



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

LANDS AND ENVIRONMENT DIVISION

CIVIL CASE NO. 547 OF 2010

JOSEPH JULIA ROSARIO D'SOUZA.....1ST PLAINTIFF

MARY ANNE FILOMENA D'SOUZA.....2ND PLAINTIFF

• VERSUS -

LEO INVESTMENT LTDDEFENDANT

RULING

1. The plaintiff's Notice of Motion application made under sections 1A, 1B, 3A of the Civil Procedure Act, Order 11 Rule 2 (c) (d) (e) (f) (i) Rule 7 (1) (d) (e) (h) and 7 (3) (b) of the Civil Procedure Rules and all enabling provisions of the Law. The application inter alia seeks the following orders:-
 1. *The statement of Mary Anne Filomena Dsouza the 2nd plaintiff herein dated 30th August 2012 and filed herein on 3rd September 2012 be admitted in evidence without calling her to testify; and or alternatively,*
 2. *The said Mary Anne Filomena D'souza do give evidence on the basis of affidavit evidence.*

Among the grounds that the applicant relies on is that:-

- a. *The witness, the 2nd plaintiff herein, is sickly, frail and her health condition is deteriorating fast requiring priority disposal of this matter.*
- b. *The 2nd plaintiff recently suffered heart attack and prolapsed hip disc and is also suffering from cancer and is unable to walk or stand and is out of the country in London for treatment and is therefore not able to attend court for hearing or stand and testify in a court of law.*
- c. *From the witness's condition, this necessary that her witness statement be admitted in evidence without calling her to testify, or alternatively, her evidence be taken on the basis of sworn affidavit evidence.*

The plaintiff's application is supported on the annexed affidavit of Thomas K'bahati Advocate sworn on 2/7/2013 and the supplementary affidavit sworn by the Advocate on 11/9/2013. The Defendant's Advocate V.K. Nduhiu has filed a replying affidavit in opposition to the application sworn on 25th July 2013. Following the directions by the court the parties filed written submissions articulating their respective positions.

2. The plaintiff position is that the 2nd plaintiff is prevented by reason of sickness and her advanced age coupled with failing health from being able to attend court to give *viva voce* evidence and be cross examined by the opposing party. The plaintiff cites sections 1A and 1B of the Civil Procedure Act which set out broadly that the overriding objective of the Civil Procedure Act and the rules made thereunder in all civil cases is to facilitate the just and expeditious resolution of all civil disputes governed by the Act by the just determination of proceedings, the efficient disposal of the business of the court; and the timely disposal of the proceedings at a cost affordable by the parties.
3. The 2nd plaintiff's Doctor vide a medical report dated 6th September 2013 annexed to the further affidavit of Thomas K'bahati and marked "TK" has detailed the medical condition of the 2nd plaintiff who has been receiving treatment at Charing Cross Hospital, London and expresses his opinion thus:-

"I believe that her physical health is such that she is not fit to travel or attend court, and the stress of doing so could negatively affect her health even further. As such, I would strongly advise against this".

The plaintiff further submits the court under order 11 rule 7 (1) has power to *inter alia* order: "the admission of statements without calling the makers where appropriate; the giving of evidence on the basis of affidavit evidence and making appropriate orders concerning the receiving in evidence of any exhibit. The plaintiff further submits the court under the provisions of sections 1A, 1B and 3A has the inherent powers to determine and to direct this matter to proceed to conclusion in spite of the medical condition of the plaintiff for the ends of justice to be met. The plaintiff further submits the right to cross examine a witness is not a mandatory requirement and that each case ought to be treated having regard to its unique circumstances. The plaintiff further contends that this is a suit that is largely based on documentary evidence and oral evidence may be unnecessary where documentary evidence suffices.

4. For his part the Defendant through his Advocate contends that it is a cardinal rule of natural justice that every party must be accorded a fair opportunity to present their case and the evidence. The Defendant submits that cross-examination enables the court to have before it facts and evidence that has been tested through cross examination. The Defendant avers that he stands to be prejudiced if the applicant's application is granted as he will have been denied the opportunity to cross examine the 2nd plaintiff. The Defendant cites section 34 (1) (c) of the Evidence Act to support his proposition that he stands to be prejudiced but the plaintiff counters that this provision of the Evidence Act has no application to the facts and circumstances of this case.
5. Having set out the rival positions of the parties the issue that stands to be determined is whether the applicant has made out a case to enable the court to admit the 2nd plaintiff's evidence without having her physically attend court to give evidence and be cross examined.
6. The court is satisfied that the plaintiff is undergoing treatment at a London Hospital and that on the basis of the Doctor's medical report the court further accepts that the 2nd plaintiff is presently not in a state to travel to Kenya to testify. The doctor's medical report does not indicate whether the 2nd plaintiff is expected to fit any time soon to be able to travel. The 1st medical report rendered on 12/6/2013 indicates the patient was being treated for a cancerous condition for which she had completed a course of chemo radiotherapy for treatment of a T2 No squamous carcinoma of the anus in mid 2008. The medical report of 6th September 2013 indicated the patient was undergoing active investigations and titration of treatment and these included rectal cancer with recent deterioration and abdominal distension which was currently under investigation and that the patient was due for colonoscopy on the 11th September and CT thereafter. The sickness was thus active and the possibility of full recovery anytime soon is not foreseeable.

Under order 11 Rule 3 (2) (c) the court has power to order admission of statements without calling of the maker as a witness where appropriate. Under order 11 Rule 7 (1) (d) the court may at the Trial conference equally order the admission of statements without calling the makers where appropriate. It is therefore clear that the court may in appropriate circumstances order the

admission of witness statements without the makers being called upon to testify.

7. In the circumstances of this case it is the court's view that the 2nd plaintiff has demonstrated that it is impractical for her to travel to testify in this matter at least at the present moment and it is not possible to determine whether she will be well enough any time in the near future to be able to travel. She wishes the matter to proceed on the basis of her witness statement without her having to physically attend court as she is not in a position to travel and withstand sitting through a court session.
8. The Defendant's assertion that she will be denied the opportunity to cross examine the 2nd plaintiff is well founded as a party has a right to cross examine the opposing party and that party's witnesses. The court appreciates this right of a party but also acknowledges that there will be situations when it will not always be possible to procure the attendance of a witness for cross examination. It does not mean a statement of evidence admitted without calling the maker is not good evidence; it is evidence okay save that the weight to be given to such evidence is less than if the witness had been cross examined and further that the evidence of a party who has not been cross examined has to be evaluated together with the other available evidence to determine its veracity.
9. In the circumstances of this case the court is of the view that in the interest of justice the 2nd plaintiffs statement of evidence should be admitted without requiring her to attend court to be cross examined on the basis that her attendance cannot be procured without difficulty and/or without undue delay and expense which will not be in the best interest of the parties in the suit. The court therefore allows the plaintiffs application dated 2nd July 2013 and directs that the 2nd plaintiff do file a sworn statement of evidence within the next 45 days from the date of this ruling which the court will admit in evidence on the understanding that the court will in evaluating the totality of the evidence treat the evidence with caution having regard to the fact that the witness was not cross examined. I direct that this matter be mentioned on 20th January 2014 for pretrial directions.

I order that the costs of this application be in the cause.

DATED and DELIVERED at NAIROBI this 20th day of November 2013.

J.M. MUTUNGI

JUDGE

Ruling read in open court in the presence of

..... for the 1st Plaintiff.

..... for the 2nd Plaintiff.

..... for the Defendant.