



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

PETITION NO. 10 OF 2014

FEDERATION OF WOMEN LAWYERS (FIDA) KENYA.....1ST PETITIONER

DUKALE OMAR SHAMBARO.....2ND PETITIONER

MIKALI DANAI KOFA.....3RD PETITIONER

RHODA HASHALA MANASE.....4TH PETITIONER

AIMIKE M. MANGA.....5TH PETITIONER

BADJNA DIGALE.....6TH PETITIONER

VERSUS

INSPECTOR GENERAL OF POLICE.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

This matter was listed for hearing on 24.10.2016. Mrs. Kipsang appeared for the petitioners while Miss Munyuny appeared for the 1st and 3rd respondents. Mrs. Kipsang informed the court that she was expecting two witnesses from the Orma Community but due to the dry weather conditions, they had moved to other areas. Counsel made an oral application under section 35 of the Evidence Act to have the statements of DUKALE OMAR SHAMBARO (2nd petitioner) and KHADIJA DIGALE (6th petitioner) adopted as evidence without calling the witnesses.

Miss Munyuny did not oppose that request by Mrs. Kipsang. The statements of the two witnesses were adopted as part of the petitioners' evidence. The petitioners then proceeded to close their case. Mrs. Munyuny informed the court that she was ready to proceed with the defence case and one witness was already in court. The matter was kept aside pending the hearing of the defence case.

Later on the same day at 11.30 am, Miss Lutta and Miss Munyuny appeared in court for the 1st and 3rd respondents. Miss Lutta informed the court that she was holding brief for Mr. Waigi and that Mr. Waigi was against the consent which adopted the evidence of the two witnesses. Miss Lutta submitted that Mr.

Waigi required to have the witnesses present so that they could be cross-examined and test their veracity taking into account the hefty amount being claimed by the petitioners. Miss Lutta urged the court to expunge the witness statements if the witnesses cannot be found.

On her part, Mrs. Kipsang objected to the turn of events. Counsel submitted that the request to have the statements adopted was made under section 35 of the Evidence Act. No reasons were given as to why the court has to go back to the issue. A consent was recorded and the request to vacate the consent is an abuse of the court process. The amount of the claim cannot be a reason to have statements expunged.

The record of the court is quite clear. When the matter was called, counsel for the respective parties stated their respective positions. Miss Munyuny is a qualified advocate who informed the court that she has no objection to the adoption of the statements of the two witnesses as evidence. Mr. Waigi and Miss Lutta should not be seen to be dictating to the court that Miss Munyuny had no such instructions. Objection should not be raised for the sake of complicating a matter. I have noted that parties did not go through the process of compliance with Order 11 of the Civil Procedure Rules. Order 11 rule 2 (c) allows the admission of statements without calling the makers. Evidence can also be given through affidavits under Order 11 rule 2 (d).

I have read the pleadings and the statements of the two witnesses which were filed with the petition. Copies of identity cards of the witnesses are also filed. The statements simply give evidence similar to that of the three witnesses who have already testified. The only difference is that the two petitioners are from the Orma Community while PW1, PW2 and PW3 are from the Pokomo Community. Whether the witnesses come and give oral evidence or their statements are adopted as evidence does not change much. Miss Lutta did not indicate which part of their statements the respondents wish to cross-examine on.

Mrs. Kipsang informed the court that the two witnesses are from the Orma Community and due to the dry conditions could not be traced. Section 35 (2) of the Evidence Act states: -

“2. In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible or may, without any such order having been made, admit such a statement in evidence –

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.”

The court can admit a statement even if the maker is available but has not been called as a witness. Section 36 of the Evidence Act provides for the weight to be put to statements admitted under section 35. I have read the statements of the two witnesses and do find that having them admitted as evidence will not prejudice the defence case. The evidence contained in those statements is in line with what is already on record. The statements were admitted by consent and a counsel who is known to this court ably represented the respondents. I see no cause for alarm. Waiting for the two witnesses to return to their homes after the dry spell would cause undue delay to this matter. Whereas Mr. Waigi appeared in court when PW1 and PW2 testified. Miss Munyuny appeared when PW3 testified and is therefore well versed with the case.

The upshot is that the request by the 1st and 3rd respondents to set aside the consent which allowed the adoption of the statements of the 2nd and 3rd petitioners as part of the petitioner’s evidence and have the witnesses testify is rejected. The petitioner’s case was closed and is hereby deemed as closed. There shall be no orders as to costs.

Dated and delivered in Malindi this 24th day of November, 2016.

S.J. CHITEMBWE

JUDGE