



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 568 OF 2011

ANTHONY MILIMU LUBELELLAH.....PLAINTIFF

-VERSUS-

THE STANDARD LIMITED & 9 OTHERS.....1ST DEFENDANTS

RULING

1) The subject matter of this ruling is the motion dated 25th January 2021 taken out by the plaintiff in which the plaintiff sought for the following orders:

i. The honourable court e pleased to grant leave for the plaintiff; Anthony Milimu Lubulelah to be recalled for the sole purpose of producing the statement of Mica Mujesia dated the 7th day of March, 2012.

ii. The said statement be admitted into evidence not as proof of its contents but in proof of the fact that the deceased made the statement bearing the contents thereof.

iii. The costs of the application be in the cause.

2) The motion is supported by the affidavit sworn by Antony Milimu Labellalah. When served, the 1st, 2nd and 3rd defendants filed the replying affidavit sworn by Milicent Ngetich to oppose the application. The 4th and 5th defendants filed grounds of opposition and the replying affidavit of George Maina to resist the motion. The 6th defendant also filed grounds of opposition to oppose the application

3) This court gave directions to have the foresaid motion disposed of by written submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have also considered the grounds of opposition plus the rival written submissions. The main order sought by the plaintiff is for the plaintiff to be recalled for purposes of producing the witness statement executed by the late Micah Mujeisa dated 7th March 2012 to be admitted into evidence not as proof of its contents but as proof of the fact that the deceased made the statement.

5) It is the submission of the plaintiff that Micah Mujesia died at Kakamega in 2019 and that the defendants have been served with a notice to admit the facts dated 4th June 2020. The plaintiff further stated that he has been unable to obtain a copy of the deceased's death certificate but that as a neighbor to the deceased he knows of his own personal knowledge that Micah Mujesia is now deceased.

6) The plaintiff pointed out that the plaint was filed and served

together with the deceased's witness statement dated 7th March 2012. It is pointed out that the deceased passed on before testifying hence this court should be given the opportunity to is relevance, materiality and weight.

7) The plaintiff further argued that the witness statement is crucial and hold great evidentiary value and will assist this court in achieving a just and fair determination based on the facts adduced in the deceased's statement.

8) The 1st, 2nd and 3rd defendants urged this court not to admit the witness statement in evidence since it is more of hearsay evidence. The respondents pointed out that the deceased's witness statement is solely in the interest of the plaintiff and is not connected with the public right or custom.

9) It is argued that the plaintiff has not met the conditions set under Section 33 of the Evidence Act. This court was urged to invoke the doctrine of laches. The 4th and 5th respondents also pointed out that the plaintiff had filed a similar application which application was heard and dismissed by Lady Justice Njuguna.

10) They also averred that the plaintiff's application does not meet the conditions set out under Section 33 of the Evidence Act. It is also argued that if the order is given it may infringe the 4th and 5th respondents right to a fair hearing under Article 50 (1) of the constitution, 2010.

11) The 6th defendant/respondent argued that the plaintiff is guilty of laches hence the motion should be rejected.

12) Having considered the material placed before this court plus the rival submissions and the main issue is whether the order sought by the plaintiff should be granted. In determining such an application, the court has to consider the principles and or conditions set under Section 33 of the Evidence Act. Under the aforesaid provision a statement made by a person who is dead like in this case is admissible where the statement made against the pecuniary or proprietary interest of the person making it or where if true, it would have exposed him to a criminal prosecution or to a suit for damages or when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware and when such statement was made before any controversy as to such right, custom or matter had arisen.

13) It is expressly stated by the plaintiff that he intends to produce in evidence the statement of Micah Mujesia (deceased) only to prove that the deceased gave the statement and nothing beyond that. It is not in dispute that one Micah Mulimu Mujesia executed a witness statement which was filed together with the plaint. He passed away before testifying in this suit. The statement is therefore reliable and can be admissible under Section 33 of the Evidence Act.

14) Its production cannot be said to be prejudicial to the defendants because its production is to only prove that the deceased gave the statement. I find the motion to be meritorious. It is allowed. Consequently, leave is granted to the plaintiff to recall Antony Milimu Lubelellah for purposes of producing the statement made by Micah Malayi Mujesia dated 7th March 2012 to be admitted into evidence as proof of the fact that the deceased made the statement. Costs to be in the cause.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant