



REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT NAIROBI

ELC SUIT NO. 193 OF 2007

HUMPHREY NJURU KARANJA.....PLAINTIFF

VERSUS

JOHN MWANGI KIN'GORI.....1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

RULING

This suit is part-heard, with the Plaintiff having closed its case, and the 1st Defendant having commenced his evidence in chief. The Defendant's Advocate on 11th September 2013 orally applied to have a Further Statement by the Plaintiff and a Further List of Documents filed and served without leave of the court on 2nd September 2013 admitted as part of the court record. The Plaintiff's Advocate objected to the said application and filed a Notice to strike out the said statement and further list of documents dated 4th September 2013, and sought to have them expunged from the court record. This ruling is on the application made by the Defendant and resultant objection by the Plaintiff, after hearing their Advocates' oral submissions made on 11th September 2013.

It is the 1st Defendant's argument that the Plaintiff's counsel replaced a deed plan that he had produced in his bundle of documents, after he had closed his case and during the examination-in-chief of the Defendant. The 1st Defendant's counsel submitted that he consequently got further instructions from his client as he had relied on the previous deed plan, which resulted in the further statement and further list of documents being filed. Further, that the said documents were filed without leave to save the judicial time that would be taken in the making and hearing of an application, and that section 1A and 1B of the Civil Procedure Act provide that the overriding objective is that justice should to be dispensed expeditiously and proportionately. The counsel also argued that the documents sought to be admitted would not be prejudicial to the Plaintiff, as close of his case did not mean that there has been a close of evidence.

The Plaintiff's counsel in his submissions argued that the documents sought to be admitted were filed irregularly without leave of the court, and that the 1st Defendant's counsel did not give any notice of his intention to file the said documents. Further, that the 1st Defendant could not introduce and ambush him with new evidence which contradicts his earlier evidence. The Plaintiff's counsel also argued that the deed plan referred to by the 1st Defendant was not a new document introduced by the Plaintiff, but was the correct copy produced to replace the earlier copy that had mistakes.

The 2nd Defendant's counsel on her part submitted that once pleadings are closed no party can introduce

new evidence, and that the deed plan that was introduced by the Plaintiff was already in the 1st Defendant possession.

I have carefully considered the submissions by the parties to this application. The main issue to be decided is whether the further witness statement and further list and bundle of documents filed by the 1st Defendant without leave during the hearing of the suit, and after the close of the Plaintiff's case should be admitted as part of the court record. The applicable provisions as to the filing and serving of witness statements and documents are Order 3 rule 2 and Order 7 Rule 5 of the Civil Procedure Rules, which require that the said statements and documents be filed and served together with the Plaintiff and Defence. There is a proviso to the said rules that leave can be granted for witness statements to be furnished at least fifteen days prior to the trial conference under Order 11 of the Rules. Under Order 11 the court can also make directions to ensure that parties have complied with Order 3 Rule 2 and Order 7 Rule 5.

It is therefore the intention of the Civil Procedure Rules that there should be compliance with regard to filing of witness statements and documents before trial commences, and Order 11 of the Rules has elaborate provisions as to the pretrial conferences that need to be held to ensure that a suit is ready for hearing and to expedite the trial. Various pretrial hearings were held and pretrial directions given by this court in this regard before the trial herein commenced, and the parties herein complied with the said directions.

However, the provisions of the Civil Procedure Rules are not cast in stone, and the court is enjoined by Article 159 (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act to ensure that in implementing the rules we dispense substantive justice, and ensure that there is just, expeditious, proportionate and affordable resolution of civil disputes. To this end this Court is also given inherent power under section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice. It is for this reason that this court has previously allowed the Plaintiff to introduce further documents during the hearing of this suit.

This court cannot therefore prevent the 1st Defendant from stating its case, as it is his right to seek substantive justice from this court. The only limitation to the exercise of this right would be if there was prejudice to be caused to the Plaintiff in allowing the 1st Defendant to file a further witness statement and further documents. It is my view that the Plaintiff will still have the opportunity to cross-examine on any additional evidence produced by the 1st Defendant, and to recall any of his witnesses who have already given evidence for further examination-in-chief and cross-examination on any new evidence that may be introduced.

I accordingly allow the 1st Defendant's application and dismiss the Plaintiff's objection for the foregoing reasons, and hereby admit the 1st Defendant's Further Statement filed herein on 2nd September 2013 and Further List and Bundle of Documents dated and filed on 2nd September 2013 as part of the court record.

There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of
____November____, 2013.

P. NYAMWEYA

JUDGE