



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL AND ADMIRALTY DIVISION
CASE NO. 79 OF 2013

LUCY MOMANYI T/A L. N. MOMANYI

& COMPANY ADVOCATES.....PLAINTIFF

-VERSUS-

JOEL OMBATI NYAMWEYA.....1ST DEFENDANT

KENYA POWER AND LIGHTING

COMPANY LIMITED.....2ND DEFENDANT

CONSOLIDATED WITH

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL AND ADMIRALTY DIVISION
CASE NO. 642 OF 2011

LUCY MOMANYI T/A L. N. MOMANYI

& COMPANY ADVOCATES.....PLAINTIFF

-VERSUS-

KENYA POWER AND LIGHTING

COMPANY LIMITED.....1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES.....2ND DEFENDANT

AND

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATE'S COURT AT MOMBASA
CIVIL CASE NO. 919 OF 2003

LUCY MOMANYI T/A LUCY NYAMOITA

MOMANYI & COMPANY ADVOCATES.....PLAINTIFF

-VERSUS-

KENYA POWER AND LIGHTING

COMPANY LIMITED.....1ST DEFENDANT

REALITE LIMITED.....2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 3rd April, 2020 brought under the provisions of Article 50 of the Constitution, 2010, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 7 Rule 5(b) and (c) of the Civil Procedure Rules, 2010 and all the other enabling provisions of the law. The defendants seek the following orders -

(i) That the defendants be granted leave to substitute their witness; and

(ii) That the Costs of this application be provided for.

2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on 3rd April, 2020 by Ronald Sevu, the Property Officer of Kenya Power & Lighting Company Limited, Coast Region.

3. Advocates for the parties canvassed the application by way of written submissions. The defendants' submissions were filed by the law firm of Hamilton Harrison & Mathews Advocates on 19th June, 2020 while the plaintiff's submissions were filed by the law firm of Stephen (A.K.A Suleiman) Macharia Kimani Advocates on 12th November, 2020.

4. Mr. Mugambi, learned Counsel for the defendants submitted that the orders which were being sought by the defendants are discretionary in nature. He stated that courts have wide and almost unfettered discretion as the only constraint imposed upon them is that when they exercise their discretion, the terms should be just and equitable. Counsel submitted that central to this application, is the defendants' constitutional right to be heard and the constitutional duty of the Court to determine disputes before it, in a timely, efficient and cost effective manner.

5. He urged this Court to look at the defendants' conduct in determining whether to exercise its discretion in their favour. He indicated that the Court record shows that the defendants have always been ready to proceed with the hearing of this matter but there have been numerous adjournments caused mainly by the plaintiff. He further indicated that whereas the plaintiff gave her evidence-in-chief on 23rd July, 2014 she was cross-examined on 11th November, 2019 since she always had an excuse for not taking the stand each time the matter came up for cross-examination, thus occasioning the delay in having the case heard.

6. Mr. Mugambi submitted that the plaintiff's conduct had caused the defendants the challenges which it was experiencing in this case. He also submitted that the plaintiff had not presented any evidence to show that the defendants were not being candid in their reasons for the present application. He relied on the case of **Mohamed & another vs Haidara** [1972] EA 166, to the effect that where facts stated in an affidavit are not controverted, those facts are taken to have been admitted. He was of the view that it was not too late for the defendants to seek substitution of the witness since the right to be heard is never closed to parties who are seen to exercise due diligence in pursuing their rights to be heard, such as the defendants.

7. He further submitted that the Court has the power to allow a party to amend its pleadings at any stage of the proceedings, to re-open its case even if the hearing has closed, to recall witnesses, to add witnesses, to file additional documents, to set aside an *ex parte* judgment or proceedings and to admit new evidence on appeal among other powers. He relied on the case of **Republic v Kenya Revenue Authority Ex parte Stanley Mombo Amuti** [2018] eKLR, where the Court held that there was nothing arbitrary or capricious in a court exercising its discretion in order to give effect to a constitutional right.

8. Reliance was also placed on the case of **Meera Umoja Kenya Limited v David Gikara & Another** [2020] eKLR, where the court when dealing with an application similar to this one observed that allowing the application therein would expedite the matter as it would pave way for the hearing to proceed instead of holding on to a witness who may have difficulties in attending Court. Mr. Mugambi urged the Court to grant the defendants leave to substitute their witness.

9. Mr. S.M. Kimani, learned Counsel for the Plaintiff submitted that the defendants' conduct was sloppy and most dilatory as to disentitle the Court to exercise its discretion in their favor. He stated that a party cannot seek to belatedly substitute a witness, long after the plaintiff testified against the wrongful actions of Mr. Joel Ombati Nyamweya. He submitted that statements are meant to facilitate advance discovery and that it is irrelevant that the new witness would copy Mr. Joel Ombati's statement. The plaintiff's Counsel also submitted that it would not be possible to cross-examine Mr. Sevu on what Mr. Ombati did, since the new witness was not privy to the acts complained of in the suit. Mr. Kimani was of the view that the plaintiff would suffer prejudice as a result of the substitution.

10. He further submitted that a witness cannot adopt another witness's direct evidence and be cross-examined on it, without violating the

Evidence Act. While relying on the case of **Samuel Kiptoo Rop & Another v Beatrice Nakhumicha Khaoya & 3 others** [2020] eKLR, he submitted that the rules of procedure envisage statements of witnesses or documents not supplied at the filing stage may be supplied only with the leave of the Court if they are made available at least 15 days before the pre-trial conference as contemplated under the provisions of Order 11 Rule 7 of the Civil Procedure Rules. He was also of the view that by allowing the substitution of a witness and a new statement to be filed after the close of the plaintiff's case may lead to the plaintiff re-opening her case to recall witnesses, or call fresh testimony, to counter the new evidence from the defence.

11. Mr. Kimani contended that allowing Mr. Sevu to testify instead of Joel Ombati Nyamweya on behalf of the 1st defendant would alter the character of the case. He cited the case of **Johana Kipkemei Too v Hellen Tum** [2014] eKLR, where the Court stated that since the plaintiffs had already closed their case and would not have an opportunity to rebut the new evidence, it would be unfair to the plaintiffs, if it was to allow the defendant at that late stage of the proceedings to fundamentally alter the character of her case to one that the plaintiffs never contemplated when tabling their evidence. The said court took the position that if it did so, the trial would end up being unfair to the plaintiffs and would violate the provisions of Article 50(1) of the Constitution.

12. He also indicated that there was neither sincerity nor *bona fides* in the applicant's plea and urged this Court to dismiss or strike out the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issue that arises for determination is whether the defendants should be allowed to substitute their witness.

13. In the affidavit in support of the application, the defendants averred that initially, they had indicated that Joel Ombati Nyamweya, a former employee of the 1st defendant would be their witness in this case and even went ahead and filed a witness statement in his name on 10th February, 2014. The affidavit stated that Mr. Ombati was employed in the capacity of the Property Officer in charge of Coast region before he left the 1st defendant's employment on 2nd October, 2013.

14. The defendants further averred that Mr. Ombati had agreed to testify on his own behalf and on behalf of the 1st defendant and the latter used to facilitate his attendance in Court whenever the case came up for hearing. It was claimed that it became unsustainable and highly burdensome due to the various adjournments that were being occasioned by the plaintiff. The affidavit stated that on 21st February, 2019, the 2nd defendant sent the 1st defendant a proforma invoice for the sum of Kshs. 58,500.00 in order to facilitate him to attend Court for hearing of the case on 26th February, 2019.

15. The defendants further claimed that the various adjournments had made it very costly for the 1st defendant to maintain the 2nd defendant as its witness. The 1st defendant gave a scenario where the 2nd defendant learnt that the plaintiff would occasion an adjournment on 26th February, 2019, and asked for compensation for the inconvenience for having to postpone his business for two days in order to attend the hearing.

16. It was the 1st defendant's position that in order to avoid further escalation of costs associated with bringing Mr. Ombati to testify, the 1st defendant decided to substitute him with his successor in title, Mr. Sevu who has access to all the information and records that the 1st defendant intends to use in its defence in the case against it.

17. The defendants averred that the Court's overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of disputes before it and that the Court has unfettered discretion to permit substitution of a witness where the attendance of a witness initially listed cannot be secured.

18. The defendants further averred that no prejudice would be occasioned to the plaintiff as a consequence of the substitution of the defendants' witness, as Mr. Sevu's testimony shall be based on the documents that already form part of the Court record and the plaintiff will have the opportunity to test his evidence by way of cross-examination. The defendants affirmed that they would not be introducing any new evidence.

19. The plaintiff filed grounds of opposition dated 18th May, 2020 to oppose the application. They are to the effect that-

(i) The defendants are neither candid nor honest in their reason or reasons for their present application;

(ii) It is too late in the day to seek to substitute;

(iii) The interlocutory application and affidavit alluded to in paragraph 11(d) and (e) are not part of the record of the Court and the Court is not obliged to take cognizance of the documents; and

(iv) The defendants have acted and conducted their case in a sloppy and most dilatory manner as to be disentitled to exercise of discretion in their favor.

(v) Grave prejudice continues to accrue and ensue to the plaintiff, directly from the dilatory and convoluted conduct and stance of the defendants.

20. It is not contested that Mr. Joel Ombati Nyamweya, the 2nd defendant herein is no longer an employee of the 1st defendant since 2nd October, 2013. Prior to his exit, he was working as the Property Officer of the 1st defendant, in charge of the Coast region. It was also not

disputed that the said position is currently held by Mr. Sevu. Mr. Kimani's contention was that a witness cannot adopt the direct evidence of another witness and be cross-examined on it. He was of the view that it would be impossible to cross-examine Mr. Sevu on the actions of Mr. Ombati.

21. This Court need not state that the 1st defendant is a separate entity from Mr. Ombati who has been sued in his own personal capacity and is the 2nd defendant. Mr. Mugambi submitted on the challenges that have been experienced in the past by the 1st defendant in trying to avail Mr. Ombati to testify on its behalf. Mr. Sevu in his affidavit deposed that he has access to all the information and records that the 1st defendant will use in its defence.

22. This Court notes that the 1st defendant seeks to substitute its witness and not to introduce a new witness and/or new documents that the plaintiff had no knowledge of at the time the hearing of the case commenced.

23. This Court in considering whether to grant the 1st defendant leave to substitute its witness has to determine whether the plaintiff shall suffer any prejudice. Article 50 (1) of the Constitution of Kenya, 2010 provides that every party is guaranteed the right to a fair hearing.

24. The 1st defendant has indicated that the statement of the proposed witness is similar to the statement filed by the original witness and that the proposed witness is conversant with the issues before court as a successor in title to the witness it intended to call. That being the case, it means that the character of the case shall not be affected and/or changed since the nature of evidence to be adduced will not change. The case of **Johana Kipkemei Too v Hellen Tum** (supra) relied on by the plaintiff is not applicable in this case since the parties therein sought to file a *supplementary list of witnesses and documents which had not been filed earlier on, so as to allow the plaintiff to be cross-examined before the close of his case.*

25. This Court finds that the plaintiff has not demonstrated any prejudice that she is likely to suffer if the proposed witness is allowed to testify in place of the original witness. This court also notes that Mr. Ombati still remains as the 2nd defendant and nothing stops him from attending court to adduce evidence and be cross-examined in that capacity. Substitution of the 1st defendant's witness does not exclude the 2nd defendant from the proceedings in this case.

26. In light of the foregoing, I am satisfied that the reasons advanced by the 1st defendant are sufficient to allow it to substitute its witness, Joel Ombati Nyamweya with Ronald Sevu.

27. The upshot is that I find that the application dated 3rd April, 2020 has merit. The 1st defendant is granted leave to substitute its witness. It will file and serve a supplementary list of witnesses and a witness statement within 21 days from today. The costs of the application shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 30th day of April, 2021. Ruling delivered through Microsoft Teams Online Platform due to the outbreak of the Covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Lelu for the defendants/applicants

Ms Kimani holding brief for Mr. S.M Kimani for the plaintiff/respondent

Mr. Oliver Musundi – Court Assistant.