



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS APPLICATION NUMBER 33 OF 2016

ELIZABETH WANJIKU NJOKA (Suing as the legal representative of

ALICE KAHAKI NJOKA (Deceased).....PLAINTIFF

VERSUS

JUMA KIPLANGE (Sued as the Legal Representative of

Philip Njoka Kamau (Deceased).....1ST DEFENDANT

TERESIA NJERI 2ND DEFENDANT

MARGARET DAMAT.....3RD DEFENDANT

LUCY WANJIRU.....4TH DEFENDANT

JAMES GICHERU5TH DEFENDANT

PETER NJOROGE.....6TH DEFENDANT

GILBERT KABAGE T/A PATA AGENCIES7TH DEFENDANT

JOSEPH NJUGUNA NJOKA.....8TH DEFENDANT

SOMOIRE KEEN9TH DEFENDANT

FAMILY BANK LIMITED10TH DEFENDANT

SAMUEL GITIMU.....11TH DEFENDANT

ERIC KAMAU.....12TH DEFENDANT

PINKAM HOLDINGS LIMITED.....13TH DEFENDANT

RULING

1. The main issue for determination is whether PW1 having relied on her Witness Statement and Affidavit in support of her case, can purport to produce as exhibit all the bundles of documents annexed to her affidavit as exhibits in her case.

2. The issue arose after PW1 Elizabeth Wanjiku Njoka testified and during her testimony made reference to;

(i) *“All three bundles of documents dated 7th September 2016, 31st May 2018 and 28th April 2018.”*

Counsel then stated;

“I wish to produce them as P. Exhibit 1, 2 and 3 respectively.”

3. This drew objections from the defendants, that the plaintiff could not purport to produce bundles of documents, in their copies, without testifying about them, and denying the defendants the opportunity to scrutinise them. That no basis was laid by the plaintiff for producing secondary evidence, as is required by the law of evidence.

4. That the attempt to produce documents in a wholesale manner without identifying each of them was unacceptable as there was no consent to do so. That ultimately the matter was not ready for hearing.

5. The plaintiff's counsel responded that the objection by counsel for defendants was putting the clock back to pre- 2010 Civil Procedure Rules days when parties had to prove document by document, that the documents ran to 700 pages and did they want each document to be proved? That the correct procedure would be for the defendants to state which documents they were objecting to having had them since 2016. That the post 2010 procedure was for a witness to adopt their statement, produce their documents and then be subjected to cross examination.

6. Let me say that in all this, no single authority was cited, nor any specific provision of the **Evidence Act or the Civil Procedure Code**.

7. Let me also point out that the plaintiff did hold up a bag in in court indicating that all the original documents were contained therein.

8. **Order 2 rule 3 and order 7 rule 5 of the Civil Procedure Rules** provides for which documents ought to accompany the suit, the defence and the counter claim respectively. These include the Verifying Affidavit, List of Witness, Written Witness Statements and Copies of Documents to be relied on at the trial. It clearly states *copies* of documents to be relied on, which I understand to mean that that the witness annexes the copies of the documents one to alert the other side that they will be relying on the said documents, and two, to enable the other side prepare for the trial, knowing full well the evidence the adversary intends to rely on during the hearing of the case.

9. The post 2010 procedure referred to by counsel for the plaintiff is found at **Order 11**, where parties to a suit are supposed to comply with Order 11 processes. The Case Management's Conference under this **Order 11 rule 3** parties ought to have had the opportunity to agree on what document to produce by consent, and what documents would be objected to. It is not expected that parties would be objecting to **documents during the hearing**.

10. On 25th January 2021 this court gave directions for pre-trial conference.

- a. For parties to confirm that they had exchanged the requisite documents.
- b. Whether to proceed orally or in whichever manner.
- c. The Number of witnesses to be called by each party.
- d. Any other relevant issue.

11. On 4th March 2021 this court was it was reported to court through Dr. K. Kuria Senior Counsel that;

- i. Matter was to proceed through viva voce evidence.
- ii. Parties had filed and exchanged documents.
- iii. He intended to call nine (9) witnesses.

Mr. Ndolo on this part said; In view of the many documents he would prefer oral evidence and would call four (4) witnesses.

Ms Wangari holding brief for Mr. Waiganjo said they would call four (4) witnesses.

Mr. Kioko said he would call the same witnesses as Dr. K. Kuria Senior Counsel.

Mr. Kipkoech said he would call one (1) witness.

12. The Court determined that parties would call 23 to 25 witnesses and gave the parties time to haggle over hearing dates. That is how we came to have these hearing dates. to now hear the defence, cry out loud that this matter is not ready for hearing is to mean that counsel were dishonest with the court when they appeared on 4th March 2021, when they haggled over hearing dates and when they, by consent fixed the matter for hearing.

13. When Dr. K. Kuria SC told the court that parties had exchanged documents, none of the other parties raised any objection. Hence, for counsel to continue to say that the matter is not ready for hearing on the ground that they have not verified the documents upon which the plaintiff is relying to prove her case is to take this court in circles, and that is unacceptable. I want to reiterate what my brother Justice A.K

Ndung'u had to say on 4th April, 2018 about the conduct of the defendants, and point out the obligation of counsel and parties under **Section 1A (3) of the Civil Procedure Act**. Parties and their counsel are duty bound to comply with the directions of the court, and in this case, compliance with **Order 11** was done before Justice A.K Ndung'u A.K, and before me as well and hearing dates fixed for 23rd, 24th and 25th July 2018. No party should be heard saying that this matter is not ready for hearing.

14. On the other hand, if parties and counsel are of the view that they require further directions in the matter in the interests of justice it is upon them to move the court.

15. With regard to the procedure adopted by Dr. K. Kuria SC, it is evident that there is nothing on record to show that parties admitted any documents by consent. That procedure will only be applicable where parties have admitted documents by consent and agreed on which documents they are objecting to. I do not have that on record, I only have an indication that documents were exchanged.

16. The **Evidence Act Part 3** stipulates the manner of proving documents. At **Section 64**, Proof of Documents must be by either primary or secondary evidence and **Section 67**, documents must be proved by primary evidence except in the exceptions under **Section 68**.

17. It is therefore my view that the objections raised by the defendants are in order to the extent that they affirm that no documents were produced by consent. It is the plaintiff's case and if she wishes to rely on the documents, then she must prove those documents unless they are agreed on by consent.

18. There was an issue raised regarding documents allegedly obtained illegally. The court would only be able to establish this alleged fact during the trial and the court cannot issue a blanket order as the case for each document will depend on the circumstances.

19. In the upshot, the objection is sustained.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF OCTOBER 2021.

Sent to parties by email by consent of counsel

MUMBUA T. MATHEKA

JUDGE

IN THE PRESENCE OF: -

C/A EDNA

DR. KAMAU KURIA SC FOR PLAINTIFF

MR. WAIGANJO FOR 1ST, 6TH, 7TH, 8TH, 11TH 12TH & 13TH DEFENDANTS

MR. NDOLO & MURIITHI FOR 3RD & 4TH DEFENDANTS

MR. NDOLO HOLDING BRIEF FOR MR. KANCHORI FOR THE 9TH DEFENDANT

MS. MAGANA FOR THE 2ND & 5TH DEFENDANTS

MR. KIPKOECH FOR THE 10TH DEFENDANT

MR. KIOKO FOR CHRISTINE & JOHNSON