



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 79 OF 2013**

**CHARLES WAKHU OTOKOMA.....PLAINTIFF**

**VERSUS**

**JOYCE MALALA.....1<sup>ST</sup> DEFENDANT**

**MICHAEL ASUMBA.....2<sup>ND</sup> DEFENDANT**

**VINCENT MUYEYI.....3<sup>RD</sup> DEFENDANT**

**PROTUS MUKABANA.....4<sup>TH</sup> DEFENDANT**

**DANIEL OKELLO.....5<sup>TH</sup> DEFENDANT**

**MOSES MALALA.....6<sup>TH</sup> DEFENDANT**

**MARTIN NABWIRE.....7<sup>TH</sup> DEFENDANT**

**RULING**

In order to ensure an orderly way of conducting the trial process, parties are required to disclose their cases at an early stage. This ensures that there are no delays or ambush of a party and also promotes the expeditious disposal of cases while minimizing costs. That is why under **Order 3 Rule 2 of the Civil Procedure Rules**, the plaintiff is required to file a verifying affidavit, list of witnesses and their statements and copies of the documents to be relied upon during the trial. Similarly, the defendant is obliged under **Order 7 Rule 5 of the Civil Procedure Rules** to file the same documents together with his defence and Counter – Claim, if any. Before the pre – trial conference, statements may be filed with leave of the Court. Thereafter, all the parties will have disclosed their respective cases so that the trial can proceed in a seamless manner. All this is geared towards ensuring a fair trial as guaranteed under **Article 50(1) of the Constitution**. However, these are pre – trial directions and in ensuring that justice is administered without undue regard to technicalities as provided under **Article 159(2) (d) of the Constitution**, the Court can exercise its discretion in allowing a party to file fresh statements and documents but in so doing, no prejudice should be occasioned to either party. Each case must therefore be decided on its own peculiar circumstances.

In **MARCLUS KIRANGA NIMROD & ANOTHER.V. NESSY KUTHI JUSTUS & ANOTHER KERUGOYA ELC CASE NO. 737 OF 2013 (2017 eKLR)**. I allowed the plaintiff to introduce new evidence because he had not closed his case and the defendant would have an opportunity to rebut such evidence during the defence case. **JUSTICE MUNYAO** has also taken the same view in **ESTHER WAMBUI NJENGA .V. HARRISON MWANGI NYOTA & OTHERS NAKURU ELC CASE NO 5 OF 2017 [2018 eKLR]**.

However, in **FLAVERMART ENTERPRISES LTD .V. KENYA RAILWAYS KISUMU ELC CASE NO 48 OF 2013 [2018 eKLR]**, the Court declined to allow the defendant to file further statements since the plaintiff had already closed his case. See also **FREDERICK JUMA AHIJA & ANOTHER .V. JASON OYOLA OPENDA & ANOTHER .V. JASON OYOLA OPENDA & OTHERS KISUMU ELC CASE NO 730 OF 2015 [2018 eKLR]** and **JOSEPH TAABU DESILO .V. PETER OKIRU OMELA BUNGOMA ELC 110 OF 2014 [2018 eKLR]** where the Court expunged from the record documents filed late and without leave of the Court.

The plaintiff herein closed his case on 22<sup>nd</sup> May 2019 and the defendants' case was listed for hearing on 3<sup>rd</sup> October 2019. On that day however, **MR MAKOKHA** counsel for the defendants sought time to re – organize the defence case because two of the defendants' main witnesses had passed away in 2017 and 2018. He also informed the Court that previously, this case and **ELC CASE NO. 49 OF 2014** were to be consolidated and some of the defendant's witness statements are in that file.

**MR MUSEVE** counsel for the plaintiff informed the Court that on 22<sup>nd</sup> May 2019, the defendants had been granted leave to substitute a witness but that had not been done.

The Court nonetheless gave the defendants time to re – organize their witnesses since some of their statement were in **ELC CASE NO 49 OF 2014** which was assumed would be consolidated with the case. The case was then fixed for hearing on 22<sup>nd</sup> January 2020.

On that day **MR MUSEVE** drew the Court’s attention to the fact that he had just been served with new statements of three witnesses namely: -

**1. JOYCE MALALA**

**2. JULIANA A. MALALA** and

**3. DANIEL O. MALALA**

which are different from the earlier statements dated 3<sup>rd</sup> and 6<sup>th</sup> April 2013 and filed on 2<sup>nd</sup> May 2013 and also filed on 12<sup>th</sup> October 2015 and dated 29<sup>th</sup> June 2015 by the same witnesses. He asked that they be expunged from the record.

**MR MAKOKHA** objected and stated that there was no basis for expunging the said statements. He argued that there was nothing in the new statements that was different from the previous statements and in any case, the plaintiff will have time to cross – examine those witnesses and no prejudice would be caused to the plaintiff. He found the application to be an attempt to delay the case and asked that it be disallowed.

**MR MUSEVE** responded that the statement of **JOYCE MALALA** was different from the one earlier filed and, in any case, the defendants were given time to re – organize but not to file new statements.

I have considered the submissions by counsel.

When counsel for the defendant addressed me on 3<sup>rd</sup> October 2019, he sought time to re – organize the defence witnesses because some of their statements were in another file which was previously supposed to be consolidated with this case but that was not done. He was allowed to do so. The record shows that on 22<sup>nd</sup> January 2020 the defendants filed statements by the following witnesses: -

**1. JOYCE AYIELO MALALA** dated 11<sup>th</sup> October 2019.

**2. JULIANA ADHIAMBO MALALA** dated 11<sup>th</sup> October 2019

**3. MATHIAS MAKANDA INDUMULI** dated 11<sup>th</sup> October 2019

**4. ALFRED SIMIYU WASIKE** dated 11<sup>th</sup> October 2019

**5. VINCENT MUYEYI MALALA** dated 11<sup>th</sup> October 2019

**6. DANIEL OKELLO MALALA** dated 11<sup>th</sup> October 2019

**MR MUSEVE** has pointed out the difference between the witness statements signed by **JOYCE MALALA**, **JULIANA A. MALALA** and **DANIEL O. MALALA** dated 11<sup>th</sup> October 2019 and filed on 22<sup>nd</sup> January 2020 and those signed by the same witnesses and filed in **MAY 2013** when the defendants filed their defence and witness statements. Although **MR MAKOKHA** pointed out that there was nothing new in the statements of the above-named witnesses, he did not explain why he had to file new witness statements if indeed there was nothing in them different from their previous statements. I have myself perused the statements of **JOYCE MALALA** and **JULIANA MALALA** filed on 22<sup>nd</sup> January 2020 and compared them to the statements by the same witnesses filed previously in **MAY 2013** and October 2015 and it is clear that they are different.

The plaintiff has already testified, called his witnesses and closed his case. All this was with the knowledge that the defendants’ case was hinged on the defence and witness statements previously filed in this case in compliance with the Rules as to filing of witness statements and documents. For the defendants to introduce new statements at this stage is clearly prejudicial to the plaintiff and amounts to trial by ambush. That is in derogation from the principle of a fair trial enshrined in **Article 50(1) of the Constitution**. It is also in contravention of the provisions of the Civil Procedure Rules which are meant to ensure that at the parties in a dispute know the case and evidence that they are supposed to traverse.

Accordingly, therefore, I up – hold the objection by **MR MUSEVE** and direct that the defendants’ witness statements filed herein on 22<sup>nd</sup> January 2020 shall be expunged from the record. The trial shall proceed on the basis of the statement filed earlier.

It is so ordered.

**Boaz N. Olao.**

**J U D G E**

**20<sup>th</sup> February 2020.**

**Ruling dated, delivered and signed in Open Court this 20<sup>th</sup> day of February 2020 at Bungoma.**

Ms Mburu for Guserwa for plaintiff present

Mr Makokha for defendants present

Joy/Okwaro – Court Assistants

**Boaz N. Olao.**

**J U D G E**

**20<sup>th</sup> February 2020.**