



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 36 OF 2016

ASHOK L. DOSHI.....1ST PLAINTIFF

AMIT A. DOSHI.....2ND PLAINTIFF

VERSUS

CENTRAL BANK OF KENYA.....1ST DEFENDANT

IMPERIAL BANK LIMITED.....2ND DEFENDANT

RULING

1. The plaintiffs herein who are represented by Messrs Oluga and Amadi sought to rely on pleadings and witness statements from several other cases namely, HCCC Nos. 522 of 2015, 523 of 2013, 131 of 2018, 392 of 2017 and JR 53 of 2016.

2. The 1st defendant on the other hand objected through their Advocate Mr. Chege to the action by the plaintiffs of filing and intending to rely on pleadings from other proceedings at the hearing of this case. He submitted that Order 11 Rule 3 of the Civil Procedure Rules, 2010 provides that during case management, the Court can strike out such documents. He stated that in this instance, the said cases are still pending in the Nairobi High Court and the witnesses therein have not been cross-examined by the defendants in the said case.

3. Mr Ouma for the 2nd defendant stated that on 18th October, 2016, they filed a paginated bundle of documents and Mr. Mohamed Mohamed filed his witness statement. He indicated that the order by Judge P. J. Otieno was to the effect that the Judge who would hear this case would deal with the issue of striking out of the plaintiffs' bundle of documents namely, volumes 1 to 5, filed on 3rd July, 2018. He indicated that they would not accept any documents by consent.

4. In response to the submissions by Mr. Chege, Mr. Oluga submitted that the basis upon which the defendants were seeking to strike out the documents was that the makers of the same are not available to produce them. He was of the view that the defendants were pre-empting the manner in which the plaintiffs should produce the said documents. He submitted that the defendants were disowning the documents yet they were the makers of the same. He stated that the issue herein cannot be raised now but only at the time when the plaintiffs' witness will be testifying.

5. In a rejoinder, Mr. Chege submitted that it was not true that all the documents the plaintiffs' Counsel were referring to were made by the defendants. He relied on the provisions of Section 34 of the Evidence Act which provides that previous proceedings cannot be relied on unless the adverse party has cross-examined witnesses. He submitted that the plaintiffs cannot pursue their case through the other proceedings referred to by their Counsel.

ANALYSIS AND DETERMINATION.

6. This Court has considered the defendants' objection, the previous proceedings as well as the oral submissions by Counsel for the parties herein. The issue for determination is if the application made by the plaintiffs is merited. The provisions of Section 34 of the Evidence Act Cap 80 Laws of Kenya provide as follows-

“1. Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable; and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.” (emphasis added).

7. In **Hassan v Jaswinder Singh Enterprises & another** [1992] eKLR, the Court in upholding an objection in an application similar to this one held that-

“In the Indian Evidence Act the similar section is section 33. According to Sarkar on Evidence 10th Edition at p 365, the previous evidence of a witness who cannot be called is admissible in subsequent judicial proceeding in proof of the facts stated therein when the following conditions are fulfilled.

1. that the evidence was given in a judicial proceeding or before any person authorized by law to take it.

2. that the first proceeding was between the same parties as the second proceeding or between representative in interest of the parties to the second proceeding; in other words, the party to the first proceeding should have been a representative in interest of the party to the second proceeding and not vice versa. The identity of the parties in the proceedings must be substantial and not nominal.

3. that the party against whom the deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken.

4. that the issues involved are the same or substantially the same in both proceedings.

5. that the witness is incapable of being called at the subsequent proceeding (on account of death, incapability of giving evidence or being kept out of the way by the other side or on unreasonable delay or expense” (emphasis added).

8. Having gone through the pleadings in the other matters, it is evident that the plaintiffs herein are not parties therein. It is not in dispute that the defendants are yet to cross-examine the witnesses in HCCC Nos. 522 of 2015, 523 of 2013, 131 of 2018, 392 of 2017 and JR 53 of 2016 which pleadings and witness statements the plaintiffs seek to rely on, in this case and/or have them adopted. It is thus apparent that the provisions of Section 34(1)(b) and (c) of the Evidence Act have not been met by the plaintiffs. This Court finds that from the pleadings and proceedings on record, it is evident that the plaintiffs only intend to call one witness Ashok L. Doshi who is the 1st plaintiff herein. There has been no indication from the plaintiffs that they shall be calling any additional witnesses.

9. This court sustains the objection raised by the defendants on the plaintiffs’ intention to rely on pleadings in HCCC Nos. 522 of 2015, 523 of 2013, 131 of 2018, 392 of 2017 and JR 53 of 2016. In the said circumstances, the plaintiffs’ bundle of documents filed on 3rd July, 2018 is hereby struck out. In consideration of the fact that the case herein was filed in the year 2016, parties are hereby directed to fix a hearing date for the main suit at the registry on a priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JULY, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Amadi holding brief for Mr. Kadima for the plaintiffs

Ms Ogejoh holding brief for Mr. Oluga for the plaintiffs

Mr. Chege for the 1st defendant

Mr. Ouma for the 2nd defendant.