



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L NO. 984 OF 2012**

**JEMELI CHEPKISA.....PLAINTIFF**

**VS**

**JAMES R. RONO .....1ST DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2ND DEFENDANT**

***(Application to introduce new witnesses at defence stage of proceedings; whether such application maintainable; on the facts and circumstances application disallowed)***

**RULING**

1. This suit was commenced through a plaint that was filed on 21 December 2011. The case of the plaintiff is that she and her co-wife, one Jebet Cheruiyot (now deceased), jointly purchased the land parcel Nandi/Kaptel/263 measuring about 6.6 Ha. They then registered it in the name of one Michael Cheruiyot (now deceased) who was son to Jebet Cheruiyot, and who it is said, held the land in trust for them. They otherwise took possession of it and enjoyed peaceful possession until the year 1993 when one Kiprono Boit, who is now deceased, and who was father to the 1st defendant herein, started laying claim to 3 acres of the land. In 1998, the Land Disputes Tribunal awarded the 3 acres to Kiprono Boit. It is the case of the plaintiff that the Tribunal had no jurisdiction to hear the dispute yet the defendant has moved to actualize the order of the Tribunal. In the suit, the plaintiff has sought a declaration that the award of the Tribunal was null and void and also an order of permanent injunction to restrain the 1st defendant from the suit land.

2. Together with the plaint, the plaintiff filed the requisite copies of documents and statements of witnesses to be relied upon.

3. The 1st defendant filed Defence on 8 March 2012 and denied the plaintiff's allegations. Inter alia he stated that Kiprono Boit had a legitimate claim to 3 acres of the suit land and he supported the award of the Tribunal. Together with the Defence, the 1st defendant filed a list of witnesses containing James Rono as the only named witness and "any other witness to be called with leave of the Honourable Court." There was also a list of documents with 4 documents being named, i.e Official Searches to land parcels Nandi/Kaptel/263, Nandi/Kaptel/863 and Nandi/Kebulonik/35; the file to Kapsabet Succession Cause No. 75 of 1993, and "any other document to be produced with leave of the Honourable Court."

4. The matter was mentioned on 16 May 2013 to confirm pre-trial compliance and it was stated that the plaintiff and 1st defendant had filed their statements and documents and were ready to take a date for hearing. Thereafter the matter was fixed for hearing on 12 November 2013. It did proceed on that day and on other subsequent days when the plaintiff testified and called two witnesses, the last of whom, testified on 21 January 2014. The plaintiff then closed her case. Mr. Choge for the defendant then stated that he would call the defendant and two other witnesses. He sought leave to file their statements. I directed the statements to be filed and served within 7 days but was careful not to state that the said witnesses could proceed to testify. My intention of stating that the statements be filed was so as to give opportunity to the plaintiff to either accede to them testifying or to object to them testifying. On 28 January 2014, witness statements were filed.

5. Mr. R.M. Wafula for the plaintiff has now objected to the witnesses testifying. He submitted that when the plaintiff and their witnesses gave evidence, they did not contemplate that the said witnesses would

testify. He further submitted that since the plaintiff has already closed her case, she will not have opportunity to rebut the evidence of the new witnesses tabled by the defendant. He submitted that the plaintiff will therefore not get a fair hearing contrary to the provisions of Article 50 of the Constitution. He further submitted that Order 7 Rule 5 (b) and (c) give a clear timeframe on the filing of witness statements. He stated that leave ought to have been sought at least 15 clear days to the date of trial for any late statements. It was his view that this was an ambush by the defendant and he asked that the statements be expunged.

6. Mr. Choge submitted that on 22 January 2014, the court allowed him to file statements within 7 days which was done. He stated that there was no ambush as leave was sought and granted. It was his view that no prejudice would be caused to the plaintiff.

7. I have considered the rival submissions. In essence, what the defendant wants, is to introduce new witnesses at the defence stage of the trial. What does the law say on this ? The operative provision in my view is Order 7 Rule 5 which provides 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.*

8. It will be seen from the above that a defendant needs to file her documents and statements together with the Defence. If any further statements are to be filed, the leave of the court must be sought 15 days prior to the trial conference. Ordinarily a trial conference would come in the form of a mention, where the parties state their readiness to proceed, on the basis of the statements and documents that they have filed. In our case, the mention was on 16 May 2013, when the parties affirmed that they are going to proceed on the basis of the statements and documents that they had then presented. No leave was sought at that time by the defendant to introduce new statements or documents.

9. I believe that it is on the basis of the statements and documents of the defendant that the plaintiff produced her evidence and closed her case. The statements and the new evidence now sought to be introduced were not within the contemplation of the plaintiff when she gave evidence. It is apparent that new evidence, of which the plaintiff did not know that she will have to face, is being introduced at a time that the plaintiff has already closed her case. The plaintiff will not have an opportunity to rebut all this new evidence that she did not know of when she was presenting her case. This is a clear ambush on the part of the defendant.

10. A more or less similar scenario did present itself in the case of ***Johana Kipkemei Too vs Hellen Tum, Eldoret E & L No. 975 of 2012 (2014) eKLR***. In that case, the plaintiff had called his evidence and closed his case. The defendant after testifying, applied to introduce additional witnesses and a document that had not been revealed to the plaintiff before. I had this to say on the issue :-

*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.*

*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 vs 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.*

*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.*

11. I have not seen the need to depart from the above reasoning. As stated above, the prejudice to the other party increases as the trial progresses. In our case, the plaintiff has already closed her case. The evidence being sought to be introduced is new evidence which was never put to the plaintiff during cross-examination. There was absolutely no mention of the evidence sought to be introduced until the plaintiff closed her case. In my view, and after assessing the surrounding circumstances of this case, I am of the opinion that it will be unfair to the plaintiff to have the new evidence introduced at this late stage of the proceedings. Introduction of the same will be an ambush to the plaintiff and will lead to an unfair trial.

12. Mr. Choge cannot argue that leave to introduce the new evidence was granted on 21 January 2014. No such leave was given. I only stated that the statements be filed so that the plaintiff can make an informed decision on whether or not to allow the same or oppose their introduction.

13. For the above reasons, I have no option but to disallow the application to introduce the new evidence. The defendant will have to proceed on the basis of the evidence that he had mentioned he will table through the witness statements and documents filed with the defence.

14. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

*Ms Adhiambo holding brief for Mr. R.M. Wafula for plaintiff.*

*Mr. Akello holding brief for Mr. Choge for 1st defendant.*

*Ms Lung'u present for 3rd defendant.*