



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 111 OF 2013

JEREMIAH MBUGUAH KARIUKI

T/A DELIGHT PLUMBERS..... PLAINTIFF

VERSUS

SWAHILI BEACH RESORTS LTD. DEFENDANT

RULING

1. The defendant's Counsel, Mr. Wafula filed an application by way of Notice of Motion on 4th October, 2016 under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules seeking the following orders:-

- (i) That leave be granted to the defendant to rely on its further documents filed on 30th September, 2016 for ends of justice (sic);
- (ii) The plaintiff be at liberty to re-open his case for purposes of commenting on the further defendant's documents (sic) filed on 30th September, 2016; and
- (iii) Costs of the application be provided for.

The application is supported by the affidavit of Barendar Kalsi, a Director of the defendant herein.

2. In arguing the said application, Mr. Wafula, Counsel for the defendant/applicant briefly submitted that they forwarded the documents to the Counsel for the plaintiff on 4th October, 2016. He sought leave to rely on the said documents and that the plaintiff be at liberty to re-open his case for purposes of commenting on the documents filed on 30th September, 2016.

3. Mr. Wafula further submitted that the documents will enable the court to reach a fair decision. He added that he was relying on the provisions of sections 1A and 1B of the Civil Procedure Act in the search for substantive justice. He asked the court to exercise its discretion and allow parties to put the real issues before the court. He explained that the documents, which are monthly invoices, were not traced as at the time the defendant was filing his list of documents.

4. In response to the above, Mr. Kahuthu, Learned Counsel for the plaintiff stated he was served with the present application in court, which he termed as a total ambush. He further said that the documents alluded to were left in his office on 3rd October, 2016 and no leave of the court was sought to bring them

on record, yet the plaintiff had closed his case.

5. Counsel further submitted that the DW1, the defendant's Director, gave his evidence in chief without reference to the said documents and at the point of cross-examination that is when the documents were being put in to cover the defendant's track in a case that was filed in the year 2013. As such, equity did not aid the defendant at all as the application was an afterthought. In his view, there was non-disclosure on the part of the defendant who was now saying that the documents were locked up in the wrong store. He prayed for the application to be disallowed.

ANALYSIS AND DETERMINATION

The issue for determination is if the court at this stage of the hearing of the suit should allow the defendant to introduce additional documents to the case.

6. The plaint herein was filed on 27th September, 2013 together with a verifying affidavit, list of witnesses, the plaintiff's statement, a list of documents and documents to be relied on during the trial. The plaintiff filed a supplementary list of documents, list of issues and a reply to the defence and witness statements on 21st November, 2013. He later filed a supplementary list of documents and further documents on 15th September, 2015.

7. The defendant entered appearance on 1st October, 2013. It filed a defence on 10th October, 2013. On 11th June, 2014 Counsel for the defendant filed a list of witnesses, witness statements, list of documents and the documents that it would rely on at the hearing.

8. On 18th February, 2016, Counsel for the parties herein appeared before Judge P.J.O. Otieno who granted the plaintiff fourteen (14) days to file and serve his documents. Corresponding leave was granted to the defendant to file any additional documents it wished to rely upon during trial. No documents were filed by either party after that. The plaintiff served his supplementary list of documents to the defendant on 14th March, 2016.

9. The hearing of the case commenced as scheduled on 9th June, 2016. The plaintiff testified as PW1 and called three (3) witnesses. The plaintiff closed his case on 14th September, 2016 and the defence case begun on the same date. DW1 adduced evidence and he was cross-examined by the plaintiff's Counsel. On 14th July, 2016 the case was adjourned and a date given for further hearing. It was during the intervening period that the defendant's Counsel filed the present application, a further list of documents and further documents in support of the defendant's case. This court has perused the further list of documents filed without leave of the court and noted that some of the documents have already been produced by the plaintiff as exhibits. These are the quotation dated 1st May, 2007 which was produced as plaintiff exhibit 1 and the agreement signed on 5th May, 2007 produced as plaintiff exhibit 2. It is worth noting that all the other documents that the defendant is seeking to introduce have been in its custody from the time the case was filed to the date when the hearing commenced.

10. 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 a 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.”

11. The foregoing provisions are clear on the requirement for parties to file documents within certain time frames. If documents are not available as at time of filing pleadings, a party should seek leave of the court to file the same before the hearing of the case commences. That is one of the purposes for the directions that a court gives under the provisions of Order 11 of the Civil Procedure Rules. The documents that were filed on 4th October, 2016 were well within the custody of the defendant from the time the suit was filed. They 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.

12. In the case of **David Sugut & Another vs Mercela Cheptoo Chuma** [2016] eKLR, when faced with similar circumstances, the court had this to say:-

“The defendant is out to build her case after hearing what the plaintiffs had said. This cannot be allowed as to do so will prejudice the plaintiff’s case. The defendant had the opportunity to lay her case before the hearing commenced. She cannot seek to introduce documents after the closure of the plaintiff’s case”

13. This court has considered the circumstances surrounding this case. I am of the view that it is too late in the day now to allow the introduction of further documents in the case without causing prejudice to the plaintiff’s case. I hereby expunge the documents filed on 30th September, 2016 from the court record and dismiss the application dated 4th October, 2016, with costs to the plaintiff.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of January, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff

Mr. Wafula for the defendant

Oliver Musundi - Court Assistant