



REPUBLIC OF KENYA



KENYA LAW
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**Khalfan v Ladha (Miscellaneous Application 7 of 2017)
[2022] KEHC 12526 (KLR) (15 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 12526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 7 OF 2017**

JO NYARANGI, J

APRIL 15, 2022

BETWEEN

NAWAL BADRUDEEN MOHAMED KHALFAN APPLICANT

AND

AHMED FAKIR MOHAMED AHMED LADHA RESPONDENT

RULING

1. In this matter, the plaintiff/applicant gave evidence in chief and was duly cross examined by the respondent's counsel. The applicant/ plaintiff closed her case on May 10, 2018. On October 24, 2018 the respondent took the witness box. When the matter came up for cross examination on April 25, 2018, Ms. Osino for the applicant sought court's permission to have 2 charge sheets in respect of two pending criminal cases namely; Cr. Case No. 1760/2018 and Cr Case No 470 of 2018 in which the respondent was allegedly charged with forgery of documents (spousal consent) and assault against the applicant respectively.
2. Ms Osino further sought time to access a document examiner's report which had been referred to in the respondent's evidence in chief and that she had just seen it that morning with the respondent's counsel. Counsel intimated that she was ready to proceed with cross examination if enabled to access the two charge sheets and document examiner's report. She submitted that counsel for the respondent was free to recall witness.
3. Mr Siminyu for the respondent opposed the same on various grounds inter alia; It was an afterthought and that there was nobody to produce the documents. In its ruling delivered on the same day, the Judge allowed the application. The court directed M/s Osino to file a supplementary affidavit within 14 days to introduce the charge sheets in Cr case No 470/2018 and 1760 /2018 together with the report from the document examiner. The court further stated that Mr Siminyu was at liberty to file a response and to recall the applicant if he deemed it fit or necessary to cross examine her on the said document.



4. Upon delivery of the ruling, Mr Siminyu for the respondent sought leave to appeal which was granted and proceedings stayed for 21 days . On February 7, 2019 Mr Siminyu indicated that he was ready to proceed with the hearing having abandoned the idea of filing an appeal.
5. When the matter came up for hearing on 8th April.2021 Mr Siminyu sought leave to introduce additional evidence being judgments of the aforementioned Cr.case No 1760/2018 and 740/2018 which were delivered on 23rd Februry,2021 and April 1, 2021 respectively.
6. Ms Osino opposed the same arguing that it was prejudicial to the applicant who had already closed her case. However, the court allowed it on grounds that the subject judgments were not available by the time the applicant had testified and the respondent given evidence in chief. M/s Osino requested the court to allow production of the entire proceedings in those cases which the court allowed by directing the Executive Officer to produce the actual physical files.
7. After giving the said directions, M/s Osino made a further application that she be allowed to introduce the document examiner's report. On the other hand, Mr Siminyu urged the court not to allow the same as the applicants had squandered the opportunity since April 25, 2018. Counsel further submitted that M/s Osino had filed a supplementary affidavit as directed but omitted the document sought to be introduced. That the applicant cannot wait for all this long to apply for extension of time.
8. In her rejoinder, M/s Osino admitted it was her mistake not to have acted promptly but was quick to add that an advocate's mistake should not be vested on her client and that the respondent will not suffer any prejudice after all.
9. I have considered the application herein for the applicant to file a supplementary affidavit to introduce additional evidence in the nature of document examiner's report as per the order of this court made on April 25, 2018 and the objection thereof. It is clear that leave to adduce additional evidence within 14 days was granted on April 25, 2018. It is now 3 years down the line.
10. From the record, on November 2, 2018, M/s Osino filed supplementary list of documents listed as; charge sheet for forgery; case report from document examiner and charge sheet for assault case. Unfortunately, only the charge sheets and witness's statements in respect of the two cases were filed minus document examiner's report. M/s Osino could not justify the omission in attaching the document examiner's report but admitted her mistake.
11. I do agree with learned counsel Mr Siminyu that 3 years is such an abnormal period to fail to act on a court order.
12. I do however note that M/s Osino acted although not within 14 days but omitted a crucial document which she now admits was her mistake. Taking into consideration the totality of the circumstances of this case and further taking into account that no further proceedings took place since the time the order was made, there will be no prejudice in submitting the document as it is listed in the list of supplementary list of documents but not attached.
13. Having allowed the application, the rest of the orders and directions of the court made on April 25, 2018 remains. The applicant to file a supplementary affidavit to introduce the said report within 7 days and the respondent to file a response thereto within 7 days if need be. Hearing date remains to be 10th June, 2021.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 15TH DAY OF APRIL, 2021.

J. N. ONYIEGO



JUDGE

