

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 302 of 2001

JOSEPHINE MLIKELI MUTIKU PLAINTIFF

- Versus -

HASSAN MGAMBA DEFENDANT

Coram: Before Hon. Justice L. Njagi

Mr. Tindika for Plaintiffs

N/A for Respondent

Court clerk - Ibrahim

RULING

After the plaintiff had completed her evidence by examination-in-chief, a fresh date was taken for cross-examination. When the time came for cross-examination, Mr. Tindika for the plaintiff told the court that he wished to reopen the plaintiff's evidence and produce some documents. Mr. Muthama for the 1st and 2nd defendants opposed the application on the grounds that Mr. Tindika had not laid out any basis in law for the application as he had not shown any provision in the Evidence Act in support of that application. He referred to section 144 of the Evidence Act which he said allows a witness to be recalled for further cross-examination but not further examination-in-chief. He submitted that the court has no power to allow the application.

Secondly, Mr. Muthama argued that if the documents to be produced were not on the list of documents discovered and duly filed in court, the defendants will have been ambushed because they have prepared the case on the basis of the documents on the aforesaid list.

Thirdly, counsel submitted that the plaintiff's assertion that she forgot to produce some documents was clearly an afterthought. He thereupon asked the court to reject the application and order that cross examination proceeds.

Mr. Namboye for the Interested Party associated himself with these sentiments. He remarked, however, that if they get copies, they would not be averse to accommodating Mr. Tindika.

Mr. Tindika then said that the documents were on income and were served on them a long time ago, but they were misplaced. However, they had found them only that morning and it was in the interest of the parties that the application be allowed.

I have considered the application to reopen the plaintiff's evidence and produce some documents. At this stage, our main concern should be whether the plaintiff can be allowed to reopen its evidence. The answer is to be found in Section 146(4) of the Evidence Act, Cap 80, Laws of Kenya. It states as follows

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“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross examination, and if it does so, the parties have the right of further cross examination and re-examination respectively.”

Under this Section, therefore, the court has the power to recall a witness for further examination-in-chief. In exercise of that power, I allow the application to recall the plaintiff for further examination-in-chief. Whether the documents intended to be produced are admissible or not is a different matter altogether.

It is so ordered.

Dated and delivered at Mombasa this 26th day of October, 2007

L. NJAGI

JUDGE