



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 2 OF 2016

JUBILEE HOLDINGS LIMITED

JUBILEE INSURANCE COMPANY OF KENYA LIMITEDPLAINTIFF

VERSUS

BUPA INSURANCE SERVICES LIMITED.....1ST DEFENDANT

BUPA INSURANCE LIMITED2ND DEFENDANT

RULING

1. By a chamber summons application is dated 6th September 2018. The Applicant seeks for an order that the evidence of one Mr. Ian Malcom Caivns be taken vide video conferencing on the ground that, the witness was subjected to intimidation with regard to the impugned series of transactions herein. It is averred that the witness who was the head of Marketing Development at the Defendant's Company has crucial information and evidence in relation to the proceedings. If not allowed to so testify, the Defendant will suffer prejudice. To the contrary, the Plaintiff will not suffer any prejudice as they will have an opportunity to cross examine the witness and communicate with the witness as though he were physically present in court. Further, the use of suitable technology will ensure fair, just, proportionate and efficient disposal of the business of the court. The application is further supported by the affidavit sworn by Victor Njenga, an Advocate in the firm of Kaplan & Stratton Advocates which has conduct of this matter whose content I have noted and considered.

2. However, the application was opposed on the ground that, the affidavit in support there has been sworn by an Advocate of the court and not the Applicant. Secondly, the affidavit contains a lot of falsehoods in that the alleged intimidation was in the year 2013, yet ever since the witness has travelled twice to Kenya to attend meetings without an incident of intimidation. It has been five (5) years down the line since the alleged occurrence of intimidation. Further, there is no evidence that the witness is employed in the United Kingdom as alleged.

3. That the Respondent/Plaintiff will suffer prejudice as the element of demeanour will be lost. The recording of evidence by video conference should only be allowed where there is no perjury. The Plaintiff relied on a replying affidavit sworn by Ms. Kipchumba whose content I have considered. However in final response, the Learned Counsel Kahura for the Applicant reiterated that, the witness has clearly stated in his statement that he is not able to attend court and that he was intimidated in the meeting held in September. The Counsel invited the court to note that, the Plaintiff was raising the issue of perjury from the bar and therefore it should be disregarded.

4. I have considered the submissions by the parties on the application generally. I find that the provisions of Section 63A of the Evidence Act, (Cap 80) of the Laws of Kenya states that, a court may receive oral evidence through teleconferencing and video conferencing. Similarly, the provisions of Section 1A and 1B of the Civil Procedure Act provide for the overriding objective of the Act, and states that, the court shall in promoting the said objective make "use of suitable technology." Finally, the world has become a globe village due to the use of technology. Any use of alternative methods of adducing evidence in the absence of a valid reason would defeat the purpose of the overriding objectives which are aimed at facilitating the just, expeditious, proportionate and affordable resolution of civil disputes. It will amount to spinning the wheel of justice backwards.

5. The issue raised of demeanour has no basis in view of the fact that, the witness will be live on video/television and demeanour can be ascertained. Finally, the issue of perjury (if any) can be dealt with during the cross-examination. Further, malfunction of the machine cannot be speculated and neither will the Plaintiff be prejudiced having testified in person. However, I agree with the Respondents that the Counsel representing the Applicant should not have sworn an affidavit in support of the application. The Counsel risks being subjected to cross-examination which could put him in an embarrassing situation. Be that as it were, in view of the fact that this kind of an application can still be heard orally, I see no prejudice suffered by the Respondents by virtue of the affidavit sworn by the Counsel. Therefore, in the interest of substantive justice, I shall allow the application which will mitigate the costs that may flow from the physical attendance of the witness.

6. The costs of this application shall be in the cause.

7. It is so ordered.

Dated, delivered and signed in an open court this 23rd day of September 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Muchiri holding brief for Mr. Mbaluto for the Plaintiff

Ms. Onyango holding brief for Mr. Gachuhi for the Defendant

Dennis -----Court Assistant