



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 29 OF 2012

DAVID GEORGE KATIBA RUTHI.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LTD.....1ST DEFENDANT

BARCLAYS BANK (K) LTD.....2ND DEFENDANT

JOSEPH M. GIKONYO T/A

GARAM INVESTMENTS.....3RD DEFENDANT

RULING

1. The application dated 20th February, 2020 seeks orders **that leave be given to the Plaintiff to file supplementary documents out of time.**
2. Secondly, **that the attached, served herewith, list of the audited accounts and financial statement be deemed as dully served with leave of court.**
3. It is stated in the grounds set out in the application and the affidavit in support that the Plaintiff gave instructions to his Advocates to file the documents in question but that due to an oversight they were not filed. It is further averred that the documents got mixed up in a different file when the Plaintiff's Advocates were relocating to a different office. That when the hearing of the case commenced it was realized that the Statements of Account were missing and a search was mounted for the same and they were retrieved. The court was urged not to lock out the Plaintiff's relevant material on grounds of technicalities of procedure.
4. The application is opposed by the 2nd and 3rd Defendants. It is stated in the replying affidavit that the application offends the mandatory provisions of Order 3 rule 2(d), Order 11, Order 15 rule 2(c) and Order 16 civil Procedure Rules which provide for the requirements of filing documents to avoid trials by ambush. That the cause of action herein arose in the year 2011 and the suit was instituted in the year 2012 and therefore the Plaintiff ought to have filed all the documents at the time of filing the suit. That the time of the alleged relocation of the advocate's offices is not disclosed nor the time the search commenced to enable the court to determine the issue of the unreasonable delay.
5. It is further averred that the Plaintiff had an opportunity to amend his plaint in the year 2014 and annexed a list of documents that he wished to rely on. That the Plaintiff then listed the Statement of Accounts issued on 8th July, 2002 but now wishes to include Statements for year 2009 to 2017 and even year 2018 to 2019 which do not support the argument in respect of misplacement of the initial documents.
6. It is contended that the Statements of Accounts for year 2012 to 2019 cannot amount to new and compelling evidence that has come to the knowledge of the Plaintiff after the filing of the suit but is a cunning manoeuvre to introduce additional documents to fill in the gaps exposed during the cross- examination of the Plaintiff.
7. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.
8. Article 159 of the Constitution and Section 1A, 1B and 3A of the Civil Procedure Act enjoin this court to dispense substantive justice and to ensure that there is just, expeditious, proportionate and affordable resolution of disputes and to make such orders as may be necessary to meet the ends of justice.
9. Order 3 rule 2 and Order 7 rule 5 of the Civil Procedure Rules provide for statements signed by the witnesses and copies of documents to

be relied on at the trial to be filed at the time of the filing of the suit or the defence. Although the record herein reflects compliance with Order 11 Civil Procedure Rules and readiness to proceed with the trial as at 9th November, 2017, I am persuaded that the Civil Procedure Rules are not cast in stone and this court has the discretion to make such orders as are necessary to meet the ends of justice. (See for example **Anne Mumbi Hinga v Gaitho Oil Limited [2013] eKLR** and **Jones Alaka Kimatu v Joseph Kimath [2017] eKLR**).

10. The case of **Lorna Jebiwott Kiplagat v Esther Cheruiyot & 5 others [2019] eKLR** which has been cited by the Defendants had been closed and had been delayed for 19th years prior to the application and is therefore distinguishable from the case herein.

11. The reasons given for the delay as narrated in the affidavit in support of the application lack pertinent details regarding the date of the giving of instructions by the Plaintiff to his advocates, when the advocates re-located offices and when it dawned on the Plaintiff's side that the documents in question had been left out. There has also been a lengthy delay of six years since the date the pre-trial conference was concluded. However, this delay cannot be wholly attributed to the Plaintiff. The case is still pending and the Plaintiff's case has not yet been closed.

12. The Defendants will have their chance to further cross- examine the Plaintiff and file any further witness statements and documents if they so wish. The court will also have an opportunity to evaluate the evidence vis-a-viz the date the cause of action arose and the dates the documents in question were generated. There is therefore no prejudice to be suffered by the Defendants which cannot be addressed herein whereas the Plaintiff stands to be locked out of presenting it's case on merits as opposed to technicalities of procedure.

13. With the foregoing, the upshot is that the application is allowed. Costs of the application in any event to the Defendants.

Dated, signed and delivered at Nairobi this 4th day of March, 2021

B.THURANIRA JADEN

JUDGE