



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**ELC CIVIL SUIT NO 13 OF 2013**

**DANIEL KIPNGETICH KORIR.....PLAINTIFF**

**VERSUS**

**MARY KETER.....1<sup>ST</sup> DEFENDANT**

**PETER TANUI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. When this case came up for defence hearing, on 10<sup>th</sup> October 2021, Counsel for the Defendants made an oral application seeking the leave of the court for the defence to be allowed to introduce a new document not previously listed in their list of documents which application was opposed by Counsel for the Plaintiff to the effect that the said documents had not been supplied to them.
2. To put matters into perspective, this suit was commenced by way of a plaint which was filed on 21<sup>st</sup> February 2013 and amended on the 9<sup>th</sup> March 2016. The Defendants filed their statement of Defence on 4<sup>th</sup> April 2013, their list of witnesses and statements on 27<sup>th</sup> October 2014 and their list of documents on the 24<sup>th</sup> October 2014 that had a rider that: 'any other document to be produced at the hearing with the leave of Court'. They subsequently filed their defence and counterclaim to the amended Plaint on the 18<sup>th</sup> April 2016.
3. After the pre-trial conference, the hearing of the matter commenced on 12<sup>th</sup> February 2018 where the evidence of PW1 was taken. On the 8<sup>th</sup> March 2019, the Defendants filed their supplementary list of document, the surveyor's report dated the 5<sup>th</sup> November 2018 herewith, with a rider 'any other relevant documents that may come into possession of the Plaintiff'.
4. The matter proceeded for further hearing of the Plaintiff's case on the 4<sup>th</sup> March 2019 wherein the Plaintiff closed its case. The defence case was then set for hearing on the 2<sup>nd</sup> May 2019. On the 24<sup>th</sup> October 2019, with the leave of court, the defence filed their further amended defence.
5. On the 9<sup>th</sup> March 2020 the defence called its first witness who testified and the matter was slated for further hearing of the defence case. On the 4<sup>th</sup> October 2021 the defence called its second witness wherein the defence Counsel sought to produce as their exhibits, the surveyor's report dated the 5<sup>th</sup> November 2018 alongside the subdivision forms, transfer forms and the letter of consent to land parcel No. Kericho/Kabianga/1548 for the said subdivision from the Land Control Board.
6. The Application was objected to by Counsel for the Plaintiff to the effect that the defence was introducing new evidence at a time when the Plaintiff had already closed its case and therefore would not be in a position to call evidence to counter it.
7. The Court has given consideration to the submissions made by Learned Counsel herein and I find that apart from the surveyor's report dated the 5<sup>th</sup> November 2018 to which the defence had notified the Plaintiff as being one of the documents they intended to rely on vide their list of documents dated the 24<sup>th</sup> October 2019, I am afraid that I am unable to allow the introduction of the other documents herein above stated.
8. The Plaintiff has already closed its case and will not have an opportunity to verify such evidence. Order 7 Rule 5 of the Civil Procedure rules provide that:-

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

- a. an affidavit under Order 4 rule 1(2) where there is a counterclaim;

- b. a list of witnesses to be called at the trial;
- c. written statements signed by the witnesses except expert witnesses; and
- d. copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11

9. It will be seen from the above that the defence needs to file its documents, list of witnesses and statements, together with the statement of defence, and in any event, no later than 15 days from the date of the pre-trial conference. There is no provision for filing of witness statements after the close of the Plaintiff's case and although the court has the discretion to allow the introduction of new evidence, at any stage, the same must be in special circumstances wherein the defendant must demonstrate that the evidence was either deliberately concealed by the other party, or the same was not available to the defendant even after due diligence.

10. At this stage of the proceedings, the Plaintiff has already presented and exhausted his evidence and will not have an opportunity to introduce evidence to counter any new evidence not earlier discovered by the defendant. This will certainly prejudice the Plaintiff's case and may lead to an unfair trial of the suit.

11. The litigants and Counsel ought to have seriously adhered to the provisions that relate to discovery of evidence before litigation started before seeking to introduce new evidence at every step of the hearing as was in the present case.

12. Odunga J (as he then was) had the following to say in the case of **National Bank of Kenya Limited vs John Aswani Litondo & Another Nairobi HCCC No. 171 of 2006**, which views I fully endorse:

“The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of Sections 1A & 1B of the Civil Procedure Act are meaningfully implemented...to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing... To conceal documents until after the Plaintiff's case is closed was mischief that the new rules were meant to cure. Trial by ambush is no longer acceptable in civil litigation and any party doing so, will be doing so at the risk of being locked out of relying on its documents...”

13. In the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** Kiage JA held as follows:

“I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

14. Whereas the Court does appreciate that it is a constitutional imperative to administer justice without undue regard to procedural technicalities, yet any party who fails to comply with the clear and unequivocal rules of procedure set out in the Civil Procedure Rules, is duty-bound to provide a plausible account for the breach.

15. I therefore uphold Counsel Mr. Orina's objection and hold that save for the surveyor's report dated the 5<sup>th</sup> November 2018 which can be marked for identification, the application by the Defendants to introduce new evidence at defence stage is disallowed.

16. It is so ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**