



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO.333 OF 2001**

HELIDA ASIKO.....PLAINTIFF

VERSUS

MASELINA ODAWA.....DEFENDANT

**R U L I N G**

This ruling is prompted by objections raised by Mwamu for plaintiff when this matter came up in Court for hearing on 19/2/2013. The defendant's side intended to call a witness who is working in the same capacity as P.W.3, a witness called by the plaintiff's side earlier (and who Mwamu mistakenly called P.W.4. Records show there is no P.W.4 so far).

The gist of the objection is that since the plaintiff had called P.W.3 as a witness, the defendant's side can't call the same witness or another in the same capacity from the same office. It was feared that there would be conflict of interest. Otieno P.J objected pointing out, inter alia, that there is no property in a witness.

He also promised to avail decided authorities showing that the witness can give testimony.

Later on, Otieno availed to the Court the following decided cases:

1. **HIRJI V MODESSA (1967) EA 724**
2. **VERSLOOT DREDGING BV VS HDI GERLING INDUSTRIE VERSICHERUNG AG & 6 OTHERS: (2013) EWHC 581 (COMM)**
3. **VANCOUVER COMMUNITY COLLEGE VS PHILLIPS, BARRATT: (1987) BCJ NO.3149**

The case of Hirji Vs Modesa (supra) concerned an award of general damages following a traffic road accident and at some point during the trial at the High Court, the plaintiff sought to call the defendant as a witness. This was declined by the High Court.

The matter later went on appeal and the Court held that the plaintiff should have been allowed to call the defendant as a witness.

The case of **VERSLOOT DREDGING** (Supra) explained what is meant by the assertion that there is no property in a witness.

It explicated that the fact that there is no property in a witness means that one side to the case can't prevent the other side to the case from calling the same witness. No side has the absolute right to have the witness to itself.

The other case, Vancouver Community's case (supra), is, in court's view, not dealing with the calling of the same witness by both sides. It is dealing, inter alia, with the issue of confidentiality or privilege of evidence or information held by expert witness, with the position being that that privilege or confidentiality is lost when the witness starts testifying.

It is clear that the issue we are dealing with here is a simple one especially viewed in light of some of the authorities availed.

In the case of Hirji Vs Modesa (Supra) one would have thought that the court would not countenance the idea of the plaintiff calling the defendant as a witness, our system being adversarial.

**BUT** the final court was saying that that is perfectly in order.

In Verslout's case (Supra), it is clear that one side can't claim to have exclusive rights to a witness. In our present case, it is clear that the witness intended to be called is not even the same person who testified as P.W.3. He is a different person coming to give evidence concerning a different document.

The Court thinks that it would be improper to block the witness from testifying.

It would be different however if the witness was coming to give the same evidence that was given earlier by P.W.3. If that was the situation, it would be easy to hold that the defendant's side had ample time to cross-examine the other witness.

**BUT** it is not so now. The witness is different. The evidence is presumably different. It is not lost on the Court that an office is sometimes a big entity with multifaceted functions. One side may call an official to testify only on aspects that suits its case. The other side should have opportunity too to call evidence which suits its case. That should be so irrespective of whether it is the same person or different persons who will be called to testify.

In this matter therefore, the defendant's side has a right to call evidence that suits its case.

For the afore stated reasons, Mwamu's objection is dismissed. The witness intended to be called will therefore be allowed to testify.

**A.K. KANIARU – JUDGE**

**27/6/13**

**27/6/13**

A.K. Kaniaru – Judge

Dianga G – Court Clerk

No party present

Interpretation: English/Kiswahili

Otieno PJ for defendant

Olel for Mwamu for Plaintiff

**COURT:** Ruling on objection raised by Mwamu on 19/2/2013 read and delivered in open Court.

# **Right of Appeal - 30 days**

**A.K. KANIARU – JUDGE**

**27/6/2013**