



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO 55 OF 2017

FREEMAN WAFULA WATAMBEKO 1ST PLAINTIFF

LEONARD OWENS WATAMBEKO 2ND PLAINTIFF

PETER MAMBIRI WATAMBEKO 3RD PLAINTIFF

NICK LUGANO WATAMBEKO 4TH PLAINTIFF

VERSUS

ENOS JUMA WABOMBA DEFENDANT

RULING

The plaintiffs closed their case herein on 26th February 2020 after which the defendant also testified and called five (5) witnesses. Thereafter, **MR MURUNGA** counsel for the defendant sought to be allowed to call as the defendant's witness one **MIKE FWAMBA** who was the parties Chief so that he can produce a letter that he wrote touching on the dispute between them. The said **MIKE FWAMBA** did not record any witness statement and **MR MURUNGA** had assumed that the said letter dated 7th February 2018 would not be opposed.

However, **MR WERE** for the plaintiffs opposed the calling of the said **MIKE FWAMBA** as a witness in this case stating, firstly, that he had not recorded a statement and he is not in a class of expert witnesses. Secondly, that he had been in Court all along listening to the evidence adduced by the parties and finally, that the plaintiffs would be prejudiced.

MR MURUNGA in reply took the view that the intended witness would only be reiterating the contents of the letter which he wrote when he was a Chief.

That application is the subject of this ruling.

It is clear from the documents filed by the defendant including the witness statements that **MIKE FWAMBA** was not listed as among his witnesses nor was the letter dated 7th February 2018 which is sought to be produced by him listed as among the defendant's documents.

In order to ensure orderliness in the conduct of a trial and also to prevent trials by ambush, the Civil Procedure Rules require parties to furnish their evidence to the other side in advance before the commencement of the trial. **Order 3 Rule 2 of the Civil Procedure Rules** provides that: -

“All suits filed under rule 1(1) including suits against the government, except small claims shall be accompanied by –

(a) The affidavit referred to under Order 4 rule 1(2);

(b) A list of witnesses to be called at the trial;

(c) Written statements signed by the witness excluding expert witnesses; and

(d) Copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of the Court be furnished at least fifteen days prior to the trial conference under Order 11.”

A similar requirement is expected of a defendant while filing a defence and Counter – Claim under **Order 7 Rule 5 of the Civil Procedure Rules**. I take the view that neither **Order 3 nor Order 7 of the Civil Procedure Rules** bar a Court, for sufficient reasons and upon application, from allowing a party to file late statements so long as there is a good explanation as to why that was not done at the right time and, most importantly, the other side will not be prejudiced. The stage at which the trial has reached will also be an important consideration. That is the position that I took in **MARCLUS KIRANGA NIMROD & ANOTHER .V. NESSY KUTHI JUSTUS & ANOTHER 2017 eKLR** where I allowed the plaintiff who had not yet closed his case to introduce a new witness because the document sought to be produced had not been available earlier and no prejudice would be caused to the defendant who was at liberty to file fresh documents. I took a similar view in the case of **JOSEPH MUMERO WANYAMA .V. JARED WANJALA LYANI & ANOTHER 2019 eKLR**.

However, where an application to introduce a new witness and new documents is made late in the trial, I have taken the view that it would not be proper to allow the introduction of such evidence as that would prejudice the other side. Therefore, in both **FLAVERMART ENTERPRISES LTD .V. KENYA RAILWAYS CORPORATION KISUMU ELC CASE NO 48 OF 2013** and **FREDERICK JUMA AHIJA & ANOTHER .V. JASON OPENDA OYOLA KISUMU ELC CASE NO 730 OF 2015 [2018 eKLR]**, I declined similar applications where the plaintiffs had already closed their cases and would therefore be prejudiced by the introduction of new evidence which they would not be able to rebut. While appreciating the right to a fair hearing as guaranteed by **Article 50(1) of the Constitution** and which of course means allowing a party to present the whole of his case and evidence for adjudication by the Court, there must also be a level playing field where parties know the case that they have to meet. Parties ought not to be taken by surprise in the cause of the trial. That would amount to trial by ambush which would in itself negate the very essence of **Article 50(1) of the Constitution**. Each case must however, be considered on its own peculiar circumstances.

In his case, the witness whom the defendant wishes to call is a former Chief. He is not in the class of expert witnesses and therefore, he ought to have recorded a statement. He did not do so. No reasons have been advanced as to why he did not record a witness statement. Besides, the plaintiffs have already testified and closed their cases without the advantage of knowing what this witness will testify about. They will be prejudiced. I uphold the objection by **MR WERE** and direct that **MIKE FWAMBA** will not be permitted to testify in these proceedings on behalf of the defendant.

What then is the fate of the letter dated 7th February 2018 and which the said **MIKE FWAMBA** authored and the defendant wanted him to be called as a witness so that he can produce it?

The said letter is part of the defendant's documents filed herein and is document No. 8 of the defendant's supplementary list of documents filed on 8th February 2018. I notice from the record however that although on 11th May 2017 the Court had directed the parties to comply with **Order 11 of the Civil Procedure Rules**, that was not done. It is at that trial conference that the parties would have agreed on, inter alia, admission of any statements without calling the makers. Although the letter by the said **MIKE FWAMBA** dated 7th February 2018 is already part of the documents filed by the defendant, this Court cannot admit it without the said **MIKE FWAMBA** being called as a witness to testify on its contents and be cross – examined on it. This was considered by the Court of Appeal in the case of **PRAFULLA ENTERPRISES LTD .V. NORLAKE INVESTMENTS LTD & A – G C.A CIVIL APPEAL NO 117 OF 2006 (KSM) [2014 eKLR]** where it said: -

“In our view, the fact that documents are produced by consent of the parties to a suit is not in itself proof of the contents of these documents. It only means that parties agree that those are the documents the contents of which are to be canvassed, or are in controversy but as to the proof of the same contents, witnesses are required to be produced and to be examined and cross – examined on the same contents unless the parties categorically admit the contents.”

My understanding of the above is that unless the parties agree, during the trial conference to admit the contents of the documents filed, without calling the makers thereof, those persons must be called as witnesses so that they can be examined and cross – examined on the contents of the documents in question. The parties did not do so in this case and it is clear from the objection raised by **MR WERE** that the plaintiffs object to the production of the letter dated 7th February 2018 and authored by one **MR MIKE FWAMBA**. And in view of the fact that I have already ruled that the said **MR MIKE FWAMBA** shall not be allowed to testify in this case, it follows that the said letter shall be expunged from the record herein.

Ultimately therefore, I make the following orders with regard to the objection raised by **MR WERE** on 26th February 2020: -

- 1. The objection is up held.**
- 2. MIKE FWAMBA will not be permitted to testify on behalf of the defendant.**
- 3. The letter dated 8th February 2018 and authored by the said MIKE FWAMBA will be expunged from the record herein.**

Boaz N. Olao.

J U D G E

27th May 2020.

Ruling dated, delivered and signed at Bungoma this 27th day of May 2020.

Boaz N. Olao.

J U D G E

27th May 2020.

This Ruling was due on 4th June 2020. However, in view of the measures restricting Court operations due to the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23rd April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

Boaz N. Olao.

J U D G E

27th May 2020.