REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 410 OF 2012

ELIZABETH GUTTMAN……..……1ST PLAINTIFF

MATHEW SHELTON ……2ND PLAINTIFF

VERSUS

IITAYASON NEEPE ……..……..1ST DEFENDANT

LADY LORI KENYA LIMITED ……..…….2ND DEFENDANT

ORYX SAFARI LIMITED ……..….3RD DEFENDANT

RULING

The plaintiffs brought this suit against the defendants jointly and severally following an aviation accident that took place on 17th August, 2010. They blamed the accident on the defendants jointly and severally.

The case is part heard where the plaintiff has not fully exhausted her evidence in chief. The defendants have raised three preliminary objections. The first is dated 27th February, 2017 and filed on 1st March, 2017. In that notice the defendants state that they shall oppose and raise objections against the testimony of one Robert S. Tucker Jr. which they say is inflammatory and misleading and irregularly filed in court on 15th February, 2017.

The second notice is dated 14th March, 2017 and filed on 19th June, 2017 objecting to an Air accident investigation report by one M. Soulhiard which is also said to be inflammatory and misleading, filed without leave of the court long after pre-trial procedures were concluded and directions given.

The third notice is dated 14th March, 2017 and filed on 19th June, 2017 objecting to supplementary list of documents irregularly filed in court without leave and long after the pre-trial procedures and directions given.

It is the defendants' prayer that the same be purged from the court records. The notices are opposed by the plaintiff and both counsel have filed submissions which I have read. Although the first notice of preliminary objection filed on 27th February, 2017 was filed two days thereafter, the subsequent two notices dated 14th March, 2017 were filed three months thereafter, that is 19th June, 2017. No reasonable explanation has been given for that delay.

That notwithstanding, the objections relate to evidence of witnesses yet to be called but where statements have been filed in that regard. The defendants have variously called the two intended witness as strangers

to the cause of action, who have no knowledge whatsoever of the occurrence, and are only busy bodies who should not be allowed to testify. The defendants also submit that the two alleged experts have not been shown to possess the relevant qualifications to investigate air craft accidents and lack the mandate of the Federal Aviation Authority of the US or National Transport Safety Board of Kenya under the Civil Aviation Act.

On the other hand it is submitted on behalf of the plaintiffs that it is properly in order to file the statements being objected to in view of the provisions of Section 48 of the Evidence Act Cap 80 Laws of Kenya.

I have considered the material placed before me. In the determination I am about to reach, I am guided by the provisions of the Civil Procedure Act Cap 21 Laws of Kenya and in particular Sections 1A, 1B and 3A thereof. I have considered that this matter is part heard and the plaintiff is yet to complete her evidence.

The overriding objective in any case is to facilitate the just, expeditious and proportionate resolution of a dispute. That is the underlying import of the provisions of law under the Civil Procedure Act I have cited above. It may not serve the interest of justice to lock out evidence a party intends to call in any proceedings, unless such evidence is shown to be utterly irrelevant to the issues at hand or that admission of such evidence will result in untold prejudice to the other party.

The two witnesses intended to be called by the plaintiff cannot be excluded at this point because in the end it is the evidential value of their testimonies that would be considered. The defendants will have an opportunity to cross-examine the witnesses and even bring witnesses to counter the evidence produced by such witnesses.

Whether or not the evidence of a witness adds any value to the final determination of the dispute may not be addressed in the cause of the trial, but the end thereof when all the evidence is considered holistically. No prejudice has been shown shall be visited upon the defendants if the statements objected to remain part of the court record. In any case, the list of witnesses provided by the plaintiffs alluded to expert witnesses to be called. The defendants therefore had notice of intended evidence to be called.

The risk of raising preliminary objections in the cause of the trial is real in that, it may lead the court to address the merits or otherwise of the evidence of a witness who is yet to give evidence. My view is that, whatever submissions have been made at this stage are premature as they belong to the province of final submissions.

I am constrained to observe that the obsession with raising preliminary objections by a party in the cause of the trial should be deprecated as it not only prolongs a trial at great expense, but may also prejudice the interests of the parties. Unless such objections may lead to a final determination of an issue at hand, such a practice should be frowned upon by any court seized of a trial.

My observation about whether or not any prejudice has been shown to the detriment of the defendants by the objections to the statements of witnesses said to be experts, apply in equal measure to the objection relating to the third notice of preliminary objection. That list is not likely to cause any prejudice to the defendants.

The three objections therefore are hereby dismissed. The costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered at Nairobi this 30th Day of August, 2017

A. MBOGHOLI MSAGHA

JUDGE