



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 113 OF 2014**

**EDWARD NYONGESA NDEKE.....PLAINTIFF**

**VERSUS**

**SILA AMBATIA AYIEKO.....1<sup>ST</sup> DEFENDANT**

**B. MUTIMBA.....2<sup>ND</sup> DEFENDANT**

**FRANCIS MWAURA.....3<sup>RD</sup> DEFENDANT**

**RULING**

**(On an Application for a leave to file a Defendant's witness statement after close of the Plaintiff's case)**

**Introduction**

1. The instant suit was filed on **08/07/2014**. Accompanying the Plaintiff was a Verifying Affidavit, a witness statement and a list of documents together with copies of the documents. On **21/07/2014** the **1<sup>st</sup>** and **3<sup>rd</sup>** Defendants entered appearance. On **05/08/2014** the **1<sup>st</sup>** Defendant filed a Defence, a list of witnesses and a witness statement together with a list of documents and copies of documents.
2. On **05/08/2014** the **2<sup>nd</sup>** Defendant entered appearance and on **19/08/2014** he filed a written Statement of Defence but no witness statement or documents. The record also shows that on **11/08/2014** the **3<sup>rd</sup>** Defendant filed a Statement of Defence, a list of witnesses, one witness statement, and list of documents and copies accompanying it. It is also apparent that on **29/07/2015** the Plaintiff filed a Reply to (all) Defences. The pleading was dated **28/07/2015**.
3. Subsequent to that, the parties filed a number of interlocutory applications which were determined. Then, on **27/06/2019** the Plaintiff fixed the suit for hearing on **15/10/2019**. On that date it was adjourned to **19/02/2020** when the first witness testified. The record, at the relevant part, shows that on **25/07/2018** directions were taken before the judge along the following terms:

**“Mr. Kiarie for the Plaintiff**

**Mr. Kaosa for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants**

**Mr. Khisa for the 2<sup>nd</sup> Defendant**

**Mr. Kiarie: We filed the necessary documents**

**Mr. Khisa and Kaosa: We are ready.**

**Court: Hearing on 28/11/2018.**

**Signed”.**

4. At no time then or so soon thereafter has the Defendant ever stated that he had not filed his witness statement until the **22/02/2022** when he raised it hence the instant Application. On the date he brought it up, both the Plaintiff and the **1<sup>st</sup>** Defendant had testified and closed their cases.

5. The 2<sup>nd</sup> Defendant's Application was made on the ground that learned counsel who was in conduct of the matter on that date was not the one who had been handling the matter previously had made an inadvertent mistake in failing to have his client file the witness statement. He then stated that the other parties would have opportunity to cross-examine the Deponent on the statement hence no prejudice would be done to them if leave was granted. The 2<sup>nd</sup> Defendant undertook not to file any document but only the witness statement.

6. The Application was opposed strongly. The Plaintiff submitted that the 2<sup>nd</sup> Defendant had not explained why he never complied with **Order 11** of the **Civil Procedure Rules** and it was too late in the day because already both the Plaintiff and the 1<sup>st</sup> Defendant had testified and closed their cases. Lastly, he said that failure on the part of the 2<sup>nd</sup> Defendant to file the statement must be interpreted to mean that he did not have any to tender. He termed grant of leave for that purpose as an expensive mistake.

7. On the part of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, they submitted that it was at the discretion of the Court to grant the leave. They submitted further that the 2<sup>nd</sup> Defendant could be allowed to put in the statement so as the shed light on the case. Their view was that the 2<sup>nd</sup> Defendant was a crucial witness whose statement should not be shut out.

### **Directions**

8. Through directions made on 22/02/2022, this Court ordered that the Application be determined by way of further written submissions. All parties were given chance to file half a page set of submissions. As at the time of preparing the Ruling, none had been filed.

### **Issues, Analysis and Determination**

9. I have carefully considered the issue before me, the parties' rival oral submissions and the law. The issues that commend for determination therefore are:

*a) Whether the Application for leave is merited*

*b) What orders to issue and who to bear costs?*

10. I will analyze the issues one after the other as hereunder.

#### ***(a) Whether Application for leave is merited***

11. The law regarding filing of witness statements by parties is governed by **Order 3 Rule 2** of the **Civil Procedure Rules** for the case of the Plaintiff, and **Order 7 Rule 5** of the **Civil Procedure Rules** for the cases of Defendants. **Order 11** of the **Civil Procedure Rules** then obligates the Court and parties to take directions and certification that the matter is ready or not for hearing.

12. Under **Rule 7(3)** of **Order 11** is the provision on failure to comply with the **Order**. It stipulates that any party or Advocate who does not comply shall be deemed to have violated the overriding objective of the procedure as provided for in **Sections 1A** and **1B** of the **Civil Procedure Act**. The objective is the facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The sanction provided for in case of such a violation is the payment of costs by the defaulting party or Advocate.

13. In strengthening the process of hearings and making even the taking of evidence in the Environment and Land Court, the Rules Committee formulated the Practice Directions on Proceedings in **The Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts** (the *Mutungu Rules*), published in **Gazette No. 5178. Rule 28 (b)** thereof provides that,

*“In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference: (b) The issuance of an Order striking out pleadings or imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines.”*

14. The Rule provides for further sanctions than costs. These include striking out of pleadings or similar sanctions. In the instant case, none of the sanctions were ever made at the time of taking directions. Furthermore, the parties to in this matter have, up to the time the Application for leave was made, participated in examination, cross-examination and re-examination of the witnesses who have so far testified. Some of the pleadings they have relied on in regard to that process is the 2<sup>nd</sup> Defendant's Defence and the Plaintiff's Reply to the defences. Therefore, as much as the Rule provides for striking out of the pleadings of a non-compliant party, it is too late to strike out the Defendant's Defence. In any event, striking out of pleadings is a draconian action which should be resorted to sparingly and only in the clearest of the cases. This turns me then to consider whether or not to grant leave to file a witness statement on the part of the 2<sup>nd</sup> Defendant.

15. In considering the Application before me, there seems to me to be two competing rights which ought to be balanced by this Court. These are the right of to fair trial and the right to be heard. These are attendant, on the one hand, to the cases of the Plaintiff and the other defendants who have already testified and closed their cases and, on the other hand, to that of the Defendant pleading for the exercise of discretion by the Court in his favour to file a witness statement and adduce evidence thereon in Court. As summarized above, in the submissions of the parties, the 1<sup>st</sup> Defendant who closed his case and the 3<sup>rd</sup> Defendant who is yet to testify are not opposed to the 2<sup>nd</sup> Defendant being granted leave. This may be for obvious reasons: the two Defendants are on the same side of the divide as the 2<sup>nd</sup> and have nothing to lose whichever way the ruling goes.

16. I start by analyzing the import of the basic tenet on right to fair hearing. The right to be heard is a principle of natural justice which the

Court, while enforcing the Bill of Rights, is called upon under **Article 22 (3) (d)** of the **2010** Constitution, to draw on in making use of rules the Chief Justice shall have made for Court proceedings so much so that it (the Court) is unnecessarily restricted by procedural technicalities as it endeavours to administer justice. The right to be heard is not to be confused with the right to fair hearing. The latter is narrower in scope and it is the one which **Article 25 (d)** is specified as being among the four that under the new Constitutional dispensation is non-derogable. The Court cannot, by use of its discretion, deny any of all the parties herein the right to fair hearing.

17. Of fair hearing, in *Evans Odhiambo Kidero & 4 others v. Ferdinand Ndungu Waititu & 4 Others* *Petition No. 18 of 2014* as consolidated with *Petition no. 20 of 2014 [2014] eKLR*, Justice Njoki SCJ concurring stated:

*“[257] Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.”*

18. In regard to the right to be heard, Justice Njoki SCJ, in the same *Petition*, wrote as follows:

*“[258] What then are the norms or components of a fair hearing? The Supreme Court of India, in Indru Ramchand Bharvani & Others v. Union of India & Others, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable (citing Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460).*

*[259] That Court in Union of India v. J.N. Sinha & Another, 1971 SCR (1) 791 and C.B. Boarding & Lodging v. State of Mysore, 1970 SCR (2) 600 held that with regards to fair hearing, each case has to be decided on its own merits. In Mineral Development Ltd. v. State of Bihar, 1960 AIR 468, 160 SCR (2) 909 the Court further observed that the concept of fair hearing is an elastic one and “is not susceptible of easy and precise definition.”*

19. In *Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998* the Court of Appeal held that:

*“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”*

20. In this case the Applicant argues that due to inadvertence on the part of the counsel handling the matter, he did not file a witness statement. However, he failed to inform the Court whether or not by the time of the Court taking directions as reproduced above, he had prepared a witness statement which he thought should have been filed by counsel but was not. Be that as it may, the right to be heard is not an absolute one. But the right to be given an opportunity to be heard is an unlimited one.

21. When one is given such an opportunity but squanders it, the burden lies on him to discharge that his failure to do so arose from circumstances which can cause the Court to exercise discretion in his favour. This has to be balanced with the prejudice that may be occasioned to the other parties in the matter if the discretion is exercised in favour of an applicant and through it the Applicant is placed at an advantageous position in comparison with the other parties. It is a delicate balance which should be made bearing in mind that the Court is enjoined by law to adjudicate disputes between parties by finding out where the truth (of the facts) lies. Thus, even where the reasons advanced by a party are such that they are convincing to Court that they are reasonable and sufficient, care has to be taken that the innocent party (ies) are not prejudiced by the exercise of the discretion.

22. The Applicant herein had all the chances to present his case and even file witness statements and serve them before the suit proceeded to hearing. That would have given the other parties an opportunity to prepare their cases well. Having failed to do so up to the point where he was called to present his case only for him to realize that he did not file his witness statement, the issue is whether or not he should be permitted to file it. The basis for the amendments to the Civil Procedure and other Rules introduced in order to provide for filing of witness statements was to give the adverse parties opportunity to know the case of the opponent that they are to meet at the hearing. Except receiving the evidence of expert witnesses, there may be situations where a party may be permitted to testify even when he/she may not have filed a witness statement: but this must be an extreme and rare exception and not a norm. Courts must strongly discourage the practice of descending to the former ways of doing matters (absent of filing and serving witness statements prior to hearing) where trial was basically by ambush and it often led to unfair hearings and trials.

23. All may not be lost though. But the failure to comply with the Rules entitles the Court to deem the party at fault or his advocate to have violated the overriding objective of **Sections 1A** and **1B** of the **Act** and an order for costs will be issued against him unless there be reasons for not doing so which have to be recorded.

24. I have considered the entire scenario and weighed it against all the parameters I have discussed above. I am of the view that it would be in the interest of justice that the **2<sup>nd</sup>** Defendant be given leave to file and serve the other parties a witness statement within seven (**7**) days. But he must pay to all the parties the costs attendant to this adjournment caused in making the instant application, and all the other costs

subsequent thereto, including those that will be incurred due to the late introduction of the said witness statement as will be stated below.

***(b) What orders to issue and who to bear costs***

25. The upshot is that the application is merited and allowed in terms of the orders and directions given in the paragraphs immediately above and below.

26. The Matter shall be mentioned virtually on **11/05/2022** at **8.30 am** to confirm whether the **2<sup>nd</sup>** Defendant shall have filed and served the witness statement and whether it raises any issue of fact which were not within their knowledge, at the time of closing their cases, which would need to be addressed by way of re-opening the Plaintiff's and **1<sup>st</sup>** Defendant's cases but only limited to and for purposes of testifying on those specific new facts.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 26TH DAY OF APRIL, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**