



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 78 OF 2015**

**ALOIS OCEANO D'SUMBA ..... PLAINTIFF**

**VERSUS**

**RAJNIKANT NARSHI SHAH ..... 1<sup>ST</sup> DEFENDANT**

**NEW OCEAN TRADING (K) LTD. .... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff testified as PW4 and closed his case on 5<sup>th</sup> October, 2016. He called three (3) witnesses. Immediately after closure of the plaintiff's case, Mr. Omwenga, Learned Counsel for the defendants informed the court that he had filed a supplementary list of documents on 4<sup>th</sup> October, 2016 which was necessitated by the second witness that the defendants intend to call. He added that he had filed a statement for the said witness.

2. It was Mr. Omwenga's submission that there was need to produce financial statements and annual returns filed at the company's registry. He sought leave to file a supplementary list of documents and witness statements.

3. In response to the foregoing, Ms. Okumu Learned Counsel for the plaintiff termed the application by the defendants as an ambush as the filing of a supplementary list of documents will prejudice her client who had already closed his case. She further submitted that the said documents had been in the defendants' custody.

4. Mr. Omwenga's rejoinder was that he had not intentionally ambushed his colleague who will have an opportunity to cross-examine the said witness who is the Auditor/Company Secretary for the 2<sup>nd</sup> defendant, with respect to the documents in issue. He further submitted that the annual returns that were missing were delivered to his office on the evening of 4<sup>th</sup> October, 2016.

**ANALYSIS AND DETERMINATION**

The issue for consideration is if the defendants should at this stage of the trial be allowed to file a supplementary list of documents and witness statements.

5. A perusal of the court file reveals that the plaint herein was filed on 18<sup>th</sup> June, 2015, together with a verifying affidavit, a list of witnesses for the plaintiff, the plaintiff's statement, two other witness statements a list of documents and the documents the plaintiff would rely on at the hearing of the case.

The plaintiff filed a further supplementary list of documents on 15<sup>th</sup> September, 2015 together with a supplementary list of witnesses and a witness statement. The plaintiff subsequently filed a pretrial questionnaire on 22<sup>nd</sup> September, 2015, a supplementary list of documents and documents contained in the said list.

6. The defendants filed a memorandum of appearance on 9<sup>th</sup> July, 2015, a statement of defence together with the defendants' list of witnesses, list of documents and the documents contained in the said list. A witness statement for the 1<sup>st</sup> defendant was filed on 9<sup>th</sup> July, 2015. The defendants also filed a witness statement for Anand G. Bhatt on 21<sup>st</sup> July, 2016. This witness in his statement describes himself as the Auditor and Company Secretary for the 2<sup>nd</sup> plaintiff.

7. The Counsel for the parties herein appeared before Judge P. J Otieno on 28<sup>th</sup> October, 2015 where they stated that they had complied with the provisions of Order 11 of the Civil Procedure Rules. They sought thirty (30) days to file a list of agreed issues. These were filed on 11<sup>th</sup> November, 2015.

8. The court file further reveals that on 4<sup>th</sup> October, 2016 Counsel for the defendants filed a supplementary list of documents to include the memorandum and articles of association for the 2<sup>nd</sup> defendant, the annual report and financial statements of the 2<sup>nd</sup> defendant for the years 2011 – 2015, and a copy of the license for the Changamwe godown. The foregoing documents were filed without leave of the court when the plaintiff's case was ongoing.

9. The provisions of Order 7 rule 5 of the Civil Procedure Rules provide as follows:-

***“The defence and counter claim filed under rule 1 and 2 shall be accompanied by –***

***(a) An affidavit under Order 4 rule 1(2) where there is a counter claim;***

***(b) A list of witnesses to be called at the trial.***

***(c) Written statements signed by the witnesses except expert witness; and***

***(d) Copies of documents to be relied on at the trial.***

***Provided that statement under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.”***

10. The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is the one of the purposes for the directions that a court gives under the provisions of Order 11 of the Civil Procedure Rules. Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case.

11. In the present case, the Counsel on record did confirm to Judge P.J. Otieno on 28<sup>th</sup> October, 2015 that they had complied with Order 11 of the Civil Procedure Rules save for the agreed issues that were filed at a later date with the leave of the court. It was on the basis of the information given to the court that the Judge P.J. Otieno gave orders for parties to take a hearing date at the registry.

12. In the case of **P.H. Ogola Onyango t/a PittsConsult Consulting Engineers vs Daniel Githegi g/a Quantalysis** [2002] eKLR Waweru J. when faced with a similar situation stated as follows:-

***“Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the opposing party has***

*closed its case. .... To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.*

13. In this case, the hearing of the plaintiff's case commenced on 21<sup>st</sup> September, 2016 and closed on 5<sup>th</sup> October, 2016. The memorandum and articles of association of the 2<sup>nd</sup> defendant company have been in the custody of the defendants since the incorporation of the 2<sup>nd</sup> defendant, financial statements are generated on an annual basis and annual returns of a company are required to be filed at the company's registry on a yearly basis. These documents do not form new and compelling evidence that would persuade this court to exercise its discretion to allow the same to be relied upon by the defendant at this stage of the trial.

14. It is therefore my considered view that this court would be perpetrating injustice and would prejudice the plaintiff's case if it was to allow the defendant to rely on the documents filed on 4<sup>th</sup> October, 2016 at the hearing of this case at this point in time. I therefore expunge the said documents from the court record. I award costs of the application to the plaintiff.

**DELIVERED, DATED and SIGNED at MOMBASA on this 31<sup>st</sup> day of January, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Omondi holding brief for Ms. Okumu for the applicant

Mr. Omwenga for the defendants

Oliver Musundi - Court Assistant