



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 413 OF 2014**

**DR. EDWARD IKINYA MAINA.....PLAINTIFF**

**VERSUS**

**AERONAUTICAL SOCIETY OF KENYA.....1<sup>ST</sup> DEFENDANT**

**DR. FAUSTIN ONDORE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling was triggered by the objection which was raised at the time of taking the 2<sup>nd</sup> defendant's oral evidence.
2. More specifically, following the close of examination-in-chief of the 2<sup>nd</sup> defendant, *Mr. Gathaara* counsel for the plaintiff made an oral application to have a copy of the demand letter alleged to have been stamped by the 1<sup>st</sup> defendant produced as evidence.
3. The aforesaid application was vehemently opposed by *Mr. Kinyanjui* learned advocate for the defendants, who contended *inter alia*, that there is no evidence of service of the demand letter upon the defendants. The advocate went on to aver that in any event, there is no reason as to why the plaintiff should now be allowed to produce the demand letter claimed to have been stamped, since this was not done during the plaintiff's testimony. Finally, it was *Mr. Kinyanjui's* view that the defendants stand to be prejudiced if the application seeking the production of the demand letter is allowed.
4. In his rejoinder, *Mr. Gathaara* simply stated that the demand letter was indeed delivered to the defendants and stamped by the 1<sup>st</sup> defendant.
5. I have cautiously considered the respective positions set out hereinabove. Without going to the merits of the case since the hearing of the same is ongoing, I note that service of the demand letter was brought to question through the evidence of the 2<sup>nd</sup> defendant.
6. Upon perusal of the list and bundle of documents filed by the plaintiff at the pre-trial stage, I have established that the demand letter was not among the documents constituted therein. Moreover, it is apparent from the record that the plaintiff closed his case without seeking leave of the court to produce the said demand letter.
7. The law encompassing the production of documents is well settled. To begin with, *Order 3, Rule 2* of the *Civil Procedure Rules* ("the Rules") creates specific timelines for the filing of documents and pleadings to be relied on by a plaintiff at the trial; included therein is a copy of the demand letter. The same applies in the instance of a defendant as set out under *Order 7, Rule 5* of the Rules.
8. Further to the foregoing, *Order 11* provides for the taking of pre-trial directions so as to ascertain that all the documents to be relied on are in order before the matter can proceed for hearing. In my view, this is to enable parties not only be alive to the strengths and weaknesses of their respective cases prior to the commencement of the hearing, but to further enable them prepare adequately and curb instances of ambush during the trial.
9. A similar thinking was taken by the court in *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR* where the court held the following drawing from *Halsbury's Laws of England Volume 13*:

***"The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."***

10. That said, it is now upon me to determine the question on whether or not to allow the plaintiff to produce the demand letter which has essentially not been as required under the law.

11. In deliberating on the above, I turn for guidance to the Supreme Court's holding in **Raila Odinga & 5 Others v IEBC and 3 Others 2013 eKLR** that:

***“The parties have a duty to ensure they comply with their respective timelines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”***

12. I have gathered from the above analysis that the court ought to consider, *inter alia*, the nature and impact of the additional evidence whose production is sought, as well as to ensure that a level playing field is maintained between the parties.

13. In the matter before me, the plaintiff on the one hand did not give any explanation as to why the allegedly stamped demand letter was not produced at the appropriate stage. On the other hand, whereas the defendants mentioned that they stand to be prejudiced should the production be allowed, they did not demonstrate the manner and extent to which they will be prejudiced.

14. It is apparent that whether or not the demand letter was served upon the defendants is in issue. It is noteworthy that the suit constitutes a claim for defamation, hence the contents of the demand letter may prove to be relevant one way or another. If at all the plaintiff has any evidence as he so claims to show that service was effected, it would only be in the interest of fairness to grant him the opportunity of producing the same notwithstanding the fact that he should have done so much earlier.

15. In any event, the provisions of *Order 18, Rule 10* of the *Rules* and *Section 146* of the *Evidence Act* give courts the power to recall a witness for further examination. I am persuaded that in the current instance, the defendants would not suffer prejudice as they would still be able to cross examine the plaintiff on the issue of service of the demand letter.

16. Consequently, I will allow the plaintiff's oral application and order that a copy of the demand letter be filed and served upon the defendants within 7 days from this day. The objection is consequently dismissed.

**Dated, Signed and Delivered at Nairobi this 28<sup>th</sup> day of November, 2019.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendants