



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 405 OF 2017

JANE WAGATHUITU GITHINJI.....1ST PLAINTIFF

ISSAC KAMAU KABIRA.....2ND PLAINTIFF

JACKSON GICHUKI KABIRA.....3RD PLAINTIFF

VERSUS

SOJANMI SPRINGFIEDS LIMITED.....1ST DEFENDANT

NATIONAL ENVIRONMENT AUTHORITY.....2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....3RD DEFENDANT

RULING

(Application to introduce new evidence not before discovered at the defence stage; application dismissed)

1. When this case came up for defence hearing, on 24 October 2018, counsel for the 1st defendant made an oral application seeking the leave of this court for the 1st defendant to be allowed to introduce a new witness not previously listed in its list of witnesses and be allowed to file his witness statement. That application was opposed by counsel for the plaintiff but not opposed by counsel for the 2nd and 3rd defendants.

2. To put matters into perspective, this suit was commenced by way of a plaint which was filed on 19 October 2017. The genesis of the suit can be traced to the bursting of a dam in the premises of the 1st defendant and which the plaintiffs claim that it caused flooding of their land and has now led to significant damage. The 1st defendant filed its Statement of Defence on 25 January 2018 accompanied by its list of witnesses. Only two witnesses were named, being Beatrice Bokea and Dr. Darius Taruru, although there was a rider of “others to be added”. The witness statements of the two witnesses were attached and served. A pre-trial conference was held on 13 February 2018, when all parties affirmed that they have filed and served all their documents and were ready for trial. The hearing of the matter commenced on 9 May 2018, and the matter has proceeded for the taking of the plaintiff’s case until the plaintiff closed his case on 23 October 2018 and the matter was set to continue on the following day, 24 October 2018, for defence hearing. As I have set out at the beginning of this ruling, on this day, Ms. Momanyi, learned counsel for the 1st defendant applied to introduce a new witness, who was said to be a dam expert.

3. I have considered the application and I am afraid that I am unable to allow it. As submitted by Mr. Chege, learned counsel for the plaintiffs, the plaintiffs have already closed their case and they will not have an opportunity to verify such evidence. The rules are indeed clear about when a party needs to disclose his evidence. For the defence, the applicable provision is Order 7 Rule 5 which is drawn as follows :-

Order 7 Rule 5 Documents to accompany defence or counterclaim.

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11

4. It will be seen from the above that the defence needs to file its documents, list of witnesses and statements, together with the statement of defence, and in any event, no later than 15 days from the date of the pre-trial conference. There is no provision for filing of witness statements after the close of the plaintiff's case. The court of course has wide discretion to allow the introduction of new evidence, at any stage, but I think a litigant will need to demonstrate special circumstances before being allowed to introduce new evidence at defence stage.

5. At this stage of the proceedings, the plaintiff has already presented and exhausted his evidence and will not have an opportunity to introduce evidence to counter any new evidence not earlier discovered by the defendant. This will certainly prejudice the plaintiff's case and may lead to an unfair trial of the suit. I see no reason to depart from my reasoning in the case of ***Johana Kipkemei Too vs Hellen Tum (2014) eKLR***.

As I have said, the defendant may need to demonstrate very special circumstances, such as that the evidence was deliberately concealed by the other party, or for one reason or another, the same was not available to the defendant even after due diligence. The list is of course not exhaustive and each case will need to be determined on its merits.

6. In the instance of this case, the 1st defendant was aware that the plaintiffs have based their case significantly on the burst dam. I see no reason why the 1st defendant could not have obtained a dam expert before we commenced hearing. The plaintiffs, having closed their case, cannot now go and procure their own expert, to counter anything that the 1st defendant's expert is going to say.

7. I think it is time that litigants and counsel took seriously the provisions in the rules which relate to discovery of evidence before litigation starts. There is a purpose for this, which is to prevent trial by ambush, and give every party a fair chance at rebutting the evidence of the other party in good time. The purpose of all this is to arrive at fair trial. In my view, it will be going contrary to the spirit of the rules if I am to allow this application.

8. For the above reasons, the application by the 1st defendant to introduce new evidence at defence stage is hereby disallowed.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 25th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Chege for the plaintiff.

Ms. Momanyi for the 1st defendant applicant.

Mr. Ngara for the 2nd defendants.

No appearance on part of M/s Mirugi Kariuki & Co for the 3rd defendant.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU