



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 115 of 2011

INTERACTIVE GAMING & LOTTERIES LIMITED.....PLAINTIFF

VERSUS

FLINT EAST AFRICA LIMITED.....1ST DEFENDANT

SAFARICOM LIMITED.....2ND DEFENDANT

KENYA REVENUE AUTHORITY.....3RD DEFENDANT

RULING

This ruling arises from an objection raised on behalf of the plaintiff with respect to the admission of a further statement by **Robert Macharia** filed in support of the 1st defendant's case.

In support of the objection, **Mr Ng'ang'a**, learned counsel for the plaintiff submitted that his objection is premised on the provisions of Order 3 rule 2 of the Civil Procedure Rules which requires that witness statements be filed at the time of filing the suit provided that the same may be filed with leave of the Court 15 days before the Trial Conference. This matter being partly heard and as the plaintiff has given evidence and closed its case, learned counsel submitted that the filing of further statement on the eve of the defence hearing without leave of the court flouts the express provisions of the aforesaid rule and ought to be expunged from the record. Under Order 18 of the Civil Procedure Rules, once a hearing has commenced in a suit, there is no provision for the introduction of fresh evidence.

It was further submitted by learned counsel that the said statement would be highly prejudicial to the plaintiff's case since the plaintiff has closed its case and would be denied an opportunity to respond to the new issues raised in the further statement. In counsel's view, no effort has been made to explain why the additional evidence could not be filed before the hearing commenced hence this is an attempt to delay the suit and the said statement ought to be expunged so that the 1st defendant can be directed to adduce evidence based on its earlier statement.

On behalf of the 3rd Defendant, **Ms Ngugi** associated herself with the submissions made by **Mr Ng'ang'a** and added that since the suit commenced the 1st defendant has used all manner of tactics to delay the conclusion of this trial by making numerous applications for adjournments and even an application to disqualify counsel for the plaintiff from acting herein which tactics have served to delay the trial. In counsel's view, the inclusion of this further statement will serve no useful purpose other than to waste judicial time hence should be struck out.

Ms Onsando, learned counsel for the 2nd defendant limited her submissions to asking the Court to give a date for defence hearing.

In the absence of any representation on behalf of the 1st defendant whose counsel was duly served, there was no opposition to the objection.

I have considered the foregoing. It is true that the plaintiff has closed his case. The current procedural legal regime especially Order 11 of the Civil Procedure Rules is meant to ensure that parties to a suit disclose their evidence upfront in order to avoid trial by ambush. In **National Bank of Kenya Limited vs. John Aswani Litondo & Another Nairobi (Commercial Division) HCCC No. 171 of 2006**, I expressed myself as follows:

“The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of sections 1A and 1B of the Civil Procedure Act are meaningfully implemented. In the case of Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008 the Court of Appeal held *inter alia* that the principle aims of the provisions of sections 1A and 1B of the Civil Procedure Act and sections 3A and 3B of the Appellate Jurisdiction Act include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need 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. Advocates and their clients are obliged under section 1A(3) of the Civil Procedure Act to assist the court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court... To conceal the documents until after the plaintiff’s case is closed was the mischief that the new rules were meant to cure. Trial by ambush is no longer acceptable in civil litigation and any party who does so, will be doing so at the risk of being locked out of relying on its documents at the very least or having its defence struck out. In the case of Topen Industries Ltd. vs. Afrolite Industries Ltd. Civil Application No. Nai. 334 Of 2000 the Court of Appeal held that where a time limit is given by the Court for complying with the order for discovery and inspection and the same is not complied with until well beyond the date fixed by the Court, the filing of the said documents without extension or obtaining the consent of the opposite party is unjust. Again in Menze and Others vs. Matata [2003] 1 EA 151 it was held that although a litigant who has failed to comply with a Court order for discovery should not be precluded from pursuing his claim or setting up his defence, where the failure to comply is due to wilful disregard of the order of the Court and is a great impediment in the course and the cause of justice in the matter, the litigant may be precluded from setting up his defence”

Whereas I do not accede to the submissions made on behalf of the plaintiff that once a hearing commences no new evidence may be adduced, taking into account the fact that the Court always retains an inherent jurisdiction to make such orders as may be necessary for the ends of justice, it must be remembered that the Court also has inherent jurisdiction to prevent abuse of its process. Therefore where a party intends to adduce further evidence outside the period provided under the Civil Procedure Rules, the party must lay a basis for doing so in order to enable the Court exercise its discretion in its favour. In my view the grounds which would justify such course would be akin to those that justify the adduction of evidence after trial which includes but not limited to showing that the evidence to be adduced could not despite the exercise of due diligence be obtained earlier on in the proceedings and further that the said evidence is crucial to the party’s case and no prejudice would be occasioned to the other side.

In this case the plaintiff has already given evidence and closed its case. Whereas, the Court has discretion to reopen the same, that is a course which ought to be resorted to only in exceptional circumstances. In this case no attempt has been made at all to justify the filing of the further statement at this stage of the proceedings. In other words there is no material upon which the court can exercise its discretion and allow the said further statement.

In the premises, I agree that the further statement filed herein on 18th March 2013 by **Robert Macharia** is an abuse of the process of the Court and the said statement together with the documents annexed thereto amount to an abuse of the process of the court and in the exercise of the Court’s inherent jurisdiction, the same is expunged from the records. The costs of this objection to be borne by the 1st defendant.

Dated at Nairobi this day 15th day of April 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nganga for the Plaintiff and Mr Kahugu for the 1st Defendant