

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 116 OF 2013

SUSAN CHEPATET LOKWANGI PLAINTIFF

VERSUS

POWON LOKWANG KOMOLMOI 1ST DEFENDANT

JOEL KEDITUKEI 2ND DEFENDANT

R U L I N G

1. At the hearing of this suit on 9/6/2015, the counsel for the defendants objected to the introduction of a list of witness and witness statement which had been filed on 5/6/2015 and served in court shortly before the case could start. The counsel for the defendant argued that the statement was filed in court too late without leave of the court and that it was specifically tailored to assist the plaintiff's case. The counsel asked that it be expunged from the record.
2. Mr. Barongo for the plaintiff urged the court to disregard the submissions by counsel for the defendants arguing that this was just a procedural technicality which should not affect the statement. Mr. Barongo argued that the plaintiff had not closed her case and that the statement and evidence of the witness being introduced will not prejudice the defendants as the defendants counsel have the evidence in advance. He argued that the evidence being introduced will assist the court to reach a fair decision.
3. I have considered the submissions by both counsel for the plaintiff and defendants. The hearing of this case commenced on 5/3/2015 when the plaintiff testified and completed her evidence. The case was adjourned to 9/6/2015 for further hearing. On 5/6/2015, the plaintiff filed a further list of witness an statement.This list and witness statement was not served upon the defendants' counsel until shortly before the case was called out for hearing on the date of hearing. The list of witness and statement was filed without leave of court.
4. Order 3 Rule 2 of the Civil Procedure Rules is clear on which documents to accompany a suit. Order 3 Rule 2(b) and (c) provide that a suit shall be accompanied by a list of witnesses and written statements signed by the witnesses. The proviso to Order 3 Rule 2 provides that where statements are not filed together with the plaint, a party who has not filed the statements may with leave of court furnish the statements at least fifteen days prior to the trial conference under Order 11.
5. In the instant case, the plaintiff did not provide the name of the witness or his statement at the filing of the suit. She also never sought leave of the court to file the further statement or list of witnesses. The plaintiff's failure to follow the procedure required or even ask for court's leave cannot be excused on the ground that this was a procedural technicality which can be overlooked by the court. The rules guiding the filing of list of witnesses and witness statement was meant to achieve the overriding objective as stipulated under Section 1A and 1B of the Civil Procedure Act.
6. If parties were to be allowed to file documents at any time they wish or file statements as they wish and without leave, then there is no need for having the rules. Rules have to be followed. The court can only excuse a party for example in failure to serve a document within the days required but it cannot excuse a party who files documents without leave of court and too late in the day. Parties cannot be allowed to build their case as the trial progresses particularly where the plaintiff has testified and feels that he/she should introduce a certain line of evidence to assist his/her case

as the plaintiff is trying to do in this case. In the present case the plaintiff had been cross examined as to how she got married to the first defendant. In re-examination she was asked if she could provide evidence regarding her marriage. It is at this time that she said that she can avail a witness who was present during negotiations for dowry. This is what prompted her to go and file a further list of witness and witness statement. It is clear that this list and witness statement was specifically made to assist her case. It was made in an unprocedural manner. The same cannot be allowed. The list of witness and witness statement are hereby expunged from the court record.

It is so ordered.

Dated, signed and delivered at Kitale on this **18th** day of **June, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Boborio for Mr. Katina for plaintiff.

Court clerk – Isabellah.

E. OBAGA

JUDGE

18/6/2015