REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 81 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

REBECCA CHEPNGENO SANG.....1ST DEFENDANT/RESPONDENT

KENNETH C. KOMEN.....2ND DEFENDANT/RESPONDENT

LYNNETTE JEBET RONO.....3RD DEFENDANT/RESPONDENT

WILSON GACHANJA.....4TH DEFENDANT/RESPONDENT

RULING

1. The application before me for determination is the one dated 13th July 2021, filed pursuant to the provisions of Article 50(1) and 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 3 rule 2 and Order 51 of the Civil Procedure Rules, and all enabling provisions of the law where the Applicant seeks to introduce new evidence in form of an additional witness Mr. Wilson Kibichii and his witness statement in support of their case so as to enable the court arrive at a just determination of the matter.

2. The said application is supported by the grounds therein, and the sworn affidavit of Christine Natome, Counsel on record for the Applicant, dated the 13th July 2021.

3. The application was opposed by the 2nd and 3rd Respondents through their Grounds of Opposition as well as the 2nd Respondent's Replying Affidavit dated the 9th September 2021 and 30th August 2021 respectively, for reasons that the said application was fatally defective, lacked merit, was incompetent, frivolous, vexatious, incurable and bad in law. That the same was seeking to introduce new evidence which amounted to an abuse of the process of the court. That further, Counsel for the Applicant sought to introduce new evidence the long after the Plaintiff/Applicants' witnesses had testified and directions had been issued by the court.

4. That there was no explanation for the inordinate delay in bringing the application and Counsel could not now be heard to say that it was an error on her part. It was their contention that in so introducing the said additional evidence, the Plaintiff/Applicant was seeking to fill in gaps that had been occasioned during the cross examination which would be prejudicial to the Respondents.

5. That Counsel was not party to the suit and was therefore not suitable to lodge the said application as the suit was filed against the Respondents by the Applicant.

6. On 24th July 2021 the court gave directions for disposal of the application by way of written submissions.

Applicant's submissions.

7. The Applicants' submission is to the effect that pursuant to the filing of the suit by the Applicant against the Respondents, Counsel had inadvertently left out the witness statements of Mr. Wilson Kibichii which was in their possession and which witness they considered to be an important witness in advancing their case.

8. The Applicant framed their two issues for determination as follows;

i. Whether the court should allow the Plaintiff/Applicants to introduce an additional witness as sought?

ii. Whether the application is merited.

9. On the first issue for determination, it was the Applicants'/Plaintiffs' submission that the provisions of Order 3 and 7 of the Civil Procedure Rules mandated parties to a suit to file their respective list of documents and documents as well as a list of witnesses and witness statements in support of their case while instituting a suit. That the application now was to introduce one more witness who was inadvertently left out.

10. That they intended to call a total of 10 witnesses to testify in support of their case and so for they had commenced with the testimony of only two witnesses. That the introduction of the said witness would not prejudice the Respondents as the witness is not introducing any new document, and in any event, the Respondents would have an opportunity to cross examine the witness as the Plaintiff has not closed its case. Reliance was placed on the Supreme Court's decision in **Raila Odinga & 5 Others vs IEBC & 3 Others [2013] eKLR,** amongst others, to buttress their submission.

11. The Applicants further submitted that the additional evidence was not introducing new documentary evidence as what he sought to rely on was already on record and in possession of the Respondents. That further, by the court according the Applicant leave to file the additional statement as sought, would be advancing the administration of justice and fair hearing as enshrined in Article 50 of the Constitution. That the court should not strifle fair hearing in pursuit of technicalities as envisaged under Article 159(1)(d) of the Constitution.

12. It was the Applicants' submission that errors, omissions, mishaps and blunders do happen and the court should not close its doors to a party because of a mistake of Counsel on record, as humans were prone to honest mistakes which was the case herein.

13. On the second issue for determination, the Applicants submitted that the application was merited and the same should be allowed as prayed. That the Respondents had failed to establish the kind of prejudice they would suffer if the application was allowed as the subject witness was not introducing any new evidence that required the filing of additional documentary evidence.

1st, 2nd, and 3rd Respondents' Submissions.

14. The Respondents' submission in opposition to the Applicants' application was that first and foremost, the impugned witness' statement had not been attached to the application that secondly the supporting affidavit to the application ought to have been deponed by the Applicant as Counsel was not party to the suit. That the said affidavit therefore amounted to giving evidence and Counsel for the Applicant was incompetent to produce the statement of Mr. Wilson Kibichii herein marked as annexture ''EACC 1".

15. That the provisions of Articles 50(1) and 159 of the Constitution popularly referred to as the "oxygen rules" could not aid Counsel for the Applicant in the circumstance.

16. That since their client had instructed them to have Counsel cross- examined, the provisions of Rule 9 of the Advocate (Practice) Rules were clear. That the supporting affidavit sworn by Counsel for the Applicant ought to be struck out as Counsel ought not to be seen to descend from her hallowed position in the bar into the arena of litigation by purporting to be a witness on matters of facts, a practice that has been frowned upon by courts over time. That the striking out of the supporting affidavit would automatically lead to the dismissal of the application dated 13th July 2021.

17. The Respondents further submitted that the list of the Applicants witness dated 11th December 2018 did not contain the name of the intended additional witness and therefore it was not right for Counsel to depone that she had filed the list of witness statements without the intended witness' statement. That equitable remedies do not aid the indolent and the falsehood herein contained in the Applicant's supporting affidavit, coupled with the inordinate delay in bringing this application did not qualify the Applicant to benefit from the court's exercise of its judicial discretion.

18. That the Applicants' sole intention was to fill gaps that had been occasioned during the cross examination of the Applicants' witnesses. That for four years, Counsel had gone to slumber only to wake up and realize that the witness' statement was lacking.

19. Their submissions was that the introduction of the new evidence would greatly prejudiced the Respondents in their line of defense considering that the pleadings had long been closed and directions for compliance had already been taken. That the application was fatally defective, and the court should not exercise its discretion in favour of the Applicant. The Respondents sought for the application to be dismissed with costs.

Determination

20. I have considered the application herein, the arguments for and against it the submissions herein submitted as well as the authorities cited and it is not in contention that the current suit was filed on the 11th December, 2018 contemporaneously with an application seeking interim orders.

21. On the 18th December 2018 by consent parties agreed to compromise the application with the orders of status quo, so as to fast track the hearing of the main suit which took off for hearing on the 24th February 2020. By the 28th January 2021, when the Applicant's Counsel sought for an adjournment after calling one witness, only two witnesses, out of a list of 10 witnesses, and 'any other witness that may be found to be relevant with leave of the court' had testified.

22. The current application was then filed by the Applicant seeking leave to introduce new evidence in form of an additional witness Mr. Wilson Kibichii and his witness statements in support of their case, so as to enable the court arrive at a just determination of the matter.

23. The Application was opposed by the Respondents mainly on the ground that the Applicant's supporting affidavit had been sworn by Counsel who was not party to the suit and secondly that the additional witness would prejudice them, the application having been made after

inordinate delay when the pleadings had long been closed and two witnesses having testified so far.

24. I have considered that the Respondents submission seeking to strike out the supporting affidavit sworn by the Applicant's Counsel for reason that it flaunted the provisions of Rule 9 of the Advocate (Practice) Rules which provide as follows;

> *No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear;*
>
> *Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."*

25. With tremendous respect this provision is distinguishable from the current scenario as it is applicable in instances where Counsel has acted for one party in a matter and then acted for the opposite party in subsequent litigation. However the same is not cast on stone as the test which has been laid down in authorities applied by the Court of Appeal is whether real mischief or real prejudice would in all human possibility result.

26. Indeed the case of ***British-American Investments Company (K) Limited vs Njomaitha Investments Limited & Another (2014) eKLR***, the Court of Appeal reiterated that existence of conflict of interest must be demonstrated and stated as follows;

> *"It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party."*

27. In the instant case, Counsel representing the Applicants s not on record for the Respondents but has filed an application seeking to adduce additional evidence. I find that the said Counsel who is also the legal advisor of the Applicant in leading the evidence in chief saw the need to call for further evidence in support of her case. There was therefore nothing wrong in making the said application since the witness so sought to be added shall adduce his evidence which shall then be tested through cross-examination.

28. That said and done, the issue for consideration is if the Plaintiff/Applicant should at this stage of the trial be allowed to file an additional witness statement.

29. In ***Raila Odinga & 5 Others*** *(supra)* the Court held as follows:

> *The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.*
>
> *The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence*

30. In the case of **Johana Kipkemei Too v Hellen Tum [2014] eKLR,** the Court held as follows**;**

> *The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of the Constitution. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each Court to weigh the surrounding circumstances of each case, and determine whether it will be in the interest*s of justice*, to allow such evidence to be tendered, though outside the time frame provided by the rules.*

31. The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by Counsel for the Applicant to file and serve their witness statement and documents.

32. Indeed Courts have held time and again that the mistake of Counsel ought not to be visited upon a litigant and that the Court should endeavor to assert and preserve a litigant's rights to be heard without placing undue weight on a litigant's Counsel's mistake.

33. In the case of **Britania Sacco v Jambo Biscuits Limited [2018] eKLR,** the court held that

> *A Court of Law should always be concerned with substantive justice and the main hearing of a matter the golden opportunity for a*

party to a dispute to put forward all the evidence it can marshal. From the practice of this Court, it is to be expected that the evidence will have already been filed prior to the Case Management Conference. But as is sometimes the case, either out of oversight or for other reason, this does not happen. So as to give parties the furthest opportunity of presenting their case, a Court will allow introduction of new evidence if the failure to include it in the first place was bonafide and does not prejudice the adversary or where prejudice can be mitigated by allowing the adversary to file fresh evidence. Invariably therefore whether to allow fresh Statements and Documents will turn on the circumstances of each case.

34. Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial. Though the court no doubt has jurisdiction to allow a party to introduce a new document or evidence, yet the same should be done judiciously keeping in mind that it should not be prejudicial to the other party. In the instance case the application was made by the Plaintiff before they had closed their case and therefore the defence would be at liberty to cross-examine the said evidence which in my view is a level playing field and not prejudicial to the Respondent.

35. Indeed I have gained sight of the additional witness statement so sought to be allowed and I find that the same **is directly relevant to the matter before the Court, has direct bearing on the main issue in the suit and shall remove any vagueness or doubt over the case. I also find that it is evidence already within the knowledge of the Respondent and therefore it would not be difficult or impossible for the Respondent to respond effectively.** I think it is only fair that leeway be given to the Plaintiff/Applicant.

36. To this end and in the spirit of Article 50(1) of the Constitution and Section 3A of the Civil Procedure Act, I allow the Application with the following directions.

i. The proposed new witness statement shall be filed and served within 14 days upon the delivery of this ruling.

ii. The Defendant/Respondent is at liberty to file and serve a rejoinder statement in reaction to the new evidence, within an equal 14 days, and to recall the Plaintiff's witnesses for further cross-examination (if need be.)

iii. The cost of this Application to abide the outcome of the main suit.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 11TH DAY OF NOVEMBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE