



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 774 of 2000

THEODORE OTIENO KAMBOGOPLAINTIFF

VERSUS

NORWEGIAN PEOPLE'S AID.....DEFENDANT

RULING

The plaintiff **Mr. Theodore Otieno Kambogo** has made an application dated 18th November 2004 under Order 18 Rule 1 of the Civil Procedure Rules and he seeks;

“That the evidence of Pamela Minyenya be taken by way of the affidavit sworn on 4th October 2004”.

The grounds in support of the application are that **Pamela Minyenya** whose evidence is necessary lives in **Hertfordshire** in the **United Kingdom**. And that it would be prohibitively expensive for the plaintiff to bring **Pamela Minyenya** to testify in Kenya. It is also alleged that the said evidence would not prejudice the case of the defendant.

The plaintiff who appeared in person submitted before me that the evidence of Pamela is essential to his case and it is difficult to procure her presence without great expenses/loss. According to the plaintiff, the last time **Pamela** was in Kenya was 4th October 2004 and it would be very expensive to bring her to give evidence before this court.

The plaintiff also contends that the defendant was allowed to give evidence by way of affidavit. And he does not see the reason why the defendant should object to his request, since justice is not dispensed indiscriminately.

The application was opposed through an affidavit sworn on 2nd December 2004 by **Mr. Kiragu Kimani** Advocate. **Mr. Kimani** who responded on behalf of the defendant submitted that the application does not meet the test that there has to be sufficient reasons shown for affidavit evidence to be admitted.

He also contended that in our adversarial system the testing of evidence by way of cross examination is highly regard. And that the court should be very slow to allow a party to produce evidence by way of affidavit. **Mr. Kimani Kiragu** admitted that the defendant on 4th November 2003 obtained an order to have the evidence of two witnesses taken by way of affidavit. And that does not mean the plaintiff is entitled for a similar order.

I have considered this application which was between light weight and heavy weight in the legal profession and my view of the same is that the applicant has disclosed sufficient reasons why the

application should be allowed. I am persuaded that the attendance of **Pamela Minyenya** cannot be procured without unnecessary delay and at great costs. The plaintiff says that he is unemployed and what he is chasing is his benefits from the defendant.

I agree with **Mr. Kimani Kiragu** that what amounts to sufficient reasons is a question of act. However upon examination of the facts presented by the parties herein, it is difficult if not impossible to bring the plaintiff's witness without incurring costs. I do not think that the plaintiff is in a position to shoulder the air ticket from London to Nairobi due to impecunious nature. In my view poverty and lack of means cannot be a reason to deny the plaintiff the opportunity to present and/or support his case with the affidavit evidence of **Pamela**.

The defendant would have the opportunity to raise issues with the contents of the said affidavit in its submission before court. In any case the veracity and strength of that affidavit can be attacked at the opportune time. The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that affidavit evidence. I am not in any way saying that affidavit evidence is not good but what I am saying is that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same. It is therefore my position that there is sufficient and reasonable proposition to allow the admission of the affidavit the plaintiff intends to rely in support of his case.

In the premises the application dated 18th November 2004 is allowed with no orders as to costs.

Dated, signed and delivered at Nairobi this 14th day of February, 2008.

M. A. WARSAME

JUDGE

Court: ruling delivered in the presence of **Mr. Peter Njeru** for the defendant and no appearance for the plaintiff in open court.

M. A. WARSAME

JUDGE

14.2.08