



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIROBI

CIVIL SUIT NO. 1069 OF 1998

ANNE MUMBI HINGA.....PLAINTIFF

VERSUS

GAITHO OIL LIMITED.....DEFENDANT

RULING

The Plaintiff's Notice of Motion dated 13th May 2013 is seeking leave of the court to admit the witness statement of Mr. Richard Mutiso dated 23rd April 2013 which was filed and served on the Defendant on 26th April 2013. Further, that the Plaintiff be granted further leave to file and serve a supplementary list and bundle of documents she wishes to rely upon. The Plaintiff states in her supporting affidavit sworn on 13th May 2013 that the full hearing of this case commenced on 30th November 2011, and that after her cross-examination in which she was questioned on communication between the Defendant's Advocate and her previous Advocates on record, she informed the court that she would call three additional witnesses. The witness statement sought to be admitted is that of her previous Advocate on record.

The Plaintiff's counsel in submissions dated 1st July 2013 argued that there is no law that bars a party from calling as many witnesses as it desires in order to prove its case, and any limitation by the court in this regard would be curtailing a party's right to be heard and have its dispute resolved in a fair and just manner as provided by Article 50 (1) of the Constitution.

The Defendant opposed the Plaintiff's Notice of Motion in Grounds of Opposition dated 21st May 2013, and in a Replying Affidavit sworn on 22nd May 2013 Florence Wairimu Mbugua, a director of the Defendant. The Defendant states that the said witness statement is meant to fill gaps created by the Defence during cross-examination of the Plaintiff, and there has been inordinate delay in making the application after over one year since the hearing of the suit was adjourned. The Defendant's counsel in submissions dated 18th July 2013 relied on the decisions in **P.H Ogola Onyango T/A Pittconsulting Engineers vs Daniel Githegi T/A Quantalysis (2005) e KLR** and **Gachuma Gacheru vs Maina Kabuchwa, Nairobi Civil Case No 168 of 1981** where it was held that to allow a Defendant to introduce documents after the Plaintiff had closed its case, would occasion the Plaintiff serious prejudice that cannot be cured by cross-examination.

I have read and carefully considered the pleadings and submissions by the parties to this application. The main issue to be decided is whether the Plaintiff should be granted leave to introduce a witness statement and supplementary list and bundle of documents during the hearing of the suit. The applicable provisions as to the filing and serving of witness statements and documents are Order 3 rule 2 and Order 7 Rule 5 of the Civil Procedure Rules, which require the said statements and documents to be filed and served together with the Plaintiff and Defence. There is a proviso to the said rules that leave can be granted for witness statements to be furnished at least fifteen days prior to the trial conference under Order 11 of the

Rules. Under Order 11 the court can also make directions to ensure that parties have complied with Order 3 Rule 2 and Order 7 Rule 5.

It is therefore the intention of the Civil Procedure Rules that there should be compliance with regard to filing of witness statements and documents before trial commences, and Order 11 of the Rules has elaborate provisions as to the pretrial conferences that need to be held to ensure that a suit is ready for hearing and to expedite the trial. It is not clear from the record whether the parties did hold the pretrial conferences before the hearing commenced, but on 6th July 2011 Rawal J. (as she then was) did direct that the parties file and exchange their witness statements.

The hearing commenced on 1st December 2011, and the Plaintiff relied on a witness statement she had filed during her evidence-in-chief, and called an additional witness to produce an evaluation report. When the matter came for further hearing on 31st January 2012, the Plaintiff's counsel asked to file witness statements for three additional witnesses. There was no objection from the Defendant's counsel, and Waweru J. gave orders that the witness statements be filed by the date of the next mention on 27th February 2012. This time was variously extended as the Plaintiff's counsel sought instructions from his client.

Subsequently, there was a change of the Plaintiff's Advocates and an interlocutory application was filed by the Defendant on 9th August 2012, which was heard and a ruling delivered by Odunga J. on 30th January 2013. The disputed witness statement by the Plaintiff was then filed on 26th April 2013. It is therefore evident from the chronology of events described in the foregoing that this court did give the Plaintiff leave to file additional witness statements, and that the delay in filing the said witness statements was caused by intervening factors, including that of the Defendant filing an interlocutory application.

In addition I would like to add that the provisions of the Civil Procedure Rules are not cast in stone, and the court is enjoined by Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to ensure that in implementing the rules we dispense substantive justice, and ensure that there is just, expeditious, proportionate and affordable resolution of civil disputes. To this end this Court is given inherent power under section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice.

This court cannot therefore prevent the Plaintiff from stating its case, even if the effect as alleged by the Defendant is to fill holes that may have arisen from cross-examination. It is the Plaintiff's right to fill such holes as she seeks substantive justice from this court. The only limitation to the exercise of this right would be if there was prejudice to be caused to the Defendant in allowing the Plaintiff to file additional witnesses and documents. It is my view that as the Plaintiff is yet to close her case, the Defendant will have the opportunity to cross-examine any additional witnesses she calls, to recall any witnesses who have already given evidence for further cross-examination, and to file any additional statements and documents in response. This opportunity that is available to the Defendant herein therefore distinguishes this case from the decisions in **P.H Ogola Onyango T/A Pittconsulting Engineers vs Daniel Githegi T/A Quantalysis (2005) e KLR** and **Gachuma Gacheru vs Maina Kabuchwa, Nairobi Civil Case No 168 of 1981.**

I accordingly allow the Plaintiff's Notice of Motion dated 13th May 2013 for the foregoing reasons, and hereby order as follows:

1. The Plaintiff's witness statement filed herein on 26th April 2013 is deemed to have been properly filed and served and is admitted as part of the court record.
2. The Plaintiff is granted leave to file and serve any additional witness statements and a supplementary list and bundle of documents within 30 days of the date of this ruling.
3. The Defendant is granted corresponding leave to file and serve additional witness statements and a supplementary list and bundle of documents, if need be, within 30 days of service by the Plaintiff.
4. The costs of the Notice of Motion dated 13th May 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 31st day of October, 2013.

P. NYAMWEYA

JUDGE