

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.30 OF 2005 (O.S.)

N S G.....APPLICANT

VERSUS

S C GRESPONDENT

RULING

The Applicant filed notice of preliminary objection seeking to have the Respondent’s supplementary bundle of documents filed on 6th June 2012 and 17th September 2012 expunged from the court record on the ground that the same had been filed without the leave of the court. The Applicant further stated that the said supplementary bundle of documents was filed after the Applicant had given her evidence in chief. The Applicant contends that if the supplementary bundle of documents is allowed to be on record, it would cause grave injustice to the Applicant and would further prejudice the Applicant because she would be prevented from fairly prosecuting her case. The Applicant filed written submission in support of the preliminary objection. The preliminary objection was opposed. The Respondent filed written submission in opposition to the preliminary objection.

At the hearing of the objection, this court heard oral rival submission made by Mr. Kibanya for the Applicant and Mrs. Samnakay for the Respondent. Mr. Kibanya submitted that this suit was partly heard by GBM Kariuki J. The Applicant gave her evidence in chief. The documents that the parties intended to rely on during trial had earlier been produced by consent of the parties. According to the Applicant, the Respondent purported to file a supplementary list of documents after the Applicant had given her testimony in chief. Learned counsel submitted that the Applicant’s constitutional right to fair trial had been infringed because she was not given an opportunity to comment on the documents that were sought to be produced after she had testified in chief. The Applicant was of the view that no reason was given by the Respondent for the delay in filing the documents that he intended to rely on during trial in time. It was the Applicant’s case that the said documents were filed with the intention of frustrating the hearing of the case. In the premises therefore, the Applicant asked the court to expunge the documents from the record.

Mrs. Samnakay for the Respondent opposed the preliminary objection. She submitted that the preliminary objection was not properly raised because it did not raise a point of law. What the preliminary objection sought is to obtain the discretion of the court. She explained that the supplementary documents that were filed were documents which had been produced in an earlier matrimonial case between the parties. She submitted that the Respondent had the right to produce all the evidence that he intends to rely on during trial. She attributed the failure to produce the documents to mistake by counsel. She was of the view that the Applicant would not be prejudiced because she would have the opportunity to interrogate the said documents during trial. She urged the court to dismiss the preliminary objection.

This court has carefully considered the rival submission made by the parties to this preliminary objection. This court agrees with the Respondent that the preliminary objection was not properly raised. As was stated in **Mukisa Biscuits Manufacturing Company Limited – Vs- Westend Distributors Limited [1969] EA 696**, “*a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.*” The preliminary objection raised by the Applicant does not raise a point of law which is in the pleadings or which has arisen by clear implication out of the pleadings, and which if raised would dispose of the case. The Applicant was aggrieved that the Respondent had filed a supplementary list of documents

after she had given her testimony in chief. **Order 3 Rule 2** of the **Civil Procedure Rules** requires all parties to file copies of the documents that they intend to rely on during trial at the time of filing the suit. This court takes judicial notice of the fact that this requirement came into effect in 2010 when the **Civil Procedure Rules** were amended. The present suit was filed prior to 2010. The Rule then prevailing was **Order X Rule 11A** of the **Civil Procedure Rules** which required all parties to complete discovery, by exchanging documents that they intend to rely on during trial before the commencement of the actual hearing of the case. In the present case, it was clear that the Respondent was required to seek the leave of the court before filing the supplementary list of documents. However, this court is of the view that a party to a case has a right to produce all the documents that he intends to rely on during trial. The documents are required to be produced before the commencement of hearing of the case to enable the opposing party prepare for the case. It is a prudent requirement which eliminates ambush and surprise to the opposing party during trial.

In the present case, the Respondent has given a reasonable explanation for the late filing of the supplementary list of documents. The said documents had been produced in an earlier matrimonial case involving the Applicant and the Respondent. It is only fair that the Respondent be allowed to rely on the said supplementary list of documents for the proper adjudication of the matters in dispute. The Applicant will suffer no prejudice because the court can allow her to reopen her testimony in chief to enable her comment on the supplementary list of documents. The Applicant will also have an opportunity to interrogate the said documents during cross-examination of the Respondent. This court does not agree with submission by the Applicant that her right to a fair adjudicative process would be infringed if the supplementary list of documents is retained on record.

In the premises therefore, this court holds that the preliminary objection lacks merit and is hereby dismissed. There shall be no orders as to costs. The parties are at liberty to fix the case for further hearing. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JULY, 2014

L. KIMARU

JUDGE