

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 514 OF 2013

WYCLIFF AMBETSA OPARANYA1ST PLAINTIFF

PHILIP MUSEVE KUTIMA.....2ND PLAINTIFF

VERSUS

CITIZEN TELEVISION.....1ST DEFENDANT

ROYAL MEDIA SERVICES.....2ND DEFENDANT

FAIZA MAGANGA.....3RD DEFENDANT

RULING

This suit was filed on 6th December, 2013 based on what the plaintiffs alleged to be defamation upon them by the defendants. The defendants entered appearance and filed a statement of defence upon service of summons denying the plaintiffs claim. At some point, the defendant filed an application dated 28th June, 2017 seeking the dismissal of the suit for want of prosecution. The court declined to dismiss the suit in a ruling dated 23rd July, 2020.

Subsequently, the plaintiffs filed an application dated 11th August, 2020 seeking an order to compel the 1st and 2nd defendants to produce under oath, the video clip broadcast on 9th August, 2013 at 1900 hours by the 1st defendants televised news bulletin Citizen Nipashe. There was a second prayer to compel the 1st and 2nd defendants to produce under oath, the video clip broadcast published online on 9th and 10th August, 2013 as set out. That application is the subject of this ruling.

Reasons for the said prayers are set out on the face of the application and the supporting affidavit sworn by Lukoye Musundi advocate. The defendants opposed the application and filed grounds of opposition to that effect. Both parties have filed submissions and cited some authorities which I have noted.

Before any suit is filed there must be a cause of action and evidence to be relied upon. Order 3 rule 2 of the Civil Procedure Rules also provides that the plaintiff provides, at the time of filing the suit among other things, a list of witnesses to be called at the trial and their witness statements duly signed, list and copies of documents to be relied on at the trial including a demand letter before action.

In the list of witnesses given, the plaintiff named two witnesses and in the list of documents, the plaintiff gave only one item, the demand letter.

From the pleadings, it is clear that the plaintiffs were relying on the contents of the broadcast which they identified. However, this was not included in the list of evidence to be produced during the trial. There is on record a notice to produce dated 19th and filed on 21st February, 2018 requiring the production of the video clip broadcast on 9th August, 2013 at 1900 hours by the 1st defendant's televised new bulletin. If the same is not in the list of evidence to be produced in the trial, it may be prejudicial to order its production. See **Ibrahim Onyinkwa & 2 Others v Royal Media Services Limited (2013) e KLR**

The present application comes seven years from the time the suit was filed. The law provides at Section 107 of the Evidence Act, that whoever alleges must prove. In the statement of defence, the defendants denied all the allegations by the plaintiffs including the broadcast information. To require the defendants to produce the video clips is asking the same defendants to prove the plaintiffs case against themselves.

The burden of proof under Section 107 of the Evidence Act aforesaid may not be shifted to the plaintiffs. It is not necessary for me to recite the authorities cited by both parties save to observe that, the request by the plaintiffs is too late in the day and in any case, it will be contrary to the provisions of the Evidence Act and procedure to grant the orders sought.

The end result is that this application is dismissed with costs to the plaintiffs.

Dated, signed and delivered at Nairobi this 25th day of February, 2021.

A. MBOGHOLI MSAGHA

JUDGE