



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**CIVIL CASE NO. 26 OF 2011 (O.S)**

**IN THE MATTER OF LAND REFERENCE NO. NDIVISI/NDIVISI/1640**

**AND**

**IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATIONS OF ACTIONS ACT**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**JOSEPH MUMERO WANYAMA.....PLAINTIFF**

**VERSUS**

**JARED WANJALA LYANI.....1<sup>ST</sup> DEFENDANT**

**HESBORN MURULE LUSWETI.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

In the course of prosecuting the plaintiff's case on 26<sup>th</sup> November 2019, his counsel **MR WEKESA** sought to introduce as a witness one **ROSE NALIKA MUSAMBAI** whose statement had been filed on 25<sup>th</sup> October 2019 without leave of the Court.

Both **MR SICHANGI** and **MR OMUKUNDA**, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively, objected to the testimony of the said witness being taken because they had just been served with her witness statement yet pleadings closed in 2013. Further, that no leave was sought to introduce that statement which is an ambush.

**MR WEKESA** conceded that leave of Court was not obtained before filing the said witness statement but added that the defendants were served on 25<sup>th</sup> October 2019 and so no prejudice will be occasioned to them as they had sufficient time to study it. Further, that the witness is only confirming what other witnesses have already said. Counsel asked me to invoke the provisions of **Article 159 of the Constitution** adding that it was an over-sight on the part of counsel.

This ruling is in respect to that objection by the defendants.

It is not in dispute that pleadings in this case closed and the statement of **ROSE NALIKA MUSAMBAI** was filed on 25<sup>th</sup> October 2019 without leave of this Court.

In order to ensure orderliness in the trial process and to prevent trials by ambush, the **Civil Procedure Rules** require parties to furnish their evidence to the other side in advance before the trial commences. That is a requirement under **Order 3 Rule 2 of the Civil Procedure Rules** which provides that: -

***“All suits files 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 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 provision applies to a defendant while filing a defence and Counter – Claim in **Order 7 Rule 5 of the Civil Procedure Rules.**

It is true therefore, as rightly submitted both by **MR SICHANGI** and **MR OMUKUNDA**, that the plaintiff has flouted the provisions of **Order 3 of the Civil Procedure Rules.** Should this Court therefore expunge the statement of **ROSE NALIKA MUSAMBAI** and bar her from testifying in this case? The plaintiff has not yet closed his case and when faced with a similar situation in the case of **MARCLUS KIRANGA NIMROD & ANOTHER .V. NESSY KUTHII JUSTUS & ANOTHER KERUGOYA ELC CASE NO 737 OF 2013 [2017 eKLR]**, I said: -

***"It is instructive to note that neither Order 3 nor Order 7 of the Civil Procedure Rules prohibits the trial Court, upon application, from accepting late filing of statements or documents sought to be relied upon. In my view, and in keeping with Article 50 of the Constitution which provides for a fair hearing of any dispute, a trial Court is not barred from allowing a party, with leave, to introduce new statements and documents that were not previously filed and served as mandated by the provisions of Order 3 and Order 7 of the Civil Procedure Rules because the primary duty of the Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective claims. Each case will however be decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party."***

As in the **MARCLUS KIRANGA NIMROD CASE** (supra), the plaintiff herein is yet to close his case. His counsel has explained the failure to file the said witness statement as being an over-sight on the part of counsel. The case of **PHILIP CHEMWOLO & ANOTHER .V. AUGUSTINE KUBENDE C.A. CIVIL APPEAL NO 103 OF 1984 [1986 eKLR]** underscores the old adage that a mistake by counsel should not be visited on his client. Other than the late filing of the statement of **ROSE NALIKA MUSAMBAI**, I have not heard the defendants complain that they will be prejudiced. The defendants will have an opportunity to file any further statements to rebut the evidence sought to be introduced and also cross – examine the new witness. I note from the record that the 2<sup>nd</sup> defendant has himself also flouted the rules and filed a fresh list of witness statements on 18<sup>th</sup> November 2019 without leave. I don't know why **MR OMUKUNDA** has not found it proper to address the Court on that lapse. However, I do not think that there is a deliberate attempt on the part of the plaintiff to steal a march on the defendants or that the attempt to introduce a new witness is meant to scuttle the defence or prejudice the defendants' case. In the case of **FLAVERMART ENTERPRISES LTD .V. KENYA RAILWAYS CORPORATION KISUMU ELC CASE NO 48 OF 2013 [2015 eKLR]**, I disallowed an application by the defendant to file further documents after the plaintiff had closed his case as to do so would prejudice the plaintiff. Similarly, in **FREDRICK JUMA AHIJA .V. JASON OYOLA OPENDA & OTHERS KISUMU ELC CASE NO 730 OF 2015 [2018 eKLR]**, I declined an application by the defendant to introduce new documents after the plaintiff had closed his case. Each case must however be determined on its own peculiar circumstances as no two cases can ever be the same.

It cannot be doubted that rules of procedure were made for a purpose and must be adhered to by parties and their counsel. Courts are however temples of justice whose primary duty is to determine cases on their merits and unless there is evidence that one party, deliberately or otherwise, wants to pursue a route that will prejudice the other party and make it difficult to pursue his claim, the objective should be to allow all parties to adduce their evidence so long as it is relevant. Rules of procedure, as has been said before, were meant to be handmaidens and not mistresses of justice. As the majority held in **NICHOLAS KIPTOO ARAP KORIR SALAT .V. IEBC & OTHERS 2013 eKLR**, deviations and lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the opposite party should not be employed to impede a party's quest for justice. That is why **Article 159(1)(a) of the Constitution** provides as follows: -

***"Justice shall be administered without undue regard to procedural technicalities."*** Emphasis added

Therefore, while adherence to procedures is important for the orderly conduct of litigation, it should not be elevated to a fetish since such rules are only meant to facilitate the administration of justice in a fair and transparent manner. Pre – trial directions are basically case management tools but I do not think they were meant to block out new evidence that was not available if the Court is satisfied with the reasons advanced by the party seeking to introduce it. In **RAILA ODINGA & 5 OTHERS .V. IEBC & 3 OTHERS PETITIONS NO 3, 4, AND 5 OF 2013 [2013 eKLR]**, the Supreme Court had to consider whether to allow additional evidence filed outside the rules in a Presidential Election Petition and it stated as follows: -

***"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 inadvertences 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 and***

*extent of the material intended to be produced 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 admission of additional evidence.”*

Therefore, whereas after pre – trial the Court expects that the parties will have made full disclosure so that each knows the case of the other, the Court may in appropriate cases allow for the late filing and admission of documents and witness statements at least so that the parties can fully ventilate their grievances in accordance with the provisions of **Article 50(1) of the Constitution** which provides that:-

*“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”*

Guided by the above precedents and the law, I find that an application to introduce new evidence and documents will be considered in light of the following; the state at which the trial has reached, the nature of the evidence sought to be adduced and the reasons why it was not availed at the proper stage, the prejudice that may be caused to the other party among other reasons.

In the peculiar circumstances of this case, the trial is at its early stage and the plaintiff has not yet closed his case. The evidence sought to be produced is the witness statement of one **ROSE NALIAKA MUSAMBAI** which is basically evidence that she had been leasing land from the plaintiff from 2006 to 2010 a matter that the plaintiff has already alluded to in his own evidence. The explanation advanced is that it's omission was due to an over – sight by counsel. The defendants will be allowed to cross – examine her and also file further witness statement in rebuttal if they so wish and therefore will not be prejudiced since the defence case is yet to be prosecuted. In my view, this is a proper case to allow the new witness statement by **ROSE NALIAKA MUSAMBAI** as duly filed and served. It will therefore not be expunged.

Accordingly, I make the following orders: -

- 1. The witness statement of ROSE NALIAKA MUSAMBAI dated 25<sup>th</sup> October 2019 and filed herein on the same day shall be deemed as properly filed and served.**
- 2. The defendants are allowed 14 days from today to file and serve any fresh witness statements and/or documents if they so wish.**
- 3. In the same spirit, I notice from the record that the 2<sup>nd</sup> defendant has infact without leave also filed witness statements by DAVID LUSWETI DANIEL and DAVID WAFULA MAKOKHA dated 18<sup>th</sup> November 2019. The same shall also be deemed as duly filed and served to obviate the need of any further application with regard to the same.**
- 4. The plaintiff shall meet only the 1<sup>st</sup> defendant's costs.**

**It is so ordered.**

**Boaz N. Olao.**

**J U D G E**

**11<sup>th</sup> December 2019.**

Ruling dated, delivered and signed this 11<sup>th</sup> day of December 2019 at Bungoma.

Mr Sichangi for 1<sup>st</sup> defendant present

Mr Murunga for Ms Mumalasi for plaintiff present

Mr Omukunda for 2<sup>nd</sup> defendant present

Plaintiff present

1<sup>st</sup> defendant present

2<sup>nd</sup> defendant present

Joy/Okwaro – Court Assistants

**Boaz N. Olao.**

**J U D G E**

**11<sup>th</sup> December 2019.**

Mr Sichangi: - We can take a hearing date.

Court: - Further hearing on 16<sup>th</sup> January 2020 by consent.

**Boaz N. Olao.**

**J U D G E**

**11<sup>th</sup> December 2019.**