

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 531 OF 2013

DAUDI SAMUEL SUMBA 1ST PLAINTIFF/APPLICANT

TRUPHOSA AKINYI KWAKA..... 2ND PLAINTIFF/APPLICANT

VERSUS

PENTOVILLE HOLDINGS LIMITED.....DEFENDANT/RESPONDENT

RULING

I have been called upon to determine whether or not to admit into the court record the Defendant's Supplementary List of Documents dated 9th June 2014 and filed on 10th June 2014 as well as the Defendant's Supplementary List of Documents dated and filed on 13th June 2014 (hereinafter referred to as the "Defendant's Documents"). The Plaintiff filed their Notice of Objection dated 13th June 2014 notifying the court that they would object to the admission of the Defendant's Documents.

It should be noted that prior to the commencement of the hearing of this suit, this matter was mentioned on 28th October 2013 for purposes of pre-trial conference. On that date, the court record shows that while the Plaintiff indicated that he had complied with Order 11, the Defendant sought for leave to file their List of Issues but conceded to the matter being certified as ready for hearing subject to their full compliance. This request was granted by the court which certified the suit as ready for hearing subject to the Defendant filing its List of Issues within 14 days from that date. The court ordered that parties may fix a hearing date at the registry. The hearing date given at the registry was 6th May 2014.

Hearing of this suit commenced on 6th May 2014 when the Plaintiff testified and closed his case. This matter was hence coming up for defence hearing on 16th June 2014 but the same did not proceed owing to the objection raised by the Plaintiff.

At the hearing of the Objection, the Plaintiff stated that the Defendant filed a pre-trial questionnaire on 16th July 2013 where, in entry no. 3, the Defendant stated that it had made a full disclosure of the documents to the Plaintiff. The Plaintiff also submitted that at the pre-trial conference alluded to above, the Defendant confirmed that it had complied with the provisions of Order 11 save for the filing of its List of Issues which it was granted leave to file. The Plaintiff's counsel submitted that the Defendant never sought leave to file the Defendant's Documents and that the same should be expunged from the court record. He further stated that the Plaintiff has already adduced his evidence and has closed his case and that to allow the Defendant to introduce the Defendant's Documents at this stage would prejudice the Plaintiff. The Plaintiff relied on the case of **P. H. Ogola Onyango t/a Pittsconsult Consulting Engineers versus Daniel Githegi g/a Quantalysis (2005) eKLR** where Waweru, J. expunged documents filed after the close of the plaintiff's case.

On his part, counsel for the Defendant submitted that it is in the interest of the court to ensure that substantive justice is served in spite of procedural lapses. He submitted that it is after the hearing held on 6th May 2014 that it became apparent to the Defendant to introduce the Defendant's Documents so that

all matters in controversy may be brought before this court so that the court can make an informed decision. He further stated that any prejudice occasioned on the Plaintiff by allowing those documents can easily be cured by recalling the Plaintiff and costs can also be awarded to the Plaintiff. He further referred to Article 159(1) and (2) of the Constitution which provides that the court should avoid technicalities and seek to provide substantive justice.

In response to the Defendant's submissions, the Plaintiff pointed out that the Defendant had not given the court any good reason why it was filing the Defendant's Documents this late and further that the question whether or not to admit those documents was not a mere procedural issue but when further into the substantive justice in this case.

I have considered these rival submissions. In my mind, the question that lingers is what is the purpose of Order 11 of the Civil Procedure Rules if parties may be allowed to disregard it with the court's sanction. In this case, a pre-trial conference was held as required prior to setting the matter down for hearing. The Defendant confirmed to this court that it had complied with Order 11 save only for the filing of its list of issues. This court took note of that and indeed permitted the Defendant to file its list of issues within 14 days. The court also certified that this suit could be set down for hearing and indeed the hearing is in progress. The Defendant has now filed the Defendant's Documents and seeks for this court to admit the same into the court record. Can this court sanction this? My answer is no for several reasons. One of the reasons is that the Defendant has been slovenly in the presentation of their case. No good reason has been given to this court to explain why the Defendant's Documents are being filed and served after the Plaintiff has closed his case. The Defendant had ample opportunity to ensure that it had filed and served all its documents in good time prior to the pre-trial conference. This was not done. Further, I must emphasize that it was important that the Defendant should have served the Plaintiff with these documents even prior to the filing of this suit or latest before the court set the suit down for hearing. For all we know, this may have averted the filing of this suit or may have resulted in a consent being filed. This was not done and no good reason was given why not. It is grossly prejudicial to the Plaintiff to permit the Defendant to file the Defendant's Documents at this stage and I do so find.

The upshot of the above is that this court upholds the Plaintiff's objection and hereby expunges the Defendant's Documents from the court record. Costs are awarded to the Plaintiff.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE