



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO.492OF 2002

PELESIA ATIENO WAMIDHA PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF

KENYA LIMITED 1ST DEFENDANT

HERITAGE BUSINESS

SOLUTIONS LIMITED 2ND DEFENDANT

ANNE MUENI NDEMWA 3RD DEFENDANT

CONSOLIDATED BANK OF

KENYA LIMITED 4TH DEFENDANT

REGISTRAR OF TITLES

DISTRICT LAND REGISTRY, MOMBASA 5TH DEFENDANT

RULING

1. At the commencement of the resumed hearing of this matter before Court this morning, Mr. McCourt, learned counsel for the first Defendant herein sought to produce what may be termed a Supplementary Bundle of Documents of some 20 pages. Counsel maintained that he would be putting in these documents through a witness one **George Mbutia Gathua** that he intended to call from the auctioneers firm of **Sportlight Intercepts Kenya** based in Mombasa, once the evidence of DW 1 was complete.
2. Mr. Adipo, learned counsel for the Plaintiff, protested widely as to the production of the Supplementary Bundle as he had only just been served with the same and that they had been brought before Court without leave. There was no application made by the first Defendant's counsel for leave to produce such documentation and, as a result, the same should not be accepted by Court. In this connection, counsel pointed to page 10 of the Supplementary Bundle where appeared a Notification of Sale quite different to the one referred to in Court yesterday at page 149 of the first Defendant's current List and Bundle of documents. The first Defendant's intention was clear and that was to discount a document that was already before Court and upon which

- examination had proceeded. The proposed Supplementary Bundle contained some documents which were totally new and which the Plaintiff had never seen. The first Defendant had had all the time in the world to put in these documents prior to the commencement of the hearing. Furthermore, the first Defendant had not even indicated to Court that it had any other or such extra documentation to put in. Mr. Adipo submitted that litigation cannot be carried out by way of ambush so that a party cannot be allowed to put in fresh documents when that party decides that its documents already before Court were no longer in its favour.
3. Both Mr. Ogola for the third Defendant and Mr. Mbwago for the fourth Defendant indicated that they had no objection to the first Defendant producing its proposed Supplementary Bundle. In his turn, Mr. McCourt maintained, that in view of the Plaintiff's testimony before Court, he had been prevailed upon to call another witness. The Plaintiff's testimony in that regard had been outside what was contained in her witness statement before Court. The first Defendant had gone to great lengths to get its witness here from Mombasa. Counsel noted that Mr. Adipo had reserved the right to recall the Plaintiff and he still had the right to put the documents to her if the same were admitted by Court. Mr. McCourt didn't see how the Plaintiff could maintain that the proposed Supplementary Bundle was a surprise. All that the first Defendant was trying to do was to follow the Oxygen Principle in order to establish what had exactly gone on. Counsel admitted that the first Defendant had put, in its initial List and Bundle of Documents, a number of documents which were not in its favour.
 4. I have had an opportunity of inspecting the documents that the first Defendant proposes to put in evidence before Court by way of its proposed Supplementary Bundle. I have also noted the stringent cross examination of DW 1 by learned counsel for the Plaintiff as regards the documentation in the first Defendant's original List and Bundle of Documents dated 20th September 2012 as regards the sale of the suit property in 2008. In my view, there was little doubt that DW 1 struggled considerably in his evidence when he was shown existing documentation in the first Defendant's List and Bundle of Documents particularly in relation to documents on pages 148, 149, 150 and 151. Such involved details of the sale of the suit property, remittance of proceeds thereof and more particularly, the details of the Notification of Sale issued by the auctioneers the said Sportlight Intercepts Kenya Limited. However, it must be borne in mind that DW1 was not there at the time. It now seems that the first Defendant seeks to amplify upon the evidence given by DW 1 by calling a witness from Sportlight Intercepts who is called especially to produce before Court the first Defendant's proposed Supplementary Bundle of Documents.
 5. I have had occasion to review the provisions of the *Evidence Act* (Cap 80, Laws of Kenya) more particularly **sections 5, 6 and 7** thereof which detail as follows:

“5. Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.

7. Facts which are the occasion, cause or effect, immediate or otherwise, are relevant facts are facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their recurrence or transaction are relevant.”

Having perused the extra documents that the first Defendant proposes to produce before Court in its proposed Supplementary Bundle of Documents, I consider the same to be relevant to the matters before this Court more particularly the sale of the suit property in 2008.

6. Mr. McCourt referred to the Oxygen Principle in his submissions before Court seeking to allow the Supplementary Bundle of Documents to be admitted. He requested the court to consider the spirit of the Oxygen Principle (under **sections 1A and 1B** of the *Civil Procedure Act*) by referring the court to the overriding objective. In the case of **John Maina Mburu vs George Gitau Munene & 3 others**

(2012) eKLR, I quote as per my learned brother **Odunga J.:**

"..... the overriding Objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. The new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice in the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by decline to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."

7. In my view, the proposed Supplementary Bundle of Documents may well lend clarification to issues before this Court which should be aired in the spirit of the Oxygen Principle. As a result, I am prepared to allow the first Defendant to put in its proposed Supplementary Bundle of Documents but on two conditions: Firstly, the same must be strictly proved and secondly, the Plaintiff may be recalled by Mr. Adipo so that these documents can be put to her. Order accordingly.

DATED and delivered at Nairobi this 21st day of May, 2014.

J. B. HAVELOCK

JUDGE