



REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 1203 OF 2015

PARADISE SAFARI PARK LIMITED.....PLAINTIFF

=VERSUS=

THE ATTORNEY GENERAL.....1ST DEFENDANT

SINOHYDRO CORPORATION LIMITED.....2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant filed a Notice of Motion dated 21st November 2018 which sought certain documents from the Plaintiff/Respondent in relation to this case. The Applicant also sought for leave to amend the defence filed. The application was necessitated by the fact that in the witness statements of the Respondents' witnesses, the witnesses had stated that River Kigwa passed under some of the buildings and a carpark through an underground tunnel. The Applicant therefore argues that it is necessary for the Respondent to avail the documents particularly the design of the underground tunnel and the necessary approvals and licences from various entities to enable the Applicant prepare his case.

2. The Applicant argues that it is in the interest of justice that he is allowed to amend the defence to plead issues of negligence on the part of the Respondent.

3. The Respondent has opposed the Applicant's application based on grounds of opposition filed on 19th March 2019 and replying affidavit sworn and filed on the same date. The Respondent contends that the Applicant is in contempt of the court order given on 16th October 2017 and should be denied audience until he purges the contempt. The Respondent also argues that the application for discovery has been made too late and that in any case the documents being sought were razed down in a fire that gutted the Respondent's premises on the night of 18th March 2017.

4. The Respondent also opposes the application for leave to amend arguing that the same has been made too late and that it seeks to introduce a new line of defence which will prejudice the Respondent.

5. I have considered the Applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions filed by the parties herein. There are two issues to be determined, the first is whether an order of discovery should issue. The second is whether leave should be granted for the Applicant to amend his defence.

6. The objective of discovery has been well captured in Halsbury's Laws of England Vol 13 paragraph 1 where it is stated as follows:-

“The function of discovery of documents is to provide the parties with the relevant documentary materials before trial so as to assist them in appraising the strength and weakness of their relevant cases and thus provide the basis for the fair disposal of the proceedings before it or at the hearing.”

7. On the point of discovery, the Respondent had made an application for an order for discovery. In a ruling delivered on 16th October 2017 the court ordered the Defendants to provide the required documents within 45 days. That order was not complied with and this is the basis upon which the Respondent wants the present application denied until the Applicant purges the contempt. In this regard, the Respondent relied on the decisions **in Mawani –Vs- Mawani [1976-1980] eKLR and Ramesh Popatlal Shah & 2 others –Vs- National Industrial Credit Bank Limited [2005] eKLR** where the parties who were in contempt of court were denied audience until they purged the contempt.

8. Whereas I do not encourage disobedience of court orders and whereas I agree with the decisions relied on by the Respondent, I must say that it is not automatic that where a party has not complied with a court order, he/she should be denied audience. A party should only be

denied audience if the disobedience has made the court's work difficult. In the instant case, the case is yet to be heard and the Applicant has not indicated that he is not going to comply. I therefore find the Applicant cannot be denied audience at this stage.

9. The Applicant is seeking documents which will assist him to prepare his defence. From the statements by the Respondent's witnesses, it is clear that the Respondent had built over River Kigwa. There is a car park and other buildings on top of the river. This construction of an underground tunnel for River Kigwa would not have been done without approval from the relevant authorities. It is therefore important that the sought documents should be availed so that the Applicant can prepare his case.

10. The Respondent has said that the documents which are being sought are unavailable because they were razed by a fire which gutted its premises on 18th March 2017. I have no doubt that this may be the case because the Respondent has produced a police abstract and a document from the Nairobi City County on the said incident. However this does not prevent the Respondent from availing certified copies of the same from the authorities which granted it licences to divert the course of River Kigwa and construct an underground tunnel. If NEMA gave licence, there should be no problem in getting a copy from them. This is the case Water Resources Management Authority and Nairobi City County. I therefore find that the order for discovery is necessary.

11. On the issue of amendments, the law is clear that amendments should be given freely at any stage before the close of hearing as long as there will be no prejudice on the part of the Respondent. The purpose of amendment is to allow the parties to put before the court all the materials which will enable the court to determine the issues in controversy. The case herein is on alleged flooding of the premises of the Respondent which is said to have been caused by the diversion constructed during the construction of Thika Super-Highway at Safari Park area which caused damage to the Respondent's properties.

12. The Applicant wants to amend his defence to plead negligence on the part of the Respondent for constructing an underground tunnel for River Kigwa which may have been the cause of the flooding. It is important that the amendment be allowed so that all the parties can be treated fairly. There is nothing new which is being introduced which will prejudice the Respondent and the length of delay in bringing this application is not a reason to deny the Applicant leave to amend. To this extent, allowing application for amendment will not go against the decision in Eastern Bakery –vs- Castelino [1950] EA 365 which has been relied on by the Respondent.

13. From the above analysis, it is clear that the Applicant's application is merited. I allow the application and direct that documents sought should be availed within 60 days from the date of this ruling. The amended defence should be filed within 14 days from the date of this ruling. Costs shall be in the cause.

It is so ordered.

Dated, signed and delivered at Nairobi on this 14th day of May 2020.

E.OBAGA

JUDGE

In the virtual Presence of :-

Mr Kamau for Mr Eredi for 1st Defendant

Court Assistant: Hilda

E.OBAGA

JUDGE