



**Too v Tum (Environment & Land Case 975 of 2012)  
[2014] KEELC 512 (KLR) (27 January 2014) (Ruling)**

*Johana Kipkemei Too v Hellen Tum [2014] eKLR*

Neutral citation: [2014] KEELC 512 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 975 OF 2012**

**M SILA, J**

**JANUARY 27, 2014**

**BETWEEN**

**JOHANA KIPKEMEI TOO ..... PLAINTIFF**

**AND**

**HELLEN TUM ..... DEFENDANT**

**Fair trial requirements & the introduction of a supplementary list of witnesses and documents after the close of the plaintiff's case.**

Reported by Beryl A Ikamari

***Civil Practice & Procedure** - pleadings - documents accompanying pleadings - supplementary list of witnesses and supplementary list of documents - whether a court can allow a defendant to introduce a supplementary list of witnesses and a supplementary list of documents after the close of the Plaintiff's case - Constitution of Kenya 2010; articles 50 & 159, and Civil Procedure Rules 2010; order 7 rule 5 & order 11 rule 7.*

***Constitutional Law** - fundamental rights and freedoms - the right to a fair trial - whether a court could allow a defendant to introduce a supplementary list of witnesses and a supplementary list of documents after the close of the Plaintiff's case - Constitution of Kenya 2010; articles 50 & 159, and Civil Procedure Rules 2010; order 7 rule 5 & order 11 rule 7.*

**Brief facts**

The Defendant filed the instant application seeking leave to call 3 more witnesses in addition to those initially provided in her list of witnesses after the Plaintiffs had presented their witnesses and closed their case and also to be granted leave to adduce a document that was not initially provided in her list of documents

**Issues**

1. Whether the Defendant could be allowed to introduce a supplementary list of witnesses and a supplementary list of documents after the Plaintiffs had presented their witnesses and closed their case.



## **Held**

1. Under order 7 rule 5 of the Civil Procedure Rules 2010, when filing her defence (and set-off or counterclaim, if any) the Defendant would be required to have the defence accompanied by a list of witnesses, witness statements, copies of documents to be relied on and also an affidavit where there was a counterclaim.
2. The required documents would be filed together with the defence and it would only be with leave of court that the documents could be filed later. Such leave, as provided for in order 11 rule 7, would only allow for a filing of such documents at least 15 days before the pre-trial conference.
3. The Civil Procedure Rules 2010, made no provision which would permit a Court to accept a list of witnesses or list of documents filed outside of the prescribed time limits. Similarly, there was no provision setting out the consequences of a failure to comply with the prescribed time limits.
4. In the terms of article 50 of the Constitution of Kenya, 2010, a trial would not be fair if a party was allowed to hide evidence and ambush the other party at the hearing.
5. However, in appropriate circumstances, the court would consider its mandate to administer justice without undue regard to technicalities as provided for in article 159(2)(d) of the Constitution of Kenya, 2010. Therefore, where additional evidence brought by a party would avail that party an opportunity to present his/her case in full, without causing undue prejudice to other parties in the suit, a Court could accept the evidence. Such evidence could include a supplementary list of witnesses and a supplementary list of documents.
6. In the circumstances, the Plaintiffs had closed their case and would not have an adequate opportunity to rebut the new evidence and they would therefore suffer prejudice if the evidence was introduced.
7. It was also noteworthy that the defendant had not made mention of the additional witnesses or documents before and there had been no earlier notice of the supplementary list of documents and the supplementary list of witnesses.
8. The circumstances would not allow for the new evidence to be introduced by the defendant.

*Application dismissed.*

## **Citations**

### ***East Africa***

1. *Odinga, Raila & 5 others v Independent Electoral Boundaries Commission & 3 others* Petitions Nos 3, 4 & 5 of 2013 (Consolidated) - (Followed)

## **Statutes**

### ***East Africa***

2. Civil Procedure Rules, (cap 21 Sub Leg) order 3 rule 2, 7 order 4 rule 1(2), order 7 rule 1,2,5, order 11 rule 7 - (Interpreted)
3. Constitution of Kenya, 2010 articles 50(1); 159(2)(d) - (Interpreted)

## **Advocate**

1. *Mr RM Wafula* for the Plaintiffs
2. *Mr PK Birech* for the Defendants

## **RULING**

(Application by defendant to be allowed to furnish a supplementary list of witnesses and documents; principles to be applied; the law providing that witnesses and documents need to be filed with the pleadings; whether there is any provision allowing the filing of additional lists of witnesses and documents; need to do justice to the parties; circumstances of each case to be considered;



plaintiffs herein having testified and closed their case; defendant already having testified; whether it will be just in the circumstances to allow additional evidence; application denied)

1. The Defendant, Hellen Tum, has made an application through her counsel, Mr PK Birech, to be granted leave to call forth three more witnesses in addition to those initially provided in her list of witnesses and also to be granted leave to adduce a document that was not initially provided in her list of documents. Her reasons for the application are that the same will shed light on her defence. This application has been strenuously opposed by Mr RM Wafula for the Plaintiffs.
2. This matter is a consolidation of two suits. The first suit was filed on 30 December 2011 as Eldoret HCCC No 224 of 2011 by Hellen Tum against Jepkoech Tapkili Metto as first Defendant and Johana Too as the 2nd defendant. In that suit, Hellen Tum has contended that while a suit namely Eldoret HCCC No 25 of 2005 was pending, Tapkili Metto transferred the land parcel Nandi/Kilibwoni/1023 to Johana Too fraudulently. She has asked that the said transfer be nullified. The second suit was filed by Johana Too on 13 March 2012. It was originally filed as Eldoret HCCC No 44 of 2012. In this suit, Johana Too is claiming to be the registered owner of the land parcel Nandi/ Kilibwoni/1023 (the suit land). He has averred that Hellen Tum is a trespasser on the land and should be evicted therefrom. Hellen Tum filed a counterclaim in fairly similar terms to the plaint in the suit No 224 of 2011. She also asserted that she deserves the suit land as she is married to Tapkili Metto under Nandi woman to woman customary marriage.
3. I directed a consolidation of the two suits and they are being heard as Eldoret E&L Case No 975 of 2012. I further directed that Tapkili Metto and Johana Too be deemed as plaintiffs and Hellen Tum be deemed as defendant in the consolidated suit.
4. In compliance with the provisions of the [Civil Procedure Rules](#), the plaintiffs filed their statements and supporting documents. In the case originated by Hellen Tum as plaintiff (Eldoret HCCC No 224 of 2011), Hellen Tum furnished her own witness statement and provided a list of documents to be relied upon. This list comprised of two documents being the abstract of title over the suit land and court proceedings and pleadings in Eldoret HCCC No 25 of 2005. To the case No 44 of 2012, where she was named defendant, Hellen Tum filed on 30 May 2013, one day after she had filed her Statement of Defence, a list of witnesses alongside their witness statements. Three witnesses were named being, Hellen Tum as the Plaintiff, Peter Ngetich and Thomas Tenai. There was no indication that any other witness would be called. No list of documents was filed.
5. Directions were taken on 19 December 2012 and all parties affirmed readiness to proceed. The matter was listed for hearing on 18 and 19 June 2013. On 18 June and 19 June 2013, the Plaintiffs tendered their evidence and called one witness. They closed their case on 19 June 2013. There was time for the Defendant to testify and she gave her evidence in chief. The matter was then adjourned to 23 July 2013 for cross-examination. On that day, the Defendant completed her testimony upon cross-examination by Mr Wafula. The matter was then adjourned to 15 October 2013 to take the evidence of the defence witnesses.
6. On 14 August 2013, the Defendant filed a supplementary list of witnesses and documents. In the supplementary list, she wishes to call Andrea Rono, Nathan Tum and Kirwa arap Songol as additional witnesses. She also wants to introduce a document, namely, an engagement document dated 27 August 1987 as an exhibit.
7. Mr Wafula for the Plaintiffs strongly opposed the application to allow the three more witnesses and the document sought to be introduced. He pointed out that in her original list, the Defendant stated that she would only call two other witnesses, apart from herself, and did not allude to the document



sought to be introduced. He submitted that in the preparation of their case, the Plaintiffs were only alive to the original list of witnesses and documents. He averred that no law has been cited to back up the application. He further submitted that when the Plaintiffs testified, the document sought to be introduced was never in their contemplation and was never put to them in cross-examination. Neither were the names of the extra witnesses sought to be introduced known to the plaintiffs. He submitted that the Plaintiffs will not have an opportunity to rebut the new evidence sought to be introduced by the Defendant and that this is an ambush by the Defendant. He averred that the plaintiffs will be greatly prejudiced if the Defendant were allowed to introduce the additional evidence. He contended that during cross-examination, the Plaintiffs poked holes into the defendant's defence and the Defendant now wants to patch up those holes. He further submitted that no good reason has been tendered as to why the Defendant wants to introduce the new evidence.

8. Mr Birech in reply submitted that it will be in the interests of justice to allow the application and that the Court needs to do substantive justice to the litigants. He denied that the defendant is engaged in a fishing expedition.
9. The issue before me is whether or not the Defendant ought to be allowed to introduce these three witnesses and the new document at this stage of the proceedings. It will be noted that prior to the filing of the supplementary list of witnesses and documents, the plaintiffs had already presented their witnesses and closed their case. The defendant has also testified and has been cross-examined.
9. The *Civil Procedure Rules* of 2010 require parties to furnish their evidence in advance before the commencement of the trial. These provisions are found in order 3, order 7 and order 11 of the *Civil Procedure Rules*.
10. Under order 3 rule 2, when filing suit, one needs also to file a Verifying Affidavit, list of witnesses, statements of witnesses (excluding expert witnesses), and copies of documents to be relied upon at the trial. There is a proviso that the written statements may with the leave of the court be availed at least 15 days prior to the Trial Conference envisaged under order 11 of the *Civil Procedure Rules*.
11. The same applies to a defendant when filing defence and counterclaim (if any). The relevant provision is order 7 rule 5. I think that it is best that I set it out in full, for it is the provision that ought to apply to the application herein. The same 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.

12. It will be seen from the above that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the Court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in order 11 rule 7. In practice the Courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.



13. There is no provision in the rules that permits the Court to accept a list of witnesses or documents filed outside the time lines provided in order 3 rule 7 and order 7 rule 5. The provisions of order 3 and order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But the *Constitution* under article 50(1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.
14. The Court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the Rules. This was indeed the reasoning of the Supreme Court in the case of *Raila Odinga & 5 others v IEBC & 3 others*, Supreme Court of Kenya, Petitions Nos 3, 4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.
15. This however is not to say, that the Court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The Court as a shrine of justice, has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. This flows from the provisions of article 159(2)(d) of the *Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the Court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The Court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.
16. The question that now arises is whether it will be in the interests of justice, given the circumstances of this case, to allow the application by the Defendant to adduce the additional witnesses and documents.
17. When the Plaintiffs testified and tendered their evidence, they had in mind that all that the Defendant would call are two witnesses and that the Defendant would not be relying on any engagement document. The document sought to be introduced was not in their contemplation. They were never cross-examined on it. They never thought fit to mention it, assuming that they knew of its existence. Before the Defendant started giving evidence, she never gave any indication that after listening to the Plaintiff's evidence, she would wish to call more witnesses in addition to those that she had earlier furnished in her list of witnesses. She also never gave any indication that she would be relying on the subject document. When the Defendant testified, she never alluded to the document sought to be introduced. Indeed she never mentioned that there was ever an engagement document signed. It is after her cross-examination that she has now sought to introduce new evidence. No reason has been given as to why the Defendant did not contemplate furnishing this new evidence earlier.
18. I have to concur with the submissions of Mr Wafula that the Plaintiffs will be greatly prejudiced if I am to allow this application by the Defendant. The Plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the plaintiffs, if I am to allow the Defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to



one that the Plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the Plaintiffs and will violate the provisions of article 50(1) of *the Constitution*.

19. For the above reasons, I am inclined to disallow the Application by the Defendant to avail three more witnesses and to introduce the engagement document. The Defendant will proceed on the basis of the evidence she had proposed to tender when she filed her defence.
20. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF JANUARY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

Delivered in the presence of:

Mr. R.M. Wafula for the plaintiffs

Mr. P.K. Birech for the defendants

