



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS, COMMERCIAL AND TAX DIVISION)
CIVIL CASE 1965 OF 1991

NYANJA HOLDINGS LIMITED :::::::::::::::::::::::::::::::::::::: PLAINTIFF

- VERSUS -

CITY FINANCE BANK LIMITED :::::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

On 19th April 2012 when the hearing of this suit was due to proceed, Mr. Machira for the Plaintiff took objection on the Defendant's List of Documents filed on 19th March 2012, and asked the court to expunge this bundle of documents from the court records on the following grounds:-

1. It was filed after one of the Plaintiff's witnesses had given evidence, was cross-examined and re-examined. At that time the document was not on record. It was unfair to the Plaintiff's case to introduce the document at this stage.
2. The 2nd Plaintiff had given evidence in chief and is now due for cross-examination. At that time the bundle of document was not on record.
3. The 1st Plaintiff gave evidence in 2006 and that it is too late in the day to file new documents.
4. Certain documents are alleged to be completely new documents and do not have any relevance with the documents that were filed by the parties originally, and that other documents are completely illegible e.g. paragraph 153 – 181.
5. Other parts of the documentation are pleadings in HCCC No. 1506 of 2006; HCCC No. 993 of 2002; HCCC No. 1240 of 2000 and HCCC No. 223 of 2000. In all these pleadings the Plaintiff is alleged not to be party.

The Applicant has supported his submissions by the authority of **P. H. OGOLA – ONYANGO T/A PITTS CONSULTANT ENGINEERS – VS – DANIEL GITHEGI CIVIL CASE NO. 1490 OF 1999**, in which the court found that the filing of the Defendant's list of documents was hopelessly out of time since it was filed and served after the Plaintiff had closed his case. The Plaintiff had no way of

responding to the Defendant's List.

The Applicant also relied on the authority of **BUBAL CORPORATION – VS – SOS KINDERDROFF INTERNATIONAL** in which the court observed that:-

“The requirement to give particulars reflects the overriding principle that the litigation between the parties and particularly the trial should be conducted fairly, openly, without surprise and as far as possible to minimize costs.”

Mr. Sing Gitau, for the Defendant on his part submitted that the application is against the best evidence rule that all parties be allowed to bring before the court all the evidence to help the court. He submitted that when the suit was filed the intention was to stall the sale of a property. It was however sold. After the sale the Plaintiff filed a suit which was dismissed by Lady Justice Nambuye. Again a suit was filed being HCCC No. 251 of 2008 in which allegations were made which can assist the court in the present suit. The documents filed by the Defendant, the counsel submitted, are the amalgamation of what had transpired after Justice Ochieng heard the evidence of the P.W. 1.

The counsel further submitted that the Defendant's List has been filed in compliance with Sections 1A and 1B of the Civil Procedure Rules 2010, and that it cannot be wrong for new evidence that has now come to light to be brought to court.

The counsel distinguished the authority of **P. H. OGOLA** above on the grounds that in that case the Plaintiff had already closed its case, while in this case, the Plaintiff has not closed its case, and that the current court has never heard the matter and that it is still open to court to start the matter afresh. The Defendant further submitted that there is a counter-claim and the Plaintiff will still have the opportunity to recall the witness.

As for the cases referred to in the List of Defendant's documents the counsel submitted that those cases involve Mr. Nyanjah or Nyanjah Holdings who are parties to the current suit.

I have considered the submissions of both parties and wish to address the issue as follows:-

1. I accept the persuasive value of the authorities cited by Mr. Machira for the Plaintiff. However, I have noted that in the **P. H. OGOLA** case the Plaintiff had closed his case and the Judge noted that the documents were filed hopelessly out of time. In this case, one of the Plaintiff's witnesses has completely concluded giving evidence while the other is halfway through. It is not clear to me how many more Plaintiffs' witnesses are expected.
2. This matter was filed in 1991. It has taken over 20 years and it is not yet determined. It would not be prudent to rush to conclude it by locking out evidence on technicalities.
3. The new Section 1A and 1B of the Civil Procedure Rules 2010 and Section 159 (2) (d) of the Constitution frown upon relying on technicalities to decide a matter. While it is important that discovery of documents is made in expeditious manner as required by law, the court will be very hesitant to lock out any evidence that may assist it to arrive at a just decision.
4. I have looked at the Defendant's list of documents filed in court on 11th March 2012 and I believe it should not be locked out. Doing that will deny the Defendant of a substantial substratum of its defence.
5. However, more importantly, and for the sake of justice to all parties, I am new in this matter, so is Mr. Machira, and may be one other officer of the court. Nothing stops this court from hearing the evidence afresh if need be. This possibility remains an option for the Plaintiff notwithstanding the Ruling I render herein.

I dismiss the Plaintiff's objection to the Defendant's List of Documents filed in court on 11th March 2012.

I make no orders on costs.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 23RD DAY OF MAY 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Thangei for the Plaintiff

Ms Omino H/B for Sing for the Defendant

Teresia – Court clerk