



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 2044 OF 1993**

**KENYA ACCOUNTANTS AND SECRETARIES NATIONAL  
EXAMINATIONS' BOARD.....PLAINTIFF**

**VERSUS**

**PAUL KIPKEMBOI CHEMNG'OREM.....FIRSTDEFENDANT**  
**LELMOR LIMITED.....FIRST DEFENDANT**

**NATIONAL SOCIAL SECURITY  
FUND BOARD OF TRUSTEES.....SECOND DEFENDANT**  
**THE COMMISSIONER OF LANDS .....SECOND DEFENDANT**

**THE ATTORNEY GENERAL SUED ON  
BEHALF OF THE DIRECTOR OF SURVEY.....THIRD DEFENDANT**

**RULING**

The background information to this ruling is that the plaintiff, herein, has tendered all the evidence, and closed their case. The defendants' first witness who is the defendant has given evidence and been cross examined, and re- examined. During the pendency of calling further evidence for the defence, the defendants counsel has presented to this court, an application by way of notice of motion presented to this court, under order X and 50 of rule 1 of the CPR, section 3A of the CPA and all enabling provisions of the law. It is dated 9<sup>th</sup> day of June 2009 and filed on the 10<sup>th</sup> day of June 2009. It seeks two prayers namely:-

1. *That the first defendant be and is hereby given leave to file an additional lists of documents and that the said documents be and are hereby allowed to be part of the evidence adduced by the first defendant.*
2. *That the costs of this application be in the cause.*

The grounds in support are set out in the body of this application, supporting affidavit and oral

submission in court. The sum total of the same in a summary form are as follows:-

1. That the defendant has a list of documents relied upon in these proceedings already filed herein.
2. That they are now desirous of filing a further list in terms of the further list of documents dated 23<sup>rd</sup> day of June 2009 and filed on 24<sup>th</sup> day of June 2009.
3. The necessity to introduce these two other documents arose from the questions put by counsel for the plaintiff during cross-examination.
4. That the defendant gave an answer to those questions using answers from the content of those documents.
5. That by the reason of them not having been discovered as part of the bundle herein, the defendant could not tender them in evidence.
6. That since evidence has been adduced on those documents it is only proper that the record of proceedings be perfected by production of the same in evidence, that the cross examination tended to portray the defendant as having acquired the said property fraudulently. As such the record will not be complete without the said documentation being produced on the record to demonstrate that the defendant procedurally acquired the said property. That no harm will be occasioned to the opposite party.

In opposition to the said application, counsel for the plaintiff put in a replying affidavit sworn by one Pius Mungai Nduathi on the 7<sup>th</sup> day of July 2009 and filed the same date as well as oral submission in court. The salient features of the same are as follows:-

-The defendant should not be indulged as regards the said intended production of additional documents as they have failed to demonstrate any valid grounds upon which the orders sought should be granted.

(ii) That the relevance of the said evidence to this case has not been demonstrated, as the defendants ownership of the said property has no connection whatsoever to the issue of the access road which is the subject of these proceedings.

-That the process of discovery is complete and the defendant should be held to be the Author of his detriment at not introducing these documents at the earliest possible moment.

-That the introduction of these documents at this stage will unnecessarily prolong the disposal of the suit.

-That it will be unjustifiable to allow the application presented herein at this late hour.

-That for the reasons given, the defendant should be ordered to proceed to conclude his evidence on the basis of the documentation on the record.

-That the plaintiff counsel cannot be blamed for the defendants in preparedness to the plaintiffs mode of cross-examination due to their non production of the alleged documents.

-Contend that the application is incompetent and an abuse of the due process of the court, it is an after thought and it should be dismissed as it will only operate to delay the finalization of this case.

-Maintain that at no time did the plaintiffs counsel put questions to the defendant concerning the acquisition of the said property.

-Maintain that there is no provision of law which can be invoked by the applicant to introduce the said document at the late stage of the proceedings herein.

-The court, is invited to take note of the fact that the defendant is in the habit of introducing documents piece meal such as on the 15/12/08, and 17/2/08, and this court, should put that to a stop.

-The court, is also invited to take note of the fact that this matter has been part heard for the last 2 years and it is time the same was finalized.

Due consideration has been made of the rival arguments presented herein, by the disputants herein, and finds that what the disputants are disputing over is the issue as to whether the defendant is to be allowed to do discovery of the listed documents or not. As mentioned earlier on, the plaintiff has closed its case, the defendant has testified, been cross examined and the re-examined. The reasons for and against are already set out herein. The question is whether the defendant is to be allowed to do discovery at this stage of the proceedings or not. In resolving this, the court, has to bear in mind the arguments of the plaintiff/respondent that no provision of law, allows the granting of such an order. This being the case the starting point should be the provisions under which the relief of discovery can be assessed.

This is no other than the cited order X CPR. This court, has revisited the same, and come across the following provisions. order X rule II(1) *“Any party may request any other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the suit.*

11(2).....

(i) *That discovery shall not be ordered when and so far as the court is of the opinion that it is not necessary either for disposing fairly of the suit or for saving costs.*

(ii) *That on an application by one party the court may make an order for discovery against that party.*

*“A(1) notwithstanding anything contained in rule II, within one month after the pleadings are closed in a suit in the high court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power.....*

*13. It shall be lawful for the court, at any time during the pendency of any suit to order the production by any party there to, upon oath of such of the documents, in his possession or power, relating to any matter in question in such suit, as the court shall think right and the court, may deal with such documents, when produced, in such manner as appears just”*

Due consideration has been made of these provisions and applied them to the rival arguments herein and the court, makes a finding that order X rule 13 provides some guidelines on how to resolve the matter. It gives the court, a discretion to order the production of the documents considered to be relevant to the suit. This court, finds the command in order X rule 13 as follows:-

**(i).** *It is lawful for the court.*

**(ii).** *At any time during the pendency of any suit- By this, room is given to the court to make appropriate orders on discovery even after the plaintiffs’ case has been closed, and the party ordered to produce such documents.*

**(iii).** *The order is valid where made during the pendency of the suit – this is applicable as the suit is still pending*

**(iv).** *The order of production can be directed at any party to the proceedings. This gives room to the court, to order the defendant to make discovery of the said documents should this court, deem it fit to do so.*

(v). The order has to be granted upon oath. Herein this has been satisfied as the defendant has made the application on oath.

(vi). As for the documents relating to the matter in question. This has been satisfied by reason of the fact that one of the issue in controversy were the assertion of the plaintiff that the first defendant allocation un lawfully extends on to a road reserve and that the defendant should be addressed by this court to give up the said parcel.

(vii). As regards the provision to the effect that the orders will be made as the court, shall think right, allows the court, to exercise its discretion in allowing the said documents to be admitted into the evidence. By virtue of this discretion, the court, has no doubt that the provision enjoins the exercise of this discretion to be done in accordance with the acceptable standards set by the court, of appeal, and as dutifully followed by the superior courts, among them, those that this court, has judicial notice of among them the following namely:-

(a) That the court's discretion in the exercise of such a discretion is unfettered.

(b) The court, should not allow itself to fetter such a discretion.

(c) Only fetter recognized in law is that the same should be exercised judiciously and with a reason.

(viii) As regards the provision that the court, is allowed to deal with such documents when produced in such a manner as appears just. Also gives the court, a wide discretion when deciding or determining how such evidence should be utilized in the remainder of the trial.

The fore set out construction of order X rule 13 CPR have been applied to the arguments herein, and the court, makes a finding that although it is in agreement that parties herein should have made efforts to ensure that all documents at their disposal should be availed to the court, at the earliest opportunity especially at the out set of the trial, none less the court, has no doubt that the rules committee when including order X rule 13 CPR in the provision anticipated such eventualities such as the one the defence are confronted with, and that is why this rule was slotted in as a safely valve.

Herein the court, is of the opinion that the defendant having given oral responses on matters touching on the content of documents in his possession, the said oral testimonies on the said documents will be left in an embarrassing position should the court, not allow production of the said documents.

Production of the documents will also be in line with the standard provisions in the evidence Act cap 80 laws of Kenya. Section 64, 65 (ii) and 67 thereof. These provide:-

*“Section 64. The contents of documents may be proved either by primary or by secondary evidence 65 (1) primary evidence means the documents itself produced for the inspection of the court.*

*67. Documents must be proved by primary evidence except in the cases herein after mentioned”*

By reason of the application of the a fore set out provisions of the evidence Act, it is only proper that the said afore mentioned documents be availed as evidence in order to perfect the record since the same are within reach of the defendant.

The court, bears in mind the caution it is enjoined to take note of namely to make such orders that are just to both sides. In this courts', opinion, justice to both sides demands that the matter be re- opened, the defendant be recalled back into the witness box, tender the documents in evidence, he be further cross-examined and re examined if need be.

Leave will also be granted to the plaintiff to recall any evidence in rebuttal should need arise for them to do.

For the reasons given in the assessment the defendant/applicants' application dated the 9<sup>th</sup> day of June 2009 and filed on 10<sup>th</sup> June 2009 be and is hereby allowed for the reasons that:-

1. Order X rule 13 CPR allows the court, the discretion to take such a procedural step and allow such documents to be admitted in evidence at any stage of the proceedings during the pendency of the suit.
2. The suit herein is still pending.
3. There is no bar to the court, to allow in such documents even at the defence stage.
4. There is sufficient room for the court, to ensure that when making such orders interests of both parties have to be taken into account.
5. In this court's, opinion interest of justice demands that the matter be re opened. The defendant be recalled back into the witness box to produce the said documents, he be re cross examined, and re examined.
6. Leave be and is hereby granted to the plaintiff to recall rebuttal evidence if need be.
7. the production of the said documents is necessary because a failure to so call for the production of the said documents will leave the proceedings in an embarrassing position, as this would have been in contravention of sections 64,65 (i) and 67 of the evidence Act cap 80 laws of Kenya as the defendant would have been allowed to adduce oral evidence concerning the content of a document, which document is available as opposed to having them produced as primary evidence.
8. The plaintiff/respondent will have costs of the application.

**DATED, READ AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF JULY 2009.**

**R.N. NAMBUYE**

**JUDGE**