



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 183 OF 2008

ETS PALUKU KATALIKO.....PLAINTIFF

VERSUS

SDV TRANSAMI (K) LIMITED.....DEFENDANT

AND

1. K.K. SECURITY (KENYA KAZI LIMITED).....1ST THIRD PARTY

2. HAKIKA TRANSPORT SERVICES LIMITED... 2ND THIRD PARTY

RULING

1. In an application dated 3rd March, 2017 brought under the provisions of Sections 3A and 63 of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, the First Third Party (applicant) seeks the following orders:-

(i) Spent;

(ii) That leave be granted to the First Third Party to produce the contract document between the First Third Party and the Defendant herein;

(iii) That, if need be DW1, Mwangi Gitau, be recalled for purposes of identifying the said contract document, and nothing else; and

(iv) That costs be in the cause.

2. The application is supported by the affidavit of Sofia Jan Mohamed sworn on 3rd March, 2017 and the grounds upon which the application is premised. The defendant (respondent) filed a replying affidavit sworn by Mwangi Gitau, its Legal Officer on 6th April, 2017, to oppose the application. The applicant filed a further affidavit on 21st June, 2017, sworn by Beatrice Adhiambo Outo on 9th June, 2017. The applicant's Counsel thereafter filed his written submissions on 14th July, 2017 and the respondent's Counsel filed his on 19th July, 2017.

3. The applicant's written submissions state that the Guard Contract attached to the applicant's supporting affidavit is relevant to the matter before the court and would aid the court in doing justice and arriving at a decision based on all the facts. The applicant's Counsel relied on the overriding objectives of the court espoused in Section 1A of the Civil Procedure Act.

4. It was submitted that it is not disputed that a contract existed between the applicant and the respondent thus producing it in court would not in any way prejudice the respondent or affect its case. Counsel indicated that the applicant seeks orders to recall the respondent's witness who will be at liberty to address any issues that may prejudice the respondent.

5. The respondent's Counsel opposed the application herein and in his written submissions stated that the alarm contract attached to the affidavit in support of the present application is not relevant to the issue at hand. He stated that it does not relate to guarding services the subject of this case as it is dated 20th April, 2012, yet the cause of action herein arose in the year 2008.

6. It was submitted that the hearing of the case commenced on 18th February, 2010 and the respondent closed its case on 4th October, 2016. The applicant herein closed its case on the same day without calling any witness. The respondent argued that the applicant had not shown any reasonable ground to warrant this court to invoke its inherent powers and discretion in its favour in reopening the case.

7. Counsel submitted that the respondent will suffer serious prejudice as it shall be constrained to re-open its case and recall its witness and to rebut the evidence to be tendered by the applicant's intended witness, Beatrice Odhiambo Outa. It was contended that the said intended witness through her affidavit sworn on 9th June, 2017 admits in paragraph 2 thereof that it is one Sofia Jan Mohamed who was seized of the facts which are in dispute. It was indicated that the said further affidavit disregards the facts deposed in the affidavit in support of the application herein and it is therefore clear that the applicant is on a fishing expedition.

8. It was argued that although this court has the discretion to grant the orders sought, serious prejudice would be occasioned on the respondent as it would have to recall its witness to rebut the evidence adduced which was not supplied to it earlier. Counsel for the respondent urged this court to exercise its discretion judiciously so as not to overlook the objectives for which the rules of procedure are intended. He further stated that the applicant has not shown why this court's discretion should not be exercised in its favour. In the respondent's Counsel's view, the application is merely meant to delay the suit herein which has been in court for 9 years and is at its tail end. He prayed for the application to be dismissed with costs to the respondent.

ANALYSIS AND DETERMINATION

The issue for determination is if the First Third Party (applicant) should be allowed to reopen its case to adduce evidence.

9. The suit in this case was filed on 21st August, 2008. On 9th September, 2008, the respondent filed an application to issue Third Party notices. A Third Party Notice was filed on 12th September, 2008 and a consent was thereafter recorded on 29th June, 2009 with regard to the joinder of the First and Second Third Parties. A notice of appointment for the applicant's Counsel herein was filed on 26th September, 2008. The applicant's statement of defence was filed on 16th October, 2008.

10. On 1st December, 2014, the applicant filed its list of witnesses wherein it stated that its sole witness would be the Executive Officer, Criminal Registry, Lower Court, Mombasa Law Courts. The applicant filed its list of documents on 1st December, 2014. It is worth noting that the hearing of the case herein commenced on 18th February, 2010 before a different Judge. The defence case was heard on 23rd June, 2016 and on 13th September, 2016. On the said date, Mr. Obura, Counsel for the applicant applied for witness summons for the Officer-in-charge of the High Court Criminal Registry to produce in court the file for Mombasa High Court Criminal Appeal No. 222 of 2010. This court granted the orders sought.

11. On 4th October, 2016, Counsel for the applicant informed this court that he did not wish to call any witness or produce any documents in support of the applicant's case.

12. The Guard contract that the applicant now intends to produce in evidence was within the custody of the applicant from the time the suit was filed and upon its filing of its statement of defence. The said document does not comprise new and important matter that was not in the applicant's knowledge or compelling evidence, that would persuade this court to exercise its discretion to allow the same to be relied upon by the applicant at this stage of the trial.

13. In the case of **David Sugut and Another vs. Mercela Chepto Chuma** [2016] eKLR when faced with similar circumstances as in this case, the court had this to say:-

“The defendant is out to build her case after hearing what the plaintiffs had said. This cannot be allowed as to do so will prejudice the plaintiff's case. The defendant had the opportunity to lay her case before the hearing commenced. She cannot seek to introduce documents after the closure of the plaintiff's case”

14. See also **P.H. Ogola Onyango t/a Pittsconsult Consulting Engineers vs Daniel Githegi t/a Quantalysis** [2005] eKLR where Waweru J., when addressing a similar situation stated as follows:-

“Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the opposing party has closed its case. To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.”

15. In the present case, the respondent called 2 witness and closed its case. The applicant herein, indicated to the court that it did not wish to call any witness and closed its case. Taking the totality of all the circumstances in this case, this court is of the considered view that it is too late in the day now to allow the applicant to reopen its case so as to bring in evidence which has been well within its reach for the last 9 years. If this court was to grant the orders sought, it would prejudice the respondent's case as its witnesses have already testified at length. The application dated 3rd March, 2017 is hereby dismissed. I award costs to the defendant/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. D. Okatch holding brief Mr. Obura for the First Interested Party/applicant

Mr. V. Otieno holding brief for Mr. Oloo for the defendant

No appearance for the Second Third Party

No appearance for the plaintiff