



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 21 OF 2017

PINNACLE PROJECTS LIMITED..... PLAINTIFF

-VERSUS-

PRESBYTERIAN CHURCH OF EAST

AFRICA, NGONG PARISH.....1ST DEFENDANT

THE PRESBYTERIAN FOUNDATION.....2ND DEFENDANT

RULING

This ruling arises out of an objection raised by Learned Counsel Mr. Nyaosi for the plaintiff on the production of a witness statement for the defence from Tuskys within the trial of the claim when the plaintiff had already closed its case.

The objection sought to strike out the witness statement on the grounds that:

- (a) It is an abuse of the process of the court in that it had been filed after discovery and purportedly after closure of the plaintiff's case**
- (b) It seeks the trial by ambush**
- (c) That the witness statement was not part of the initial bundle of document served by the defence during the pre-trial conference**
- (d) That it has been introduced for a collateral and improper motive**
- (e) That a look on the face of the statement though it has a signature the stamp of the court superimposed on it is fake**
- (f) That during the pre-trial conference parties in compliance with the Civil Procedure Rules on discovery filed their respective list of witnesses and documentary evidence to be relied upon, but this one witness and statement was not one of them on record.**
- (g) That the failure by the defendant to disclose and avail this key witness statement is an affront to a fair trial.**
- (h) That as a result of the court exercises discretion to admit the witness statement the plaintiff will suffer prejudice and injustice as already their case is closed and it's time for the defence to be called upon to answer.**

Mr. Naikuni learned counsel for the defence submitted that the failure to file and serve this specific witness statement was an oversight and an error on the part of the Clerk in the office. That his main purpose to have a witness from Tuskys supermarket is only aimed at the interest of justice on account of the proceedings before this court. Further, learned counsel submitted that though they had not particularized the name of the witness in court they had indicated a need to adduce evidence from the aforesaid organisation.

Analysis and Determination

The Law

The position in Kenya regarding on the principle of disclosure on the claim against the defendant starts immediately at the commencement of filing of the suit as provided under order 3 of the Civil Procedure rules. The opponent is also entitled to file his defence and or counter claim

in answer to the claim pursuant to Order 7 of the same Civil Procedure rules. Both the plaintiff and the defendant under Order 3 and 7 are mandated to file the following documents:

- (a) A verifying affidavit
- (b) List of witnesses
- (c) Statements of witness expert evidence if any
- (d) Copies of documentary evidence in support of their respective cases at the trial.

Consequently, order 11 of the civil Procedure Rules deals with specific questions on the case management directions on matters that would mirror in the trial court and the circumstances surrounding the claim pending determination between parties by the court.

What is the purpose and function of pre-trial discovery? The question of its necessity and importance has been discharged in **Halsbury's Laws of England Volume 13** where it was stated as follows:

“The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

In terms of this doctrine of discovery and disclosure there is no question an inquiry as to the diligent, duty of care or what amounts to unreasonable delay are matters that must weigh heavily upon the court exercising discretion in one way or another dependent upon the circumstances of facts of a particular case.

In the case of **Raila Odinga & 5 Others v IEBC and 3 Others 2013 eKLR** the supreme Court stated as follows on the correct legal position where the court has to consider whether to admit or reject additional evidence filed outside the stipulated statutory timeliness:

“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 characteristics 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 of the new material intended to be provided 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 admissions of additional evidence.”

It seems to me that a reading of the above cases the principles elaborated upon is that the discretion of the court is not fettered on admission of additional evidence after the trial has commenced and the plaintiff case has been heard fully.

When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law.

In the instant case although the plaintiff has closed its case and is time for the defendant to answer both of them are on a mission for the quest of administration of justice. There is no greater duty for the court than to deliver substantive justice as provided for under Article 159 2(d) at the end of it all.

While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time.

From these specific precepts born out of criminal procedure protections account for guarantees to due process and right to a fair hearing in Civil administration of justice. The doctrine of fairness of the procedure ultimately shall as the case may be the precise architect implied under Order 3, 7 and 11 of the Civil Procedure rules.

Deriving support from the leading principles of criminal justice on disclosure in the case of **Dennis Edmond Apaa and 2 Others v Ethics and Anti-Corruption Commission and another Petition No. 317 of 2012** the court observed as follows:

“The Cholmondeley case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of Republic v Word cited by the Court of Appeal is clear on the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2) (j) that guarantees the right to be informed in advance cannot be read restrictively to mean in advance of the trial, the duty imposed on the court is to ensure a fair trial for the accused or a party in a

civil proceeding and the right of disclosure is protected by the accused or adverse party in a civil case being influenced of the evidence having reasonable access to it. Their right is to be read together with other rights that constitute the right to a fair trial.”

From the above discourse the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 50 of the constitution would not correspond with the purposeful interpretation of the aforesaid Article on the concepts of the right to a fair hearing which it was designed to protect. The aim of the right is to ensure the fair administration of justice and adherence for one to be given an opportunity to be heard by an independent tribunal without any obstacles laid on the way.

As a minimum guarantee the right to a fair trial includes fair trial rights in civil cases. The conceptualization and operationalisation of the right to a fair trial was clearly expounded in the case of **Juma & Another v Attorney General 2003 eKLR** where the court held:

“It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare at which he is permitted to have the assistance of a lawyer of his choice, a he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary’s witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgement, a right to argue that a decision be made in accordance with the law and evidence.”

This dictum by its prescription adopted a liberal approach primarily to guarantee and clothe the court proceedings with protectionist rights in consonant with the provisions of Article 50 of the Constitution.

In the case submitted by the plaintiff the right to admit additional evidence cannot be limited on grounds that pleadings and discovery closed long-time ago. While I may be inclined to agree with the plaintiff’s counsel no right is absolute. In the present case order 18 rule 10 of the civil procedure rules allows for recall of witnesses at any stage of the proceedings before final judgement.

Further section 146 of the Evidence Act provides for inherent power of the court to allow witnesses to be recalled and evidence obtained in accordance with the provisions to either conduct examination in chief, further cross-examination and re-examination respectively. The realization of the above trial events is geared at a legal process which is in line with the principles and values on integrity, accountability and transparency under Article 10 of the Constitution in adjudication of disputes. If this court closes out the evidence stated to be introduced at this stage, the contest to me can neither be said to be equal, accurate, transparent or fair to say the least.

The contours of Civil due process are the bedrock principle that a trial of the claim must precede judgement cannot be over emphasized. At the heart of Article 50 of the constitution is the notice - hearing approach and due process before an independent tribunal which simply underpins the foundation of our adversarial system of justice. Under the constitution and Civil Procedure Act and rules a model of procedural fair administration of justice highlights the following components:

- (1) Participatory procedures in the proceedings
- (2) An independent and competent umpire or adjudicator
- (3) Prior due process before judgement
- (4) Continuity fair trial rights to attach at all stages of the hearing.

We are not saying here that the civil due process imports the entire highly developed criminal procedure policy guidelines into the Civil Procedure setting. But in surveying the constitutional landscape both approaches benefits from the implicit right to a fair hearing model in litigation of the dispute or indictment. In the context of the objection raised by counsel for the plaintiff urging this court not to admit additional witnesses statement on grounds that case for the plaintiff has closed.

I have this to say it is important that in any judicial process adjudication parties involved be given an opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.

Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pre-trial or in the course of the trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The Civil Procedure Act and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time of disposition. Since the procedural directions are meant to serve substantial justice it follows therefore careful weight should be given to facially legitimate and bonafide reason for any procedural errors or omission in order to exercise discretion for the interest of justice.

In assessing what process is due in this case I give substantial weight to whether by admitting the impugned additional witness statement by the defence; there would be a likelihood of prejudice or injustice to the plaintiff. It is notable that the Civil Procedure Act Rules under Section 1A and B, Order 18 and the application of the Section 146 of the Evidence Act with particular on this issue prescribes powers and procedures within which the court exercises discretion as the particular case demands.

I have considered the plaintiff's claims in light of the facts of the case demands. I am of the view that he has not shown any prejudice or injustice to be suffered if additional witness statement by the defence is admitted and served in advance to enable him challenge it during the hearing of the defence case. I think that the very nature of due process rules is shaped to cure the risk of error or omission inherent in the truth finding process applied in the adjudication of cases.

Accordingly, the objection by the plaintiff counsel is hereby dismissed for being unmeritorious. The defendant witness statement be admitted in evidence and have it served upon the plaintiff before the next hearing date. The plaintiff has a right to file a rejoinder statement to call or recall the witnesses for further examination in chief, cross-examination or re-examination on matters arising from the additional and fresh evidence introduced by the defendant. The cost of this application to abide the outcome of the main suit.

Dated, Delivered and Signed in open court at Kajiado this 12th February, 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Thiong'o for the plaintiff - present

Ms. Obel for the Respondent - present