



REPUBLIC OF KENYA



**KSC International Limited (Under Receivership) & 5 others v
Bank of Africa (K) Limited & 6 others (Civil Case 446 of 2015)
[2022] KEHC 10653 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 446 OF 2015**

WA OKWANY, J

MAY 26, 2022

BETWEEN

**KSC INTERNATIONAL LIMITED (UNDER RECEIVERSHIP) ... 1ST PLAINTIFF
KUNDAN SINGH UBHI 2ND PLAINTIFF
OPKAR SINGH UBHI 3RD PLAINTIFF
RIPTHUMAN SING UBHI 4TH PLAINTIFF
VISTA WINDOWS LIMITED 5TH PLAINTIFF
HIGHLANDS CANNERS LIMITED 6TH PLAINTIFF**

AND

**BANK OF AFRICA (K) LIMITED 1ST DEFENDANT
KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT
I & M BANK LIMITED 3RD DEFENDANT
KOLLURI VENTAKA SUBBARAYA KAMASASTRY 4TH DEFENDANT
DELLOITTE CONSULTING LIMITED 5TH DEFENDANT
SAMUEL OKETCH ONYANGO 6TH DEFENDANT
HARVEEN GADHOKE 7TH DEFENDANT**

RULING

ARGUMENTS



1. When the matter came up for defence hearing on January 25, 2022, Mr Taib SC objected to the presence of other witnesses in court during the cross examination of DW1. Counsel argued that allowing the witnesses to sit in court during the hearing would compromise the corroborative value of evidence of the said witnesses. For this argument, counsel cited the decision in *Mary Ngonyo Kiume Vs Charles Muisyo David & 2 Others* 2020 eKLR .
2. Mr Musyoka, learned counsel for the 2nd defendant, submitted that the objection is meant to delay the case as the issue of exclusion of witnesses from court is merely a rule of practice that does not have a statutory underpinning. He contended that exclusion of witnesses from court is only intended to avoid a situation where a witness tailor makes his testimony based on what another witness had said and is only applicable where a party calls more than one witness. He noted that even in the *Mary Ngonyo case* (supra), the judge did not exclude the witnesses' evidence but only observed that the weight of their evidence would be considered. He differentiated the defendant's case from the plaintiff's case and observed that each of the defendants had their own separate and distinct cases, in which case, justice would require the presence of their witnesses in court to enable them prepare a rebuttal of any evidence that is adverse to the different institutions/persons that they represent.
3. It was submitted that the witnesses were in court in their capacities as representatives of the defendant companies and that they had a right to hear the evidence of the other defendants' witnesses. Counsel reiterated that the 7 defendants had summoned one witness each except the 4th to 7th defendants who have one common witness.
4. Mr Gachuhi, learned counsel for the 3rd defendant, submitted that in view of the practice in the Commercial Division where parties exchange the documents and evidence that they intend to rely upon during the case management conference, the old practice where witnesses could manufacture evidence during trial had been overtaken by events. He urged the court to exercise its discretion judicially taking into consideration the fact that the defendants were sued separately.
5. Counsel further observed that the 2nd , 3rd , and 4th defendants have filed counterclaims and that the plaintiffs did not establish that they will suffer any prejudice if the defence witnesses sat in court during the hearing.
6. Mr Karungo, learned counsel for the 1st 4th and 7th defendants, submitted that the objection is misplaced and will not assist the court in the just and expeditious disposal of the case.
7. In a rejoinder, Mr Taib SC submitted that the defence had misapprehended the law with respect to the issue at hand and added that the exclusion of the witnesses would assist the court in the assessing credibility of the witness.
8. Mr Sarvia, advocate for the 1st to 4th plaintiffs, submitted that since the hearing had already proceeded without the witnesses being in court, then the weight to be given in the defendants' case ought to be reduced accordingly.
9. I have considered the rival submissions made by the counsels on the exclusion of the defence witnesses from court during the testimony of the other witnesses.
10. I note that in the cited case of *Mary Ngonyo Kiume vs Charles Muisyo David & 2 Others* 2020 eKLR, an objection was raised because PW2 was in court throughout the period when the plaintiff was testifying. The court in this matter held that: -

“Indeed, as correctly argued by the defence, the practice of this court requires a witness to sit outside the court room while a party or another witness is testifying. This practice is meant



to assist the court and the parties to assess the credibility of the evidence that is given by each witness, independent of the evidence of the other witness. It is only when this practice is upheld and observed that the principle of corroborative evidence, which is key in a trial, would be helpful to the court in arriving at a fair decision.

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Just like in the *Waithaka and John Oroo* (supra) cases, I am of the same view that a witness cannot be locked out from testing just because he was in court when the plaintiff was testifying. However, the weight to be placed on his testimony will be less than the weight that would have been placed on the evidence that he would have given had he not sat in court while the plaintiff or any other witness was testifying.”

11. In *Saadiya Sheikh Muhiddin & another v Nessen Salim Karama & another* [2022] eKLR the court stated that:-

“In a recent English case of *Luckwell – Versus - Limata*, [2014] EWHC 536, where an application to exclude and/or disqualify a witness from court was made, Justice Holman had this to say:-

“If a court is, in fact, sitting in public, and if an application is made to exclude a witness or witnesses, then the court may exclude them. But it should only exclude them if the court is satisfied, on the facts and in the circumstances of the particular situation, that it would, for good reasons, be an appropriate step to take. The threshold may not be a high one. The reason may not need to be a very cogent one. But if a court is sitting in public, no one who wishes to be present should be excluded, not even a witness, without some good reason for doing so. I propose to apply that approach and direct to myself in that way in making the present ruling.”

The assessment of the credibility of a witness on the ground that he was present in court when other witness adduced evidence is based on the protection against deliberate falsification and also protection against the normal trait of memories changing based on post event information. In criminal cases, it’s paramount for witnesses to be excluded to prevent them from tailor making their evidence to the previous witness. In civil cases, as I had mentioned above, common law provides that it’s at the discretion of court to determine whether or not to disqualify the witness.

12. In the present case, I note that is not disputed that each of the defendants has been sued separately. The defendants have indicated that they each intend to call one witness. My finding is that, in the circumstances of this case, it will be prejudicial to the defendants if the witnesses are excluded from the court as each one of them has a separate and distinct case to respond to. I also note that some of the defendants have counterclaims which they will prosecute separately. Guided by the dictum in the cited authorities, I find that exclusion of witnesses should only be enforced where a defendant is calling more than one witness. This is to say that in the event that a defendant intends to call more than one witness in support of its case, then the other witnesses will have to exit the court room when a witness is testifying.
13. For the above reasons, I find that the plaintiff’s objection is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the case.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2022.

W. A. OKWANY



JUDGE

In the presence of: -

Mr. Sarvia for 1st- 4th Plaintiffs.

Mr. Taib S.C. for 5th and 6th Plaintiffs.

Mr. Karungo for 1st, 4th -7th Defendants

Mr. Musyoka for 2nd defendant.

Mr. Gichuhi for 3rd Defendant.

Court Assistant- Sylvia

