



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

H.C.C.C CIVIL SUIT NO 10 OF 2007

JOSEPH MUTURA MUGAMBI.....PLAINTIFF

RAEL RIGIRI MUTURA.....SUBSTITUTED PLAINTIFF

VERSUS

RUTERE MWIRIA & 20 OTHERS.....DEFENDANTS

R U L I N G

The ruling is in respect of the directions sought by Plaintiff's Counsel on 27.07.17 regarding the issue of compliance. The short background to the matter is that this case was scheduled to be heard on 29.05.17. Mr. Mutunga, advocate for Defendant brought to the attention of the Court that Plaintiff had just filed documents and therefore, defence would not be ready as they required to scrutinize the documents. In a short ruling, this court cited the proceedings of 27.07.15 where the Court had directed that plaintiff was at liberty to fix the matter for hearing notwithstanding the non-compliance on the part of defence. The court's records of 27.07.15 indicate that Plaintiff's side had informed the Court that they had complied and were therefore ready for hearing. The Court's directions given on 29.05.17 were that the suit was to proceed but only documents filed on or before 27.07.15 were to be considered.

In essence plaintiff's list of documents filed on 15.03.17 was disregarded, Plaintiff's case proceeded and was closed.

Defence case was then adjourned to 27.07.17. Plaintiff's counsel objected to the defence being given the opportunity to be heard averring that it would be unfair for the Court to reject plaintiff's documentary evidence then proceed to hear defence case with six witnesses where defence has never complied with order 11 as well as order 7 and 5 of the Civil procedure rules. Plaintiff's counsel had posed this question:-

“Are they (defendants) at liberty to testify before the same court they are defiant of the orders given”.

Defence counsel on the other hand averred that they had tried to show the Court documents of the Maua case in vain. Citing the constitution and the oxygen Principle, defence counsel stated that a situation was not envisaged when someone is locked out from the hearing and that equity demands that all parties be honest.

Further, defendants aver that it is the court which gave directions for the case to be heard on 27.07.17.

Defence therefore argues that it is unfair to dismiss defence case on basis of non-compliance.

I have weighed all the arguments raised herein. I must point out that on 29.5.17, the issue of the extent of non-compliance by defence was not argued in depth. The issue canvassed on that day was in regard to Plaintiff's move of produce a fresh list of documents. The Court's order was that only documents and statement filed on or before 27.07.15 would be considered.

That is the basis upon which the defence was given an opportunity to be heard on 27.07.17. In the event that they have no statements of witnesses and or documents filed on or before that date (27.07.15), the defence would certainly be locked from tendering any evidence for the following reasons.

Firstly, this is a very old case of 2007 filed before the birth of the overriding objective (commonly referred to as the oxygen principle or Double O₂ rule). However, defence willingly brought themselves under the ambit of this principle and this is evident from the court records. For the last 4 years and counting, the issue of compliance, (or non-compliance) took centre stage in this case. It is therefore not surprising that the Court finally gave directions on 27.07.2015 for the matter to be fixed for hearing.

I find it necessary to capture the entire record of the Court of 27.07.15.

“Murango Mwenda present for plaintiff

Kirima absent for the defendant

Murango- The plaintiff has complied. The Defendant has not taken any steps towards compliance. We ask the Court to make as order that Plaintiff be at liberty to file the matter for hearing. The defendants are using tricks to delay the hearing of the suit.

Court: I note that the defendants advocates was in Court but without explanation left the Court room minutes before the matter was reached I agree that defendants are delaying the hearing of the suit.

Directions:

1) Plaintiff to serve upon the defendants the orders issued by the Court today within 10 days.

2) Plaintiff granted liberty to fix the suit for hearing at the Registry, the defendant's non-compliance with order 11 CPR not withstanding”.

The proceedings of 27.7.15 clearly indicate the lackluster attitude of the defence in this matter.

I am of the view that the orders given on 27.07.15 were a warning to defence, that the case would proceed notwithstanding their non-compliance.

It is two years down the line and defence have never moved the Court to set aside the aforementioned proceedings. This is why this Court has emphasized that it is a Court of record in as much as it is a court of justice. I am bound by the orders of 27.07.15.

Secondly, the defence aver that some of the documents they desire to rely on refer to a Maua Case No. 186 of 2006 which only came up on 25.06.17. If the defence had the intention of relying on such proceedings, then why didn't they inform the Court before the trial started? It is clear that at no time did the defence demonstrate that they would be relying on evidence which was not available to them before 27.07.15.

Thirdly, I find that if defendants, 6 of them were to be allowed to testify, it would amount to trial by ambush, something and this flies against the provisions of article 50 (1) of the Constitution on what amounts to a fair trial.

“In *Jahana Kipkemei v Hellen Tom* EL No. 975 of 2012 (Sila J), it was held that:-

“the Civil Procedure Rules 2010, made no provision which would permit a Court to accept a list of witnesses or a list of documents filed outside the prescribed time limits. Similarly, there was no provision setting out the consequences of a failure to comply with the prescribed limits. 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.....the circumstances would not allow for new evidence to be introduced.

In *Safaricom Ltd vs. Ocean View Beach Hotel Limited & 2 Others Civil Application in 377 of 2009*, it was held that

“.....the purpose of the double O Principle in its application to civil proceedings is to facilitate the quick, just, and cheap resolution of the real issues.

.....It is apt to throw in a word of caution concerning the O₂ Principle. It should be regarded as a double edged sword in that it is a powerful enemy of those litigants bent on frustrating the course of Justice because it has the potential of stopping them at the earliest opportunity.....”

In *interactive Gaming & Lotteries Limited Vs. Flint Est Africa & 2 Others NB, H.C.C 115 of 2011*, Odunga J stated that:-

“The current procedural legal regime especially order 11 of the Civil Procedures Rules is meant to ensure that parties to the Suit disclose their evidence upfront in order to avoid trial by ambush.

The Court went on to state that:-

“The Court always retain an inherent jurisdiction to make such orders as may be necessary to the ends of justice. It must be remembered that the Court also has inherent jurisdiction to prevent abuse of its process. Therefore where a party intends to adduce further evidence outside the period provided under the rules, the party must lay a basis for doing so in order to enable the Court exercise its discretion in its favour”.

The defence has not given any plausible explanation as to why the 6 witnesses did not record their statement before 27:07:15. The nature of their would be evidence is hitherto unknown. The plaintiff's case has been closed and it follows that Plaintiff stands to be prejudiced by the evidence which the would be 6 defence witnesses adduce.

Pursuant to the provisions of **Article 27 (1) of the constitution**, “ **every person is equal before the law and has the right to equal protection and equal benefit of the law**”. This court will not apply different standards for the defence in light of the proceedings of 29.05.17 where the court denied the plaintiff an opportunity to rely on documents filed outside the prescribed period.

My conclusion is that only witnesses whose statements were filed as at 27.07.2015 would be allowed to testify, and only documents filed by this date will be produced.

It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MERU THIS 27TH DAY OF SEPTEMBER, 2017 IN THE PRESENCE OF:-

CA:Janet

Miss Nyaga h/b for Murango

Mwenda for Plaintiff present

Matunga for defendant present

Hon. L. N. MBUGUA

ELC JUDGE