



**REPUBLIC OF KENYA**

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

**MISC. NO. 48 OF 2015 (O.S)**

**ALICE MUHONJA KIRAMBI.....PLAINTIFF**

**VERSUS**

**REDEMPTA SUSAN CHETAMBEE.....DEFENDANT**

**R U L I N G**

1. The plaintiff's case was closed on 6/2/2018. The hearing date of 8/3/2018 was taken by consent of the parties on 6/2/2018 after the close of the plaintiff's case.
2. The defendant has now made an application that she be allowed to introduce the evidence of two new witnesses who were not originally identified to testify in this suit. The statements of those two witnesses Thomas Chelemek Chepuch and Charles Maurice said Chetambe were filed without leave of court on 13/2/2018.
3. No sworn evidence has been given as to why they had to be filed that late in the day but counsel for the defendant submits from the bar, which statements I will of course not place a lot of reliance on for obvious reasons, that Charles has been ailing and Thomas has been away in Uganda, hence the inability to file the statements earlier.
4. The counsel cites **Section 1A** and **1B** of the **Civil Procedure Act** and **Article 159 (2)** of the **Constitution** to support the defendant's application. She also relies on the case of **DT Dobie -vs- Muchina 1980 eKLR** for the proposition that a court should rather sustain a suit rather than summarily dismiss it unless it is hopeless.
5. Counsel for the plaintiff strenuously opposed the application. He outlined the history of the matter and stated that had the application been made at the time this case was reopened, the admission of the two witnesses' evidence at that juncture would have been fair as the plaintiff would have known how to counter their evidence; Now that the plaintiff's case is closed, he would be prejudiced if the evidence of the two witnesses is admitted.
6. I have considered at length the application by the defendant and the apprehensions expressed by the plaintiff. This is a 2014 case. The suit was originally heard on 14/2/2017. The plaintiff closed her case for the first time on that date. Mr. Karani, counsel who was present in court for the defendant then, declined to cross-examine all the plaintiff's witnesses for reasons this court could not comprehend. Thereafter much effort was spent by the parties on an application to reopen the case.
7. Finally by consent dated 17/8/2017 the earlier proceedings of 14/3/2017 were all set aside and the hearing started *de novo* on 6/2/2018. As stated by the plaintiff no application for the admission of any new evidence on the part of the defendant was made before the second hearing began.

8. In the circumstances I find that the defendant's current application is an afterthought. In similar circumstances in the case of *Johana Kipkemei Too -vs- Hellen Tum 2014 eKLR [Eldoret E&L Case No. 975 of 2012]* the court stated as follows:-

**“There is no provision in the Rules that permits the court to accept a list of witnesses or documents filed outside the timelines provided in *Order 3 Rule 7 and Order 7 Rule 5*. The provisions of *Order 3* and *Order 7* are meant to curb trials by ambush the objective is to make clear to the other party the nature of evidence that he will face at the trial. The court at *Article 50 (1)* provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial if a party is allowed to hide his evidence and ambush the other party at the hearing”.**

9. Consequently I find that the defendant's application is an ambush, a well calculated one meant to disadvantage the plaintiff and I reject it. If this court were to do the defendant's bidding it would delay the hearing and determination of this matter, contrary to the very **Article 159** cited by the defendant herein.

10. To protect the purposes and intent of statute and the Constitution it is only fair that the application be dismissed. The case of *DT Dobie (Supra)* and **Section 1A** and **1B** of the **Civil Procedure Rules** cannot aid the defendant at this juncture. I dismiss the defendant's application and order that the witnesses' statements of the two persons, Thomas Chelemek Chepuch and Charles Maurice Said Chetambe be expunged from the record.

Hearing to proceed.

**Dated, signed and delivered at Kitale on this 8<sup>th</sup> day of March, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**8/3/2018 - AT 2.30 PM**

Coram:

Before Mwangi Njoroge - Judge

Court Assistant - Picoty

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**8/3/2018**