

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL APPLICATION NO. 1110 OF 1999
IN THE MATTER OF THE ESTATE OF GERISHON JOHN MBOGOH

MARGARET RACHEL MUTHONI

ARTHUR MUNENE MBOGO :::APPLICANT

- V E R S U S -

VERONICA RWAMBA MBOGO.....RESPONDENT

R U L I N G

This is an oral application by Mrs. Wambugu for the Objector for an order requiring the executive officer, Nyeri Law Courts, to produce the file relating to divorce cause No. 5 of 1982.

The matters leading to the application were as follows: When the Objector had closed her case the Petitioner called three witnesses. One of those witnesses was Benson Wainaina Kangethe, an Advocate of this Court. He was shown Exhibit No. 15 which was produced by the Objector. That document is an unsigned copy of a certificate of making a Decree Nisi Absolute under Rule 26(4) of the Matrimonial Causes Rules. That “certificate” shows that an order nisi for the dissolution of the marriage between one Bernard Njiru Rabson and the Objector had been made on 10th January, 1984. The certificate is dated 14th June, 1984. It bears the stamp of the subordinate court but it was not signed. Mr. Kangethe was a magistrate at Nyeri when the certificate mentioned earlier was purportedly issued. He disputed that that certificate was ever issued from the court. When Mr. Kangethe had completed giving his testimony, Mrs. Wambugu sought an adjournment to enable her peruse the court proceedings relating to the divorce Cause before she could cross-examine. This, she did and when she cross-examined Mr. Kangethe she had with her certified copies of the proceedings in the Divorce case which showed that Mr. Kangethe was the presiding magistrate. He, however, questioned their genuineness. This prompted Mrs. Wambugu to make the present application. Mrs. Wambugu argued that the file sought to be produced was necessary to determine the legitimacy of the certificate mentioned earlier. She said that this issue was never put to her client when she testified in chief. In her view, it was in the interests of justice that the application be allowed.

Mr. Mbigi for the Petitioner, on the other hand, opposed the application arguing that there was no provision allowing a party to produce a document after closing his case. He also argued that the court cannot on its motion order the production of the file. He relied on the case of **Herman P. steyv v. charles Thys** NAIROBI C.A. Civil Appeal No. 86 of 1996 (Unreported) (GICHERU, LAKHA & PALL, JJ.A.) in arguing that a court cannot call a witness on its own. In that case, it was stated as follows:-

“This is so firmly established in our law that a judge is not allowed in a civil dispute even to call a witness whom he thinks may thro w some truth on the facts.

He must rest content with the witnesses called by the parties: See Re Enoch & Zaretsky Bock & Co. [1910] I K.B. 327)”

However, as Mrs. Wambugu rightly pointed out, this is not an application to call a witness. The fact that a person is called to produce a document does not make him a witness as provided in section 147 of the Evidence Act (Cap. 80).

Now, the question before the court is whether a party may be allowed to produce a document after closing his case.

In our adversarial system of law, the parties are left to conduct their cases as best as they can so long as they follow the rules of procedure and evidence. It is common practice in our courts to refer to proceedings in previous suits but this cannot take the place of leading evidence on a particular question. In **Damodar Jinabhai & Co. Ltd and Ano. V. Eustace Sisal Estates Ltd** [1967] E.A. (SIR CHARLES NEWBOLD, P., DUFFUS & SPRY, J.J.A.) SIR CHARLES NEWBOLD, P. said as follows:-

“.....I consider that counsel would be entitled to refer to the evidence of a witness in those proceedings for the purpose, but the sole purpose, of contradicting or corroborating the evidence of the same witness given in these proceeding..... He would not, however, be entitled to refer to the evidence of any such witness in the prior proceedings as being evidence of the truth of the statement made in those prior proceedings.”

Now, the Objector seeks to rely on a certificate that is not signed and not certified and of which she was only able to produce a copy. This is very shaky evidence. In my view, nothing would have been easier than to produce the original certificate or a certified copy thereof. She was the Petitioner in the Divorce cause and there is no reason why she cannot produce the certificate or a certified copy thereof. In short, there is no evidence before the court on the certificate which may be contradicted or supported by the court file sought to be produced. It remained upon the Objector to lead credible evidence on that matter and I do not think that she has done so. In any event, the Objector did not refer me to any authority which allows a party to produce documents after having closed his case. I do not think that there is any such provision in our law.

The law on the point as I know it is that a party must lead his evidence at examination and not after closing his case. For these reasons, I am unable to allow this application. I, therefore, dismiss the Objector's application with costs.

DATED and DELIVERED at NAIROBI this 9th day of May, 2001.

ALNASHIR VISRAM

JUDGE.