has merit. The 1st Defendant, as is evident from the record was afforded an opportunity to make discovery of the documents in the possession of the plaintiff and had been supplied with the copies of the documents he now wishes to have submitted for examination by a handwriting expert. The application is belated and has all the hallmarks of being an afterthought and is perhaps driven by the knowledge that the makers are not available to testify, the plaintiff's husband having died and the plaintiff's brother in law, the other alleged author, having become uncooperative and/or unavailable to testify.

To allow the application would in my view be prejudicial to the plaintiff who has already testified. The application has simply been made too late in the day and there is no compelling basis to grant the application. The court ought not to be used by parties to embark on fishing expeditions with the objective of bolstering their cases. Appropriate processes and procedures to conduct discovery have been provided under the Civil Procedure Rules and in my view there has to be a really compelling reason for the court to operate outside these provisions. I do not see any justification for me to grant the 1st Defendant an order to have the specified documents of the plaintiff submitted for examination and I decline to grant such an order.

The 1st Defendant urged the court to apply the overriding objective as enshrined under Article 159(2) of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice and not to

allow itself not to be shackled by technicalities. To that I state that justice looks both ways and in the instant case the plaintiff stands to be prejudiced if the 1st Defendants request is granted and further granting the request is likely to further delay the determination of the matter yet the 1st Defendant was afforded the opportunity to make the present application long before the trial opened.

In the premises I disallow the application by the 1st defendant and order that the parties take fresh hearing dates in the matter to facilitate finalization of the matter.

Ruling dated signed and delivered at Nairobi this...**26TH**day of ...**JUNE**.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... for the Plaintiff

..... For the Defendants