

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 245 OF 2016

YUDA IMUNYA alias YUDA K. IMUNYA.....PLAINTIFF

VERSUS

ATANASIO KIBAARA.....DEFENDANT

RULING

1. Counsel for plaintiff has applied to this court to have the defence list of document filed on 10.11.2017 expunged from the record. The basis upon which the application is made is that pre-trial directions closed on 20.9.2017 and plaintiff testified on 13.11.2017. Plaintiff will therefore stand to be prejudiced if this document is admitted in evidence.

2. Defence counsel avers that it will be in the interest of justice for this document to be admitted. Defence has urged the court not to hold unto procedural technicalities.

3. I find that on 29.05.2017, the court gave directions as follows: *“That all documents (if any) to be filed and served within 14 days”*. It follows that all documents which parties were to rely on ought to have been filed and served by 13.6.2017. No explanation has been advanced as to why this document was availed to the court in contravention of a court order.

4. I am inclined to find that this is not an issue of procedural technicality to be overlooked. It goes into that root of what is fair and just. **Article 50 (1) of the constitution** 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”*.

5. There can be no fairness if a party is allowed to unleash documents when the other apposite party has already testified and has been cross examined.

6. In the case of **Johana Kipkemoi Too versus Hellen Tum ELC 975 of 2012 (Nairobi)**, it was held that in terms of article 50 of the constitution, a trial would not be fair if a party was allowed to hide evidence and ambush the other party at the hearing.

7. In light of the foregoing, the objection is upheld. The document in the list dated 10.11.2017 and filed on 13.11.2017 is hereby expunged from the records.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF JULY, 2018

IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Carlpeters Mbaabu for plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE