



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO.22 OF 2003**

**PETER WANJALA WABWILE.....1<sup>ST</sup> PLAINTIFF**

**CHARLES MUSUMBA KEYA (SUBSTITUTED**

**BY SHADRACK MUNYIGULA KEYA).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PETER MAELO LUBAKAYA (substituted by**

**PHILIP MASINDE LUBAKAYA.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**DAVID W. MAELO.....4<sup>TH</sup> DEFENDANT**

**BENEDICT W. MAELO.....5<sup>TH</sup> DEFENDANT**

**VINCENT BARASA MAELO.....6<sup>TH</sup> DEFENDANT**

**MAURICE M. MAELO.....7<sup>TH</sup> DEFENDANT**

**ELIUD WAFULA MAELO.....8<sup>TH</sup> DEFENDANT**

**MANUEL SIMIYU MAELO.....9<sup>TH</sup> DEFENDANT**

**ABRAHAM MAINA MAELO.....10<sup>TH</sup> DEFENDANT**

**WILFRED WAFULA MAELO.....11<sup>TH</sup> DEFENDANT**

**DANIEL BARASA BABIKINA.....12<sup>TH</sup> DEFENDANT**

**MOSES SIRENGO MAELO.....13<sup>TH</sup> DEFENDANT**

**JOSEPH NYONGESA MAELO.....14<sup>TH</sup> DEFENDANT**

**RULING**

This ruling is in respect to the plaintiff's application dated 19<sup>th</sup> October 2018 which seeks the following orders:

- 1. Spent**
- 2. That the plaintiffs be given leave to file a further list of documents.**

**3. That the annexed draft further list of documents be deemed as duly filed and served upon the defendants.**

**4. That the costs of this application be in the cause.**

The application is based on the grounds set out therein and is also supported by the affidavit of **SHADRACK MUYIGULA KEYA** the 2<sup>nd</sup> plaintiff herein.

The gravamen of the application is that the documents sought to be introduced i.e.;

**(a) The Kenya Gazette Vol. CII-50 of 25<sup>th</sup> August 2000.**

**(b) Proceedings in KITALE CM CRIMINAL CASE NO.1401 of 2007 and**

**(c) Proceedings in BUNGOMA CM CRIMINAL CASE NO.2297 of 2004**

are necessary and relevant for the fair and just determination of the issues in this dispute and only came to the knowledge of the plaintiff subsequent to the close of pleadings and had not been obtained at the time this suit was filed.

The 2<sup>nd</sup> to 14 defendants did not file any response to the said application.

The 1<sup>st</sup> defendant filed grounds of opposition to the application describing it as an abuse of the process of the Court and running counter to the overriding objections principles. Further, that no sufficient reasons have been given as to why the documents sought to be produced were not filed in time and the defendants will be gravely prejudiced. The fact that the original plaintiff has now died without being cross-examined does not favour the grant of the orders sought.

The application was canvassed orally by **MS. ASHITSA** for the plaintiffs and **MR. OCHARO** for the 1<sup>st</sup> defendant.

I have considered the application and the oral submissions by Counsel.

**MS. ASHITSA** has submitted that the documents sought to be introduced only came to the knowledge of the plaintiffs after pleadings had closed and although the plaintiff has testified, he only came in to substitute the original plaintiff and did not know about the documents sought to be introduced. Further, that the plaintiff who has not closed his case can be re-called for cross examination and therefore, no prejudice will be caused to the defendants.

In opposing the application, **MR. OCHARO** for the 1<sup>st</sup> defendant described it as an abuse of the process of the Court because on 25<sup>th</sup> July 2018, this Court granted the plaintiff 14 days to file a formal application to adduce new evidence but this was only done on 30<sup>th</sup> October, 2018 and without leave. Counsel was of the view that to allow this application will be subverting the overriding objectives of the Civil Procedure Act on the expeditious disposal of cases. It is also **MR. OCHARO's** view that the documents sought to be produced are Court documents some of which were certified way back in 2007 and the plaintiff cannot now say they were not available.

And since the plaintiff is not being candid, he is not deserving of this Court's exercise of its discretionary powers in his favour and the application should be dismissed.

In response to the objection that this application was filed outside the 14 days period, **MS. ASHITSA** said she did not hear the Court announce the period and apologized for the lapse.

It is of course correct that on 25<sup>th</sup> July 2018 when **MS. ASHITSA** orally sought leave to file further documents, this Court granted her 14 days to do so. She did not comply with that order and instead filed this application on 30<sup>th</sup> October 2018. Her explanation is that she did not hear the Court give that time line. She has also apologized for that. The Court will accept the apology but warn Counsel that it is important to keep time lines and secondly, it is equally important to appraise oneself with the record if Counsel is not sure about the directions given by the Court. I do not consider the late filing of this application to have been done deliberately to steal a match on the defendants nor do I discern any mischief on the part of the plaintiff or any prejudice to the defendant that cannot be compensated with costs. I will therefore treat the said application as properly before me and consider its merits or otherwise in view of the wider interests of justice protected by **Article 159(2)(d) of the Constitution and Section 3A of the Civil Procedure Act.**

In order to ensure orderliness in the trial process, **Order 3 Rule 2 of the Civil Procedure Rules** provides as follows:

**“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 witnesses 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 Court be furnished at least fifteen days prior to the trial conference under Order 11.”**

A similar requirement is provided for the defendant under **Order 7 rule 5 of the Civil Procedure Rules**.

It is common ground that the plaintiff has not yet closed his case and further, the original 2<sup>nd</sup> plaintiff is deceased and had to be substituted by the Applicant herein. Neither **Order 3 nor 7 of the Civil Procedure Rules** bar a party, subject always of course to the Court's leave, from filing further documents even after the trial has commenced. In my view, that is in keeping with the provisions of Article 50 of the Constitution which provides for a fair hearing of any dispute before the Court. The primary duty of a Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective cases.

However, each case must be considered on the basis of its own peculiar circumstances.

Some of the factors that the Court will consider while faced with an application of this nature include; the stage at which the application has been made, the reasons why the new evidence was not filed at the time stipulated in law and the prejudice that may be caused to the other party. Where a trial is at its early stages, the Court may very readily accede to such an application to file fresh documents.

In **MARCUS KIRANGA NIMROD & ANOTHER V NESSY KUTHII JUSTUS KERUGOYA ELC CASE NO.737 OF 2013 [2017 eKLR]**, I allowed the plaintiff to file a further list of documents in the course of the trial and in doing so, I took into account the fact that the document sought to be produced was not previously available when the suit was being filed, and most importantly, the plaintiff had not yet closed his case and so the defendant would have an opportunity not only to file his own list of further documents in rebuttal but also to cross – examine the plaintiff on the new evidence. However, in the case of **FLAVEMART ENTERPRISES LTD V. KENYA RAILWAYS CORPORATION KISUMU ELC CASE NO.48 OF 2013**, I declined an application by the defendant to file fresh documents because the plaintiff had already closed his case and the defendants' principal witness had also testified. I took the view that to allow the defendant to file fresh documents so late in the trial would prejudice the plaintiff who, having already closed his case, would not be in a position to rebut any fresh evidence and that would be an impediment to a fair trial.

In the circumstances of this case, the original plaintiff is deceased and was substituted by the party now making this application. It is his explanation that at the time of filing this suit, the deceased plaintiff had not obtained the documents now sought to be introduced. The documents are a Kenya Gazette and Court proceedings relevant to this case. The Plaintiff has not closed his case and he can be cross-examined on the same and the defendants, if they so wish, can also file any documents to rebut what the plaintiff seeks to introduce. Although the original plaintiff is deceased, the party that substituted him will have the responsibility of answering any questions that may arise out of the introduction of those documents. After all, he is the one who seeks to produce them. Clearly, no prejudice will be caused to any of the defendants under those circumstances.

The up-shot of the above is that the plaintiff's Notice of Motion dated 19<sup>th</sup> October 2018 is merited. I allow it in the following terms;

- 1. The draft further list of documents dated 19<sup>th</sup> October 2018 annexed to the application be deemed as duly filed and served upon the defendants.**
- 2. The defendants have 14 days from the date of this ruling to file and serve any further documents should they wish to do so.**
- 3. The plaintiff shall meet the 1<sup>st</sup> defendant's costs occasioned by this application.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of November 2018 at Bungoma

Mr. Onkangi for Mr. Ocharo for the 1<sup>st</sup> defendant – present

6<sup>th</sup>, 8<sup>th</sup> defendants – present

Mr. Kiarie for plaintiff – Absent

No appearance by the other parties.

**BOAZ N. OLAO**

**JUDGE**

