REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO.20 OF 2017

GIDEON KIPAYA KITENGE ……. PLAINTIFF/RESPONDENT

VERSUS

KAMPALA COACH BUS LTD …….. 1ST DEFENDANT/RESPONDENT

CHABADIYA ENTERPRISES ….…… 2ND DEFENDANT/APPLICANT

RULING

1. The 2nd defendant/applicant has filed an application dated 24th March, 2017 seeking for orders that:-

(1) Spent

(2) Spent

(3) that this Hon Court be pleased to suspend further hearing of Mumias SPMCC No.145of 2012 until the Appeal already filed by the applicant on 23rd of March, 2017 being Kakamega High Court Appeal No.29 of 2017 is heard and determined.

(4) Spent

(5) THAT the costs of this application be in the course and/or provided.

2. The background of the application is that the plaintiff in ***Mumias SPMCC 1450 of 2011*** had testified and closed his case. The 1st defendant was in the course of giving evidence when the advocate for the 2nd defendant, ***Mr Shelenje***, sought the leave of the court to file the statement of one ***Owen Ochieng Okumu*** on the grounds that the person who had filed a statement in their case one ***Parick Shitemi Kweyu***, had left the employment of the 2nd defendant and could not be traced. The trial magistrate refused to grant the application on the grounds that the witness the 2nd defendant intended to introduce in the case was not mention by Patrick Shitemi Kweyu in the statement that had been filed with the court. After the refusal to admit the statement the 2nd defendant filed an appeal with the High Court against the decision of the magistrate.

In the meantime the 2nd defendant/applicant filed the current application seeking for orders stated above.

3. The application was supported by the affidavit of the advocate for the 2nd defendant/applicant Mr Shilenje. The grounds in support of the application are that:-

(1)the introduction of the statement of the witness was purely intended to substitute a statement of one witness who could not be found easily with one who was not only readily available, but who had also witnesses the said accident.

(2)this was not a stranger who was introducing new matters on which other parties had not been notified, but same substance that the witness had recorded and which all the parties had read and prepared themselves long before the trial commenced.

(3) the Civil Procedure Rules have no provisions on this type of scenario.

(4)excluding the proposed statement of the witness leaves second defendant without a witness.

(5)it is an old principle of the Common Law that a party should not be condemned unheard, which should take priority to observance of the time limits in the civil Procedure Rules and allow the court to be fair to all the parties.

(6)Article 159(2)(d) of the constitution requires that justice be administered without undue regard to procedural technicalities.

(7)the constitutional consideration should take precedence over provisions of Rules of Evidence to enable the court to give justice to all parties.

(8)if the hearing continues as scheduled, the 2nd defendant will suffer great loss and damages which may not be recompensed in damages.

(9)the 2nd defendant has overwhelming chances of success, and has already filed Kakamega High Court Civil Appeal No.29 of 2017 on 23.03.2017.

4. The application was opposed by the 1st defendant/respondent vide their grounds of opposition dated 3rd April 2017 to the effect that:-

1. THAT the grant of the orders sought will amount to aiding the Applicant's indolence.

2. THAT the grant of the orders sought will be tantamount to curtailing the principle that litigation must come to an end.

3. THAT the applications lacks merit, is actuated by bad faith and is only intended at stifling the 1st respondent's right to timely finalization of litigation.

4. THAT grant of the orders sought will be tantamount to a miscarriage of justice.

5. THAT the application is frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.

5. It was also opposed by the plaintiff/respondent through the replying affidavit of their advocate ***Mr Maxwell Okeyo Ochiel*** who deponed, inter alia, that:-

1. That the applicant has not met the threshold for grant of the orders sought as no legal basis for grant of stay has been established.

2. That Mumias PMCC No.145 of 2011 was filed in the year 2011 in which the plaintiff was claiming general damages resulting out of an accident that occurred on 17th November, 2010.

3. The applicants were served with the requisite notices and they in turn filed defence and with a list of witnesses and their respective statements indicating the general nature of the defence that the

applicant was to take.

4. That the parties took directions on 1st November 2011 and during which the applicant herein indicated that he had complied with Order 11 by listing all his witnesses and filing the entire set of documents that he intended to rely on.

5. That the suit was set down for hearing and the plaintiff/respondent closed his case on 7th October 2011 and the 1st defendant/respondent went on to call her witness upon which she indicated a desire to close her case.

6. That in a belated attempt to patch up the holes in the plaintiff's evidence and to ambush the respondents with new evidence, the applicant made an application before the trial court to introduce a new witness but upon counsel arguing the application, the court found no merit in the same and had it dismissed.

7. That in view of the above, the intended appeal has no chance of success and the intended introduction of a new witness is contrary to rules of civil procedure and would automatically deny the respondents a fair trial as they had already closed their respective cases.

8. That the applicant's application is therefore scandalous, frivolous, vexatious and otherwise an abuse of court process.

SUBMISSIONS BY ADVOCATE FOR APPLICANT-

6. The advocates submitted that Patrick Eshitemi Kweyu had stated in his statement that he was accompanied by their supervisor whose name Owen had been misspelt and/or mistyped as Oliver. That when the statement of Owen was recorded it conveyed the same facts and details as those of Patrick Kweyu. That the statement of Owen was not new evidence as it conveyed the same evidence as that of Patrick Kweyu. That the court has discretion to order re-opening of the case if other parties stand to suffer prejudice. That if the evidence of Owen is not allowed when the other witness cannot be traced amounts to condemning the 2nd defendant unheard. That the court's mandate is to do justice and not to be bound by procedural technicalities as stipulated by ***Article 159(2)(d)*** of the Constitution of Kenya 2010.

The advocates relied on the case of Nairobi Milimani Law Court Commercial and ***Admirals Division Civil Suit No.122 of 2008, Dalbit Petroleum Ltd vs Victory Construction Co. Ltd*** (2016) eKLR where a witness could not be procured and the trial judge allowed another witness who had dealt with the matter to be called as a witness.

SUBMISSIONS BY ADVOCATES FOR 2ND DEFEDANT/RESPONDENT

7. The advocates, ***Kairu & Mcourt*** submitted that the intended witness statement is being filed approximately 5 years after the inception of the suit which is an inordinate delay, allowing of which will amount to the court aiding the applicant's indolence. That the applicant has to satisfy the principles applicable in granting stay of proceedings pending hearing and determination of appeal which are that:

(1) the appellant has to show tht he has an urguable appeal.

(2) the appellant has to show that if the order for stay is not granted, the appeal, if it were to succeed, would be rendered nugatory.

For the above propositions the advocates relied on the case of ***Timmeh Ibrahim vs Tipapa ole Kirrokor & Another Nairobi Court of Appeal Civil Appeal No.445 of 2014*** (2014) eKLR.

SUBMISSIONS BY ADVOCATES FOR PLAINTIFF/RESPONDENT

8. The advocates, Bogonko, Otange & Co. Advocates, submitted that the intended appeal is not urguable and has no chances of success. That it would be unfair to the plaintiff at this stage of the proceedings to allow the 2nd defendant to bring a new witness to fundamentally alter the character of his case to one that the plaintiff never contemplated when tabling his evidence. On this proposition they quoted the case of ***Johana Kipkemei Too vs Hellen Tum*** (2014) eKLR.

9. Further that the applicant has since the year 2012 indicated readiness to proceed with the case only for them to change tack at the sunset stages of the case by introducing a new witness which is an after-thought designed to delay the expeditious determination of the case. That this is a demonstration of bad faith on the part of the applicant.

DETERMINATION

10. Under the provisions of ***order 7 Rule 5*** of the Civil Procedure Rules, the 2nd defendant was required when filing the defence to file a list of witnesses to be relied on at the trial together with written statements of such witnesses. The Civil Procedure Rules are silent as to what should happen later on in case a party wishes to introduce additional list of witnesses and witness statements. However it is my considered view that the court can allow such statements to be introduced where good reasons are given as to why the statements could not be filed at the time the defence was filed. The court has to use its discretion to allow or disallow the introduction of such statements. However the discretion must be used judiciously balancing the rights of all the parties in the case. In ***Jane Kipkenei Too vs Hellen Tum*** (supra) Justice Munyao Sila stated that in such sort of situations

> *"… It is up to each court to weight the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered though outside the time frame provided by the rules."*

11. The question then is whether it was in the interests of the plaintiff and both defendants to allow the statement of the intended witness to be introduced.

I have considered the application before me together with the affidavit in support thereof, the grounds of opposition and submissions by the advocates for the respective parties. I have also perused the statement of the intended witness called Owen and that of the witness who had recorded a statement Patrick Shitemi. Patrick Shitemi stated in his statement that he was in the company of a field officer called Oliver when they went to the scene of the accident. The intended witness is not called Oliver but one Owen Ochieng Okumu. Mr Shilenje states that the name Owen was misspelt or mistyped as Oliver. Nobody told Mr Shilenje that there was a misspelling of the name. It is only Patrick Shitemi who can confirm that. Since Patrick Shitemi has not been traced Mr Shilenje has no basis of saying that there was a misspelling of the name. In any case the 2nd defendant did not adduce any evidence that they did not have anybody in their employment called Oliver.

12. Besides that, the statements of the two people are very different. Patrick Shitemi says in his statement that when they reached the scene of the accident they found the accident having taken place. Owen Ochieng Okumu says in his statement that they actually witnessed the accident taking place. It is then not true as stated y Mr Shienje that the evidence of the two witnesses was similar. If Owen had witnessed the accident taking place, why did it take him 5 years to inform his employer that he had witnessed the accident? How come that his employer was not aware of such vital information since the time the case was filed in 2011? How come that the witness did not file his statement to that effect when the defence was filed five years ago? With this kind of evidence is there likelihood of the appeal succeeding?

13. I agree with the submissions for the defence that to allow such a witness to testify is to alter the character of the case. The plaintiff has already closed his case. The case for the plaintiff was conducted on the basis that there was no eye witness to be called by the 2nd defendant. For an eye witness to crop up 5 years later after the case was filed without a good explanation as to why he had not recorded his statement earlier is an ambush on the other parties in the case. The court cannot countenance this kind of fishing for evidence when a matter is in progress.

In the foregoing the applicant has not established that they have an urguable appeal. The application dated 24th March 2017 is thereby dismissed with costs to the respondents.

Delivered, dated and signed at Kakamega this 24th day of May, 2017.

J. NJAGI

JUDGE

In the presence of:

Onsondo HB Shilenje for applicant