

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI**

CIVIL CASE NO. 1490 OF 1999

**P.H. OGOLA ONYANGO T/A PITTSCONSULT
CONSULTING ENGINEERS.....PLAINTIFF**

VERSUS

DANIEL GITHEGIT/A QUANTALYSIS.....DEFENDANT

R U L I N G

Hearing of this suit commenced on 31st January, 2005 when the Plaintiff testified and closed his case. Way back on 6th November, 2002 the Plaintiff had made mandatory discovery as required by Order X Rule 11A of the Civil Procedure Rules (the Rules) by filing his list of documents. The list was served upon the Defendant's advocates on 21st November, 2002. By the time the trial commenced the Defendant had not done discovery. He tried to delay the trial on that ground but the court declined to accommodate him. After the Plaintiff closed his case the Defendant sought adjournment in order to prepare for his defence. Adjournment was granted.

On 2nd March, 2005 the Defendant filed his list of documents with copies of the documents attached. He served a copy of the list, without the documents, upon the Defendant. On 11th May, 2005 when the matter came up for hearing of the defence case the Defendant's counsel served upon the Plaintiff's counsel in court with copies of the documents.

The Plaintiff has taken strong exception to the late filing and service of the Defendant's list of documents upon the grounds that, one, discovery is a pre-trial process which ought to have been completed before the trial commenced; two, that the filing of the Defendant's list of documents on 2nd March, 2005 was hopelessly out of time, and, three, that since the Defendant's list has been filed and served after the Plaintiff has closed his case, how is he expected to deal with the documents now tendered by the Defendant? He prays that the list and documents be expunged from the record. The Defendant responded through his learned counsel that the Plaintiff can cross-examine the Defendant upon the documents and that therefore there will be no prejudice occasioned to him. He also contended that the documents were not new to the Plaintiff and referred to at least four documents that had been annexed to an affidavit sworn and filed by the Defendant on 12th October, 2001.

Indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has began, it is another thing for a party to seek to introduce documents once the opposing party has closed its case. The present suit was filed way back in 1999. The Defendant filed his defence in January, 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party to be permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.

I will therefore uphold the Plaintiff's objection. I order that the Defendant's list of documents dated 1st March, 2005 filed in court on the following day and the documents annexed to it be expunged from the

court record. The Plaintiff shall have the costs of the objection. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF MAY, 2005.

H.P.G. WAWERU

JUDGE