



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 239 OF 2013**

**STEPHEN MBUGUA MWAGIRU.....PLAINTIFF**

**VERSUS**

**MUTHAIGA COUNTRY CLUB LTD.....1<sup>ST</sup> DEFENDANT**

**MUTHAIGA COUNTRY CLUB HOLDINGS LTD.....2<sup>ND</sup> DEFENDANT**

**COLLINS CHURCH.....3<sup>RD</sup> DEFENDANT**

**GRAHAM NICHOLLS.....4<sup>TH</sup> DEFENDANT**

**RULING**

The ruling herein arises from an objection that was taken by counsel for the defendant Mr. Murgor, when this matter came up in court for further hearing on the 17<sup>th</sup> day of October, 2019. On the said date Mr. Munyori, counsel for the plaintiff sought the leave of the court to recall the plaintiff to produce a supplementary list of documents that had been filed on the 28<sup>th</sup> day of January, 2019 but which, by an oversight, were not produced when the plaintiff testified in court.

Counsels made oral submissions on the 26<sup>th</sup> November, 2019 in support of their respective positions and relied on various authorities.

In his submissions, counsel for the plaintiff contended that the plaintiff has not yet closed his case and that the provisions of Order 18 Rule 10 of Civil Procedure Rules and Section 146 of the Evidence Act gives the court power to recall a witness at any stage of the proceedings. He further submitted that the defendant will have the opportunity to cross examine the plaintiff on the document sought to be produced and that in any event, the document, is the defendant's document and hence, the defendant will not suffer any prejudice should the court allow its production. Counsel relied on various authorities in support of his proposition being that of *Thomas Ngarachu Ngugi & 5 others vs. John Wanyoike ELC 204/2017* in which the court held that re-calling of a witness should be allowed so long as no prejudice will result to other side.

On his part, counsel for the defendant submitted that going by the affidavit of Stephen Mwangi sworn on the 12<sup>th</sup> day of August, 2013, the plaintiff knew at all material times that he shall rely on the said documents in support of his case.

He further submitted that parties having gone through the pre-trial process, the plaintiff later filed supplementary list of documents and served the defendant with the same on the 22<sup>nd</sup> October, 2019 after the plaintiff had testified and that, after attending court on two other occasions, called a 2<sup>nd</sup> witness who testified and was cross examined. Counsel contended that the court has not been given any reason for the delay from 2013-2019. He took issue with the defendant for the late filing of the document.

Counsel relied on a number of authorities including that of *Johana Kipkemei vs. Hell Toom (2014)* in which the court observed that parties are required to furnish each other with documents they shall use in the trial.

Relying on the case of *Thomas Ngarachu* (supra) in which the court held the position that in instances where a party wishes to re-call a witness or produce additional documents, it's important to look at the pleadings and the cause of action by the plaintiff, he submitted that there is no mention of the extract in the plaint.

On the prejudice to be suffered by the defendant, he submitted that the documents sought to be produced being the defendants' document, the plaintiff cannot be examined on it and that instead, the plaintiff ought to have served the defendant with a notice to produce the said document since the plaintiff has no business producing it.

In his short rejoinder submissions, counsel for the plaintiff submitted that the court is under duty to do justice and allow a party to produce its

evidence in full and reiterated his earlier submission that the court has power to recall a witness.

The court has considered the objection raised and the submissions by the counsels in support of and in opposition to the same. I have also taken into account the authorities relied on. Counsel for the plaintiff made an application to recall the plaintiff and the reason he has given is that, the Advocate who took over the conduct of the matter had forgotten to produce the document sought to be produced.

Section 146(4) of the evidence Act relied on by counsel for the plaintiff provides as follows;

***“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross examination and if it does so, the parties have the right of further cross examination and re-examination respectively.”***

The court notes that the said document was filed on 28<sup>th</sup> January, 2019 by way of plaintiff’s supplementary list and bundle of documents. The record shows that the plaintiff concluded his testimony on 6<sup>th</sup> December, 2018. On the said date, counsel for the plaintiff sought leave to file a supplementary list of documents. Following this request, he filed two sets of documents on 28<sup>th</sup> January, 2019 and on 18<sup>th</sup> February, 2019.

From the record, what is clear is that the documents sought to be produced were filed after the plaintiff had testified. It is not clear to the court whether counsel for the defendant was served with the said documents but from his submissions, the indication is that he was served. I note from his submissions that his main opposition to the production is that they are sought to be produced late. Infact, he has admitted that the documents are defendants’ and therefore, he is aware of the same and their contents. Whereas I concur with him that parties are required to furnish each other with documents that they wish to rely on, I find that the defendant will not suffer any prejudice as the plaintiff has not closed his case and the defendants will have an opportunity to cross examine him. In any event, being the defendants’ documents, they are aware of their contents and the same have already been filed in court. It is only fair that the plaintiff be recalled to produce the documents and I so order.

The objection is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2020.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....For the Plaintiff

.....For the Defendants