



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

LAND CASE NO. 48 OF 2013

(Before Hon. Justice B. N. Oloo)

M/S FLAVEMART ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

R U L I N G

The Plaintiff having closed its case and after the Defendant had called one witness in its defence and counterclaim, counsel for the Defendant **MR. TOM MUTEI** sought an adjournment to enable him call a surveyor and also leave to file another list of documents. According to counsel, it is in the interest of Justice that the leave to file another list of documents is granted so that this dispute can be determined on its merit.

Counsel for the Plaintiff **MR. KEN OMOLLO** opposed that application stating that to allow it would prejudice the Plaintiff which has already closed its case. Counsel added further that the case was filed in 2013 and the Defendant only filed documents in 2016 and witness statements in 2018. Therefore having had all this time to file its documents and prepare for the trial, it will be an abuse of the court's process if the leave sought is allowed.

I have considered the application which seeks to allow the Defendant file a further list of documents and call another witness.

The reason why the Civil Procedure Rules require parties to furnish their evidence to their adversaries before the commencement of the trial is to ensure orderliness and prevent trial by ambush. **Order 3 Rule 2 of the Civil Procedure Rules** provides as follows:-

“All suits filed 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 statement signed by the witness excluding expert witnesses, and;***
- (d) copies of documents to be relied on at the 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 II.”

A similar provision is found in order 7 Rule 5 of the Civil Procedure Rules with respect to a Defendant.

Neither Order 3 nor Order 7 of the Civil Procedure Rules bars a party, subject to leave of the court, from filing further documents even after the court has commenced hearing. In my view, that is in keeping with the provisions of Article 50 of the constitution which provides for a fair hearing of any dispute because the primary duty of a court is to do justice to the parties by allowing them to present all relevant documents to support their respective cases. However, each case must be considered on the basis of its own peculiar circumstances and some of the factors that the court will take into account will include the reasons why the documents sought to be introduced were not filed and served at the stipulated time, the stage at which the proceedings have reached when the application is made and the prejudice that may be caused to the other party. In the case of **MARCUS KIRANGA NIMROD & ANOTHER V NESSY KUTHII JUSTUS KERUGOYA**

ELC CASE NO. 737 OF 2013 (2017 eKLR), I allowed the Plaintiff to file a further list of documents in the course of the trial and in doing so, I took into account the fact that the document sought to be produced was not previously available at the time of filing suit and most importantly, the Plaintiff had not yet closed his case and so the Defendant would have an opportunity not only to file any further documents if necessary but also to cross-examine the Plaintiff on the new evidence.

In this case, and as currently pointed out by **MR. OMOLLO**, the Plaintiff has closed its case and will therefore be highly prejudiced by the introduction of new evidence which it will be unable to rebut. We are also not being told why the document sought to be introduced was not filed at the appropriate time as provided for in the rules. **MR. MUTEI** has made a passionate plea that the Defendant be allowed to file a further list of documents in the interest of Justice and so that this case is determined on its merits. That sounds very appealing. However, the right to a fair trial will itself be impeded if one party is allowed a carte blanche to introduce new evidence late in the trial and especially in a case such as this where the Plaintiff has not only close its case but the principal defence witness has also testified and been cross-examined. It is also not lost to this court that as recently as 2nd October, 2018 when this suit was mentioned before **JUSTICE KIBUNJA** to confirm readiness by the parties for trial during the service week, both parties confirmed having filed all their documents and that they were ready for trial. Clearly, it could not have been the intention of the rules that a party be allowed to file fresh evidence even where doing so will highly prejudice the opposing party.

In the circumstances of this case, I take the view that to allow the Defendant to file fresh evidence so late in the trial will amount to an ambush and cause substantial prejudice to the Plaintiff. The application is therefore rejected.

Ruling Dated, Signed and Delivered this 2nd day of November, 2018 in Open Court at Kisumu.

Mr. K. Omollo for the Plaintiff

Mr. T. Mutei for the Defendant

B. N. Olao

Judge

2/11/2018