



Emerg Investments Ltd v Kenya Farmers Association Ltd (Environment & Land Case 56 of 2012) [2022] KEELC 15173 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 56 OF 2012
FM NJOROGE, J
DECEMBER 6, 2022**

BETWEEN

EMERG INVESTMENTS LTD PLAINTIFF

AND

KENYA FARMERS ASSOCIATION LTD DEFENDANT

RULING

1. When this court adjourned on 26/4/2022 Mr. Kisilah for the plaintiff was left with the task of serving a document that had never been served upon the defendant before, but the court made it in no uncertain terms that the issue of the admissibility of the document would remain outstanding.
2. PW1 was then stood down and he resumed his evidence on 24/11/2022 only for his narrative during the further examination-in-chief to be interrupted by Ms. Gatu Magana's objection to his production of that very document mentioned by Mr. Kisilah on 26/4/2022.
3. Both counsel submitted on the issue of admissibility of the said document as well as breach of rules as to discovery when PW1 tried to produce the said document.
4. It transpired during the proceedings that revelation was made by Ms. Gatu that the defendant filed on 14/12/2012 its list of documents dated 10/12/2012 in which it stated as follows:

“Defendant’s list of documents:

1. As per documents listed as (a) to (e) in the plaintiff’s list of documents dated 5th November 2012 and filed herein. (NB: Document listed as (f) was not served upon the defendant).
2. Such offer documents as may be availed/produced by the plaintiff or with leave of the court.



Dated at Nakuru this 10th day of December 2012.”

5. It is clear that that list also served as a notice that the document listed as (f) in the plaintiff's list of documents dated 5/12/2012 had not been served upon it. It cannot be deciphered whether, if it had been served, the said document would have been automatically adopted by the defendant as part of its bundle as was the fate of the copies of all other served documents. It is also to be noted that item No. 2 of the defendant's said list was prognostic of the defendant's potential future acceptance of admission to evidence of such other documents as may be availed or produced by the plaintiff or admitted with leave of the court.
6. As at 24/11/2022 the said document had not been successfully produced in evidence by the PW1 by way of pursuit of the rules of evidence or by dispensation granted by court hence leading to the taking of Ms. Gatu's objection formally.
7. Ms. Gatu urged that the document had not been served on her for a period of about 10 years since the notice was issued vide the defendant's list of documents; that it was filed long after the hearing of the suit had commenced; that though the plaintiff had filed other lists and bundles of documents subsequent to the filing of defendant's notice contained in the defendant's list dated 10/12/2012, that document was consistently omitted from those lists and bundles; that the attempt to produce it is an ambush; that the defendant would be prejudiced if the said document were admitted in evidence in the instant case since it had not been availed an opportunity to amass its own evidence to counter it, and that in the event it was admitted, the defendant would need time to consider it. Other objections were that the said document is not addressed to PW1, that it is purported to be signed by a Mr. "Singh" without any other names or initials of the signatory being given, that PW1 was not the maker thereof, and that it has no address of the writer at all.
8. Mr. Kisilah on the other hand seeking to make light of the plaintiffs default, urged that the said document was intended to be included in the bundle; that it has now been finally served; that the defendants having not yet commenced the presentation of their case, would not be prejudiced by its production; that perchance it were admitted the defendant may be granted leave to fill whatever evidence it needs to counter it; that the need to serve bundles or copies of documents is vital but it is true that until 2010 litigants used to arrive in court at the hearing with bundles of documents that had not been disclosed to other parties; that where service of a document was inadvertently omitted the document should not be locked out for the fair administration of justice.
9. It is important that Mr. Kisilah has made the concession that the document that he wishes his client to produce was filed after 2010. Indeed, the previous Civil Procedure Rules dispensation did not have as comprehensive a discovery mechanism as the present one. With the enactment of Order 3 (2) (d) of the Civil Procedure Rules, it was made mandatory to file the plaint together with copies of the documents to be relied on at the trial, including a demand letter before action.
10. Similarly, under Order 7 Rule 5(d) the defence and counterclaim were also required to be accompanied by copies of documents that were to be relied on at the trial.
11. A perusal of Order 11 of the *Civil Procedure Rules* makes it clear that these were not idle requirements but those which the drafters of the rules intended to aid the court and the parties expedite litigation, and in the environment of massive case backlog that beleaguered our justice system then, these were quite handy requirements.
12. One of the purposes of Order 11 is to enable the court and the parties consider compliance with Order 3 Rule 2 and Order 7 Rule 5 (which both include the requirement to file copies of documents with



the main pleadings as seen herein above. Another purpose is to identify contested and uncontested issues, explore methods to resolve the contested issues, secure the parties' agreement on a specific schedule of events in the proceedings, narrow or resolve outstanding issues and create a timetable for the proceedings. It is clear that under a case conference provided for under Order 11 Rule 3 (2) (a) – (o) this court could have had occasion to consider, perchance it had been appropriately moved by the plaintiff, whether to allow the late filing of the document now subject matter of this ruling.

13. It is also clear that the provisions sequentially coming after Order 11 Rule 4, CPR envisage not the filing of any further documents by parties, but only 2 things: a settlement of the suit or a hearing of the suit. Under Order 11 Rule 7 (3), any party in default of compliance with the order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the *Civil Procedure Act*.
14. Therefore, the subject document having been filed long after the amendments I refer to, Mr. Kisilah's allusion to the former times when documents were unleashed upon unsuspecting parties in court on the day of hearing in his attempt to persuade this court to admit the document fails to blend in with the current times. Indeed, it is uncharacteristic of any litigant's counsel to unquestioningly allow a document filed after the hearing nowadays, and Ms. Gatu's objections were therefore quite expected and they need be assessed for their merits.
15. This court notes that the plaintiff's reluctance or failure to respond positively to the defendant's notice in the defendant's list of documents must have made the defendant take transitory comfort in the thought that no further documentary evidence would be filed until other bundles were filed. Once filed, the plaintiff's additional bundles in the instant case, still excluded that document. The defendant may therefore be forgiven for having all along prepared for its case with the belief that the said document would not feature anywhere in these proceedings. That is not all: the plaintiff did not commence the hearing of his case by attempting to produce the said document and had indeed not served it by the date the hearing of PW1's evidence commenced. Mr. Kisilah had to give notice of his intention to file it and serve it upon Ms. Gatu for the defendant. There is no way that kind of conduct cannot be interpreted as an ambush. In all ways it resembles one and this court will not condone trial by ambush.
16. The rules as to service of documents having been breached by the plaintiff, the offender must bear the consequences thereof by way of exclusion of that document from the bundles of documents it relies on, whatever the outcome of that exclusion, for it would be unjust to foist the said consequences upon the innocent defendant's shoulders.
17. Perchance this court were wrong in finding that the document ought to be excluded from the record for its late filing and service, when it comes to the issue of its admissibility and integrity, Ms. Gatu's submissions raised numerous points regarding the integrity of the document, namely that: the said document is not addressed to PW1, that it is purported to be signed by a Mr. "Singh" without any other names or initials of the signatory being given, that PW1 was not the maker thereof and that it has no address of the writer at all. It must be stated here that such a document as would if admitted in evidence have the potential to alter the course of litigation, possibly by making the plaintiff eligible to a huge sum in damages must have particulars that make it an authentic memorandum of a commercial transaction between the plaintiff and whoever it was purporting to communicate with. I do not find failure to bear a proper letterhead, an identifiable address, a proper name of a signatory, a telephone number, et cetera to be omissions that can endear any court to the possibility of admitting such a document in the circumstances outlined in this ruling. Besides, PW1, not being the maker, is not competent to testify on its contents especially when it does not indicate that it was addressed to him.



18. The upshot of the foregoing is that I uphold the objection by Ms. Gatu and I disallow the production of the said document by PW1. It shall remain marked as PMFI-7 in the court record.
19. This matter shall be mentioned on 6/12/2022 for issuance of a hearing date for the main suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF DECEMBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

