



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 3 OF 2018

ASSL.....APPLICANT

VERSUS

ASMB *alias* ASM.....RESPONDENT

RULING

1. ASSL, the Applicant, filed the Originating Summons herein dated 21.3.18 against her husband ASMB *alias* ASM, the Respondent, seeking *inter alia* orders and declarations in respect of properties she claims to be matrimonial property.

2. The matter proceeded by way of *viva voce* evidence. During the hearing of the Applicant's testimony, the Applicant's counsel sought the Court's directions on how to proceed regarding an audio tape, the Applicant wished to rely on. The specific directions sought, was whether to play the audio recording in Court or whether the Court would listen to the same later. At this point, the Respondent's counsel informed the Court that he would object to the production of certain documents that the Applicant wished to rely on unless the makers thereof were called to testify.

3. The Respondent filed a list dated 1.11.18, of documents objected to. The documents include:

- i) medical report dated 21.2.18
- ii) schedule of payment titled "Amal Saleh"
- iii) receipts issued to the Applicant from Nabhan Swaleh Advocates dated 29.4.13 for Kshs 1,235,000/= and from Balala Abed Advocates for Kshs. 1,236,250/=.
- iv) Receipts from Balala Abed Advocates dated 8.5.13; 19.8.14; 2.10.14; 17.10.14 and 31.8.15.
- v) Cheque No. [...] from Balala Abed Advocates in favour of the Applicant dated 29.11.16 for Kshs. 828,000/=.
- vi) Agreement dated 22.10.12.

4. By her objection dated 22.11.18, the Applicant opposed the list filed by the Respondent on the grounds that the same was made contrary to the provisions of Order 37 Rule 18 of the Civil Procedure Rules and the Constitution and Section 35 of the Act. The Applicant further contended that calling the makers of the documents would result in unreasonable delay and the Applicant being one of the makers/recipients of the documents has already testified. The Applicant further contended that she is a housewife and unable to meet the costs of the witnesses, which include Kshs. 5,000/- for the maker of the medical report, and advocates who issued the receipts and cheques and who charge by the time spent. Additionally, 70-year-old Fadhil Saleh, the other party to the agreement, is resident in Yemen, a war torn country and is unable to travel without putting his life and health at risk and causing him great hardship and inconvenience. The cost of bringing him would amount to Kshs. 1,000,000/= being cost of visa, air ticket and accommodation.

5. Parties were directed to file written submissions on the objection raised by the Respondent.

6. In his submissions, the Respondent asserted that under Section 64 of the Evidence Act (the Act), contents of documents may be proved by primary evidence by means of production of the document itself under Section 65(1) of the Act, or by secondary evidence under Section 70 of the Act where evidence is led to prove handwriting of the maker of the document. Citing Section 35 of the Act, the Respondent contended that the makers of the documents in his list are all based in Mombasa and can thus attend Court. As regards Fadhil Saleh, it was submitted that air fare is not much and that he is fairly wealthy and can afford to travel. In the event the Applicant succeeds, then costs can be refunded.

7. The Respondent further submitted that the production of the audio recording cannot be allowed as the same does not meet the requirement of Sections 78A and 106B of the Evidence Act. The Applicant submitted that the audio recording was not in the list of documents objected to, that was filed by the Respondent on 2.11.18 and the same was introduced in the Respondent's submissions.

8. The Applicant in her submissions reiterated the contents of her objection dated 22.11.18. As regards the audio recording, she contended that the Respondent's objection to the same was raised in submissions. The Respondent in his filed list of the documents he objected to, did not include the audio recording. The Respondent's attempt to object to the audio recording offends the rules of natural justice as the Applicant was not given an opportunity to respond to the objection. The Applicant urged the Court to reject the submissions on the audio recording.

9. Section 35 of the Evidence Act requires that documents must be produced by the maker. Exceptions are however made, where, as provided in Subsection (2), the maker is:

“... dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

10. In the cited case of Joao Francis Quadros v SDV Transami Kenya Ltd [2005] eKLR, the Court directed that the documents sought to be produced by the plaintiff therein be produced by the maker, for the reason that:

The Plaintiff has not come under any of these exceptions. He has not given any reason why the maker of those documents cannot be called. In the circumstances I find no basis for allowing the plaintiff to produce them. The documents shall be produced by the maker. I therefore sustain the objection with costs to the defendant.

11. And in the case of Lilian Wangui Muhuyu & another v Sisters of Mercy (sued as the registered trustees of the Mater Hospital) [2017] eKLR, the Court sustained an objection by the defendant therein to production of documents without calling the maker because the plaintiff failed to address the Court on the difficulties in procuring the attendance of the maker

12. In the present case, the Applicant has stated the reason why she is unable to call the makers of the documents. She cites cost as one of the reasons. As a housewife with no income, she is not able to afford the cost of calling the maker of the medical report, and the advocates who issued the receipts and cheques. Further, the Applicant contended that in addition to the cost of visa, air ticket from Yemen and accommodation, securing the attendance of Fadhil Saleh who 70 years old, will put his life and health at risk and causing him great hardship and inconvenience. In the instant case, unlike in the cases cited by the Respondent therefore, the Applicant has given reasons why the makers of the documents cannot be called, thereby placing herself within the exceptions in Section 35(2) of the Act.

13. Further, the Applicant submitted that the objection to production of the documents was in contravention of Order 37 Rule 18 of the Civil Procedure Rules. Calling the makers of the documents would result in unreasonable delay and the Applicant being one of the makers/recipients of the documents has already testified. Order 37 Rule 18 provides:

At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

14. Directions as to the hearing of the OS herein were given by the Court on 31.5.18. Each party was granted 14 days to file the documents they wished to rely on at the hearing which was to be by way of *viva voce* evidence. The Applicant filed her documents on 14.6.18 as directed while the Respondent filed his documents on 31.7.18. The matter proceeded to hearing on 1.11.18 by way of *viva voce* evidence. During her examination in chief, the Applicant testified regarding *inter alia* the treatment notes and P3 form, the purchase of the flat and payments reflected in the receipts and cheque. These are the documents that the Respondent now objects to. At the time she testified on the documents, no objection thereto was made by the Respondent. It is only when the Applicant's counsel sought directions on the audio recording, that the Respondent's counsel raised the objection to, not just the audio recording, but the documents as well.

15. From the time the Applicant filed the documents objected to, on 21.3.18 when the Application was filed and 14.6.18 when she filed her further affidavit and right up to 1.11.18 when the matter came up for hearing, the Respondent had ample time to raise the objection he has now raised. At the time directions were taken, some of the documents now objected to had been filed. No objection was raised by the Respondent. Further, before the commencement of taking the Applicant's evidence, no objection was raised by the Respondent. As far as the Court was concerned, there was no disagreement between the parties as to the correctness and sufficiency of the facts set forth in the summons and affidavits. The Respondent having failed to raise objection to the documents on these 2 occasions cannot raise objection after the Applicant has testified on the said documents. This was the tenor of the holding in the case of Federation of Women Lawyers (FIDA) Kenya & others v Inspector General of Police & 2 others [2016] eKLR where the Court stated:

The court can admit a statement even if the maker is available but has not been called as a witness. Section 36 of the Evidence Act provides for the weight to be put to statements admitted under section 35. I have read the statements of the two witnesses and do find that having them admitted as evidence will not prejudice the defence case. The evidence contained in those statements is in line with what is already on record. The statements were admitted by consent and a counsel who is known to this court ably

represented the respondents. I see no cause for alarm. Waiting for the two witnesses to return to their homes after the dry spell would cause undue delay to this matter. Whereas Mr. Waigi appeared in court when PW1 and PW2 testified. Miss Munyony appeared when PW3 testified and is therefore well versed with the case.

16. I now turn to the audio recording. When the Respondent raised his objection to production of documents without calling the makers thereof, the Court directed that a list of documents be filed whereupon the issue of admissibility thereof would be determined. I have looked at the list filed by the Respondent on 2.11.18. It did not include the audio recording. The Respondent raised his objection to the audio recording in his submissions. As a result, the Applicant was not accorded an opportunity to rebut the objection to the same.

17. It is trite law that new issues cannot be raised in submissions. In the case of Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014] Korir, J. stated:

“The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”

18. I agree with Korir, J. submissions must be anchored on and supported by pleadings. The audio recording, not being included in the list objected to, cannot find its way in the Respondent’s submissions. The submissions on the said audio recording are therefore not anchored on anything. Accordingly, I will ignore the Respondent’s submissions and objection relating to the audio recording.

19. Similarly, it is trite law that a party cannot be allowed to go beyond his pleadings nor can the Court look beyond his pleadings. This was the holding in the case of Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others [2013] eKLR cited by the Applicant. Makau, J. while declining a request for scrutiny and recount in stations not specifically pleaded in the petition had this to say:

“In view of the foregoing I find and hold that the Petitioner can only ask for scrutiny and recount in stations which he has specifically pleaded in the petition. He cannot be allowed to go beyond his pleadings nor can court look beyond his pleadings. The polling stations which are not pleaded in the petition as objected by the Respondents are therefore disregarded as a party in any matter is bound by his pleadings ...In the circumstances this court cannot grant the Petitioner’s request to scrutinize and recount results from polling stations that he did not specifically plead in his petition.”

20. I fully concur with the holding of Makau, J. The audio recording not being included in the list filed on 2.11.18 of documents objected to, must be disregarded as the Respondent is bound by what he filed.

21. The Constitution of Kenya, 2010 guarantees to every person the right to a fair trial. This right is sacrosanct and is one of the fundamental rights and freedoms that may not, under Article 25(c) be limited. The right to a fair hearing is a critical aspect of the right to a fair trial. Article 50(1) provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

22. To allow the objection raised by the Respondent after the Applicant testified on the documents objected, to will militate against the Applicant’s right to a fair trial. The Respondent’s objection has resulted in a delay in the hearing and determination of the matter herein, thereby negating the overriding objectives of the law as espoused in Sections 1A and 1B of the Civil Procedure Act, of the just proportionate and affordable and timely resolution of disputes.

23. In the result, and for the foregoing reasons, I find no merit in the objection raised by the Respondent, to production of the documents contained in his list dated 1.11.18, without calling the makers thereof.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of June, 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**