



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 185 of 2002

ELIZABETH KAKAI & RUTH LUNGAI.....1ST PLAINTIFF

RUTH LUNGAI.....2ND PLAINTIFF

VERSUS

EVEREADY BATTERIES KENYA LTD.....DEFENDANT

RULING

By an amended plaint dated the 14th of August, 2002, Benjamin Kumani Romoka sued the defendant claiming damages on account of the injuries he claimed to have sustained while working for the defendant. In the said amended plaint, Benjamin Kumani Romoka particularized what he alleges were breaches of statutory duty and negligence on the part of the defendant. The defendant filed an elaborate defence to the amended plaint. After the close of the pleadings, the plaintiff filed his list of documents. The defendant did not however file any list of documents. The said Benjamin Kumani Romoka died during the pendency of this suit. The proceedings were however taken over by Elizabeth Kakai and Ruth Lungai. The hearing of the case commenced before Visram J. When he was transferred to Nairobi, this court took over the hearing of the case after the parties had consented to the said take over of proceedings.

This court heard the remaining evidence that was offered by the plaintiffs' witnesses. After the close of the plaintiffs' case, this court fixed a date for the hearing of the defendant's case. The date that the hearing was fixed by this court is the 29th of May 2006. Before the defendant put its first witness on the stand, it filed a list of documents, listing eighteen documents that it indicated it would rely on during the hearing of the defence case. The plaintiffs' counsel was served with the said list of documents in court. This court was not availed copies of the actual documents that the defendant intended to rely on. It goes without saying that the defendant filed the said list of documents long after the pleadings were closed. To be precise, it filed them nearly three years after the hearing of the case had commenced. Although the plaintiffs requested the defendant to avail the list of documents that it intended to rely on during the hearing of the case, the defendant either deliberately or by design, declined to avail the said list to the plaintiffs. When the defendant sought to produce the said documents in evidence, through its first witness, the plaintiffs objected, hence this ruling.

I have given a brief history of the manner in which the pleadings were filed hereinabove. I have also given a brief account of the proceedings of this case so far. The plaintiff's offered their testimony without the benefit of seeing the documents that the defendant intended to rely on. As submitted by Mr Musembi, the plaintiffs were convinced that the defendant would not rely on any documents, hence their decision

not to call any evidence to rebut or controvert the evidence that could have been contained in the said documents that the defendant could have relied on. On his part, Mr Musangi admits that the defendant indeed did not file any list of documents within the period provided by the law. Its explanation for this failure to abide by the rules is that it was by an oversight. Mr Musangi however argues that this court should overlook the defendant's indiscretion and allow it to produce the said documents, since, anyway, the defendant had marked them when it was cross-examining the plaintiff's witnesses without any objection by plaintiff's counsel. He further submitted that the plaintiffs had produced certain documents which were not in their list of documents without any objection on the part of the defendant. Mr Musangi is of the view that this court should allow the production of the said documents so that truth of the case may be brought to the attention of this court.

I have considered the rival arguments made by Mr Musembi and Mr Musangi. It is not disputed that the defendant filed no list of documents as mandatorily required by the provisions of **Order X rule 11A of the Civil Procedure Rules** within thirty days after the close of the pleadings. The plaintiffs wrote to the defendant to supply them with their list of documents. The defendant did not positively respond to the plaintiffs' request. The plaintiffs did not however seek to enforce their demand for the said documents as provided by the rules. The hearing of the case commenced in the absence of the said list of documents filed by the defendant. The plaintiffs have called their witnesses and closed their case. It is now when the defendant is adducing evidence in its defence that it has filed a list of documents. The court has not seen copies of the documents that the defendant intends to rely on. Neither has the plaintiffs. The said list of documents was filed on the day when this court listed the case for the hearing of the defence's case. No leave of this court was sought before the said list was filed.

It is clear that the filing of the list of documents by the defendant at this later stage of the proceedings was deliberate. The defendant intended to deprive the plaintiffs an opportunity of studying the said documents so that they could prepare their case and adduce evidence in light of the information contained in the said documents. The defendant's tactics, was at it is now evident, to produce the said documents at a stage where the court would see the defendant's case in a favourably light. Unfortunately in doing so, the defendant breached the mandatory provisions of **Order X rule 11A of the Civil Procedure Rules** which was promulgated so that there could be fair trials in civil case. The said rule was enacted to prevent one litigant from ambushing the other by, as it were, by pulling a rabbit from his hat during the trial. Trials are conducted according to the rules. Like in a football match, a player cannot decide to pick up the ball with his hands and ran to the opponents goal, score a goal and then claim that it was lawful. He cannot insist that the goal was genuine just because he would not averse to his opponent using the similar tactics.

This court will not allow a party to breach the clear mandatory provisions of the law just because such a litigant submits that it behoves this court to ignore such blatant breach of the said law because it has a higher calling of investigating the truth. As this court ruled in the case of **Festus Mutua & 51 others – vs- Eveready Batteries (K) Ltd Nakuru HCCC No 255 of 2002 (unreported)** at page 4:

“Under Order X rule 11A of the Civil Procedure Rules discovery is a must. Each party to the suit must supply the opposing party with the documents ‘relating to any matter in question in the suit which are or have been in (their) possession or power’.”

These documents must be supplied before the trial commences. If a party intends to rely on documents which were not supplied before trial, then such party must seek the leave of the court. In this case, the defendant did not supply any list of documents to the plaintiffs by the time the hearing of this suit commenced three years ago. It did not bother to avail the said documents during the period before the plaintiffs closed their case. It only filed the list of documents when it was preparing to adduce evidence in its defence. That cannot be. The defendant's conduct is in clear abuse of the due process of the court. It is the antithesis of all the tenets of a fair trial.

The plaintiffs proceeded with his case on the basis that the defendant will not rely on any documents. The defendant should similarly proceed with its case without relying on any documents. I cannot exercise my discretion to give an opportunity to the defendant to present its case so that, at the end of it all, I may

allow the plaintiff to rebut the evidence offered by the defendant. To do so will turn this court into a circus. I will not allow it. As was held by Njagi J, in a case where circumstances similar to the present case existed (in **Washington Nteere –vs- Marshalls (E.A.) Ltd Nairobi HCCC No. 1244 of 2000 (Milimani) (unreported)** at pg 4:

“The plaintiff prepared its case only on the basis of its own documents alone. The defendant had an advantage in preparing its case on the basis of both its documents and those of the plaintiff. If the defendant is granted leave to file those documents now, it would require that the plaintiff reorganizes its case, and this might involve having to start afresh its evidence in chief. We shall have gone back to square one. A lot of valuable time will have gone to waste. In total, I think that fair play to the parties and the court demands that we proceed as we are.”

I agree with the reasoning of the learned Judge. The plaintiffs objection is upheld. The list of documents irregularly filed by the defendant on the 29th of May 2006 is hereby struck out. The defendant shall proceed with its case without reference to any documents, which are not part of the pleadings filed in this court.

It is so ordered.

DATED at NAKURU this 29th day of May 2006.

L. KIMARU

JUDGE