REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 261 OF 2015

ALICE ATIENO ODERA.....PLAINTIFF/RESPONDENT

VERSUS

RADIO AFRICA LIMITED.....1ST DEFENDANT/APPLICANT

NWASANTHE KHASIANI Alias **CHIM KASIANI**

Alias **CHIMWANI OBIANJULU** Alias **UNCLE CHIM TUNA.....2ND DEFENDANT/APPLICANT**

RULING

1.In the defamation suit herein, the Plaintiff testified and closed her case. The Defendants closed their case without calling any witnesses. Thereafter directions were given for parties file written submissions.

2. The Defendants subsequently filed the application dated 15th May, 2017 which seeks the following orders:

1. This Honourable Court be pleased to stay the order for filing of submissions that was made on the 8th of February, 2017.

2. This Honourable Court be pleased to reopen the defence case and the Defendant be allowed to re-examine Plaintiff/Respondent in light of new evidence that has since emerged.

3. It is stated in the grounds and the affidavit in support that during the cross-examination, the Plaintiff gave false evidence to the court in response to the question why she left her previous employment at Kenya Airways. That the Defendants now have in their possession a letter from Kenya Airways which reflects a different position from what the Plaintiff told the court. That the said letter has a bearing on the Plaintiff's credibility and on the Plaintiff's allegations of disparagement of her professional character.

4. It is averred that even with due diligence, the Defendants did not have access to the information regarding the Plaintiff's exit from Kenya Airways as the issue did not arise until the Plaintiff testified in court. That the witness statement and the documents filed by the Plaintiff gave no indication as to the reasons she left Kenya Airways. That the material sought to be introduced by the Defendants raises questions of perjury and preservation of the integrity of the court records and ought to be admitted herein.

5. In the replying affidavit filed in opposition to the application, it is stated that the application is a delaying tactic. That the Plaintiff was exhaustively and extensively examined in Chief and cross- examined. That what is sought to be introduced amounts to hearsay and aims at further tarnishing her image. That the issues raised by the Defendants have no bearing on the case at hand and that there is no explanation or justifiable cause why the orders sought should be granted.

6. I have considered the application, the response to the same and the submissions filed by the respective counsels for the parties.

7. The court retains the discretion whether or not to allow the reopening of a case. The discretion must however be exercised judiciously and ensure such exercise of discretion does not embarrass or prejudice the other party. There must be new and important evidence that even with the exercise of due diligence was not within the parties knowledge. The application ought to be made at the earliest opportunity possible without inordinate and unexplained delay. The reopening of a case should not be intended to fill in gaps in the evidence. (See for example **Samuel Kiti Lewa v Housing Finance Corporation of Kenya Ltd & another [2015] eKLR, Hannah Wairimu Ngethe v Francis Ng'ang'a & another [2016] eKLR** and **Kibugu Farmers Co-operative society v Philip Mungai T/A Mungai Electrical Ventures [2014] eKLR**).

8. Under order 18 rule 10 Civil Procedure Rules 2010:

> **"The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit."**

9. Under Section 146 of the Evidence Act:

> **"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively"**

10. Section 3A Civil Procedure Act 2010:

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

11. Section 1A (1) Civil Procedure Act 2010:

> **"The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act"**

12. Article 159 (2)(d) of the Constitution:

> "**Justice shall be administered without undue regard to procedural technicalities**."

13. In the case at hand, the suit was instituted in the year 2015. The Plaintiff gave her evidence in chief on the 14th November, 2016 and was cross examined on 8th February, 2017 and both the Plaintiff's and Defendants' cases closed on the same day. The application at hand was filed on 17th May, 2017. There is no explanation why the Defendants did not carry out due diligence in time if they so wished. The letter in question was written on 29th April, 2014. The Defendants have also stated that it has become necessary to cross-examine on the letter based on the answers given by the Plaintiff during cross-examination. It is therefore apparent that the Defendants wish to fill in the gaps in evidence.

14. The reason given for the re-opening of the case is for purposes of further cross examination of the Plaintiff in light of the new evidence. There is no prayer for the calling of any defence witness or any intimation in the application that the Defendants intend to do so. Thus the letter will not form part of the exhibits produced herein and it's contents will remain mere hearsay. As stated in the case of **Odoyo Osodo v Rael Obara & 4 others [2017] eKLR** where the court considered a similar motion to re-open a case, the court held that;

> **"Quite clearly the issue for the court to determine in the instant matter is whether the defendants have provided a reasonable and justifiable basis for the court to exercise its discretion to allow them to re-open the case for the defence which they had closed and parties have filed their final submissions on the basis of the evidence adduced at the trial. The discretion of the court cannot be exercised whimsically but ought only to be exercised judicially and judiciously. A basis for the exercise of discretion has to be laid by the party inviting the court to exercise its discretion. In the present case the question for the court to answer is whether the defendants have satisfied the threshold by providing a rational basis for the court to allow the reopening of the defence case and calling of further evidence."**

15. Given that defamation is about ones reputation, if the Defendants wished to rake up any issues concerning the Plaintiff's character, employment history or any issue pertinent to the case, they had the opportunity to do so immediately this suit was commenced.

16. With the foregoing, I am not persuaded that the Defendants have established a justifiable cause for this court to exercise it's discretion in their favour. Consequently I dismiss the application with costs.

Date, signed and delivered at Nairobi this 24th day of Oct, 2019

B. THURANIRA JADEN

JUDGE