



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 153 OF 2009**

**UKWALA SUPERMARKET.....PLAINTIFF**

**-VERSUS-**

**KENINDIA INSURANCE COMPANY LIMITED.....DEFENDANT**

**RULING**

1. **Mr. Munyu** for the Plaintiff objected to the statement of a second witness for the Defence, namely **Francis Oginga Saulo**, being introduced in evidence herein on the ground that the same was filed after the closure of the Plaintiff's case and without leave of the Court. Further, it was Mr. Munyu's contention that during the Court hearing held on **17<sup>th</sup> November, 2015** the Defence Counsel, **Mr. Amoko** had indicated that he would not be calling any other witness apart from **Mr. David Freer (DWI)**. He argued therefore that to call an additional witness at this stage would amount to ambush, and would be prejudicial to the Plaintiff, quite apart from it being in breach of the overriding objective as stipulated in Sections 1A & 1B of the Civil Procedure Act. Mr. Munyu pointed out that he raised his concerns to the Defence Counsel vide a letter dated 9<sup>th</sup> December, 2015, copied to the Deputy Registrar, in which he also pointed out that it would not be in the interests of justice for the Defence to prepare and file a statement after the close of the Plaintiff's case as the Plaintiff would not be in a position to rebut the facts now sought to be introduced by the proposed 2<sup>nd</sup> witness.
2. In response to the objection, it was Mr. Amoko's argument that the proposed witness statement does not introduce anything new which had not already been placed before the Court. He added that the proposed witness will rely on the Defendant's Bundle of documents which were admitted by consent of the parties, and that the statement was served in December, 2015 well in advance of the hearing date.
3. The Court has given consideration to the submissions made by Learned Counsel herein and perused the proposed witness' statement in the light of the proceedings of 16<sup>th</sup> and 17<sup>th</sup> November, 2015. It is true that the Defence Counsel did indicate then that he would call only one witness, namely DWI, and that he proceeded to file an additional statement on 2<sup>nd</sup> December, 2015 attributed to one **Francis Oginga Saulo**. As rightly pointed out by Mr. Munyu, that statement was filed after the Plaintiff had closed its case and without leave of the Court. It was therefore filed in disregard of the provisions of order 3 Rule 2, Civil Procedure Rules. Regarding the current procedural regime under the Civil Procedure Rules 2010, Odunga J had the following to say in the case of **National Bank of Kenya Limited Vs John Aswani Litondo & Another Nairobi HCCC No. 171 of 2006**, which views I fully endorse:

**“The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of Sections 1A & 1B of the Civil Procedure Act are meaningfully implemented...to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing... To conceal documents until after the Plaintiff's case is closed was mischief that the new rules were meant to cure. Trial by ambush is no longer acceptable in civil litigation and any party doing so, will**

**be doing so at the risk of being locked out of relying on its documents...”**

4. Whereas the Court does appreciate that it is a constitutional imperative to administer justice without undue regard to procedural technicalities (See Article 159 (2) (d) of the Constitution of Kenya), any party who fails to comply with the clear and unequivocal rules of procedure set out in the Civil Procedure Rules, is duty-bound to provide a plausible account for the breach. In this regard the Court fully endorses the view taken by Kiage J in **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others [203]eKLR** thus:

**“ I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”**

5. In this instance, the statement in question was filed way out of time without leave of the Court, after counsel had given an indication that the Defence would be calling only one witness. No reason was given to explain this change of mind, or to justify the need for the additional witness. Indeed it was Mr. Amoko’s submission that the statement introduces nothing new. Accordingly, there being no reason why this statement was filed late, I would uphold Mr. Munyu’s objection and rule that the statement is inadmissible and should be expunged from the record for having been filed out of time without leave of the Court. It follows then that the Defendant is accordingly precluded from calling an additional witness as proposed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2016**

**OLGA SEWE**

**JUDGE**