



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 43 OF 2019 (O.S)

IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF TEH APPLICATION BY

SARA ANYISO MARTINS.....PLAINTIFF/APPLICANT

VERSUS

SYAM SINGH BANSAL BANSI RAM.....DEFENDANT/RESPONDENT

RULING

On the 3/3/2021, Mr. Onsongo learned counsel for the Defendant sought leave to file a witness statement and to introduce new documents. Mr. Onsongo relies on Section 147 of the Evidence Act which according to Mr. Onsongo presupposes that a person can be called to produce a document without cross-examination. The Plaintiff counsel had objected to the production of the documents during the hearing because they were copies and therefore the documents were marked for identification.

According to Mr. Onsongo, the court should do substantive justice and that in any event the plaintiff can be allowed to reopen her case.

Mr. Oyatta learned counsel for the plaintiff objected to the new documents being brought in as the parties were given opportunity to file documents and statements. According to Mr. Oyatta, the Plaintiff has closed her case and that she will not be able to peruse the documents because she has already testified and cross-examined.

I have considered the oral application by Mr. Onsongo for defendant and Oyatta for the Plaintiff and do find the contention is the statement dated 25/2/2021 by Sabina Adhiambo Mina and the documents filed on 24/2/2021 after the plaintiff and her witnesses have testified.

The general tenure of the Civil Procedure Rules is that the parties ought to disclose their case to avoid ambush, delay and increase of costs. The plaintiff is required to file a verifying affidavit, list of witnesses and the witness statements and the list of documents and the documents to be relied upon at the trial under order 3 rule 2 of the rules, conversely the defendant is required to do the same when filing the defence and counter claim under order 7 rule 5 of the rules. Before the pre-trial conference written statements may be filed with the leave of the court at least 15 days prior to the pre-trial conference under order 11 of the rules. After the pre-trial conference the matter is set down for hearing and at this stage it is expected that both parties have disclosed to each other what is expected at the trial.

This Court has the power under order 18 rule 10 of the rules and section 146 of the evidence Act and Article 50 (1) of the Constitution of Kenya to allow more witness statements and documents even after the pre-trial but the power cannot be exercised in a vacuum. The court should be careful so as not to apply the rules to impede a fair trial.

For avoidance of doubt this court did not allow the defendant to file any witness statement or documents when it adjourned on 5/11/2020. However, the defendant was at liberty to call a witness who could produce the documents marked for identification. This witness could come from the firm of Kohli, Patel & Raichura, the firm of L.G. Menezes and/or from Winam Court.

The defendant chose to file a witness statement of a former employee of Kohli, Patel & Raichura and filed further list of documents and the documents. I do find this to have been improper as the evidence of the said Sabina Adhiambo Mina is an ambush to the plaintiff and that the plaintiff has already testified.

It is my view that Section 147 of the Evidence Act only applies to persons who can be called to produce documents to demonstrate the document exists but not the import of the document. Documents such as court orders, Judgments and affidavits can be produced by the non-makers but in whose custody they are kept, to demonstrate that they are part of the court record. Such person producing the document can't

be cross-examined on the import of the document.

This court has a constitutional mandate to ensure that a trial is fair and therefore retains the power to disallow a party from bringing on record evidence that was not exchanged with the rival party as contemplated by the Civil Procedure Rules 2010.

This was the reasoning of the supreme court in Raila Odinga & 5 others vs I.E.B.C and 3 others in Supreme Court of Kenya Petitions Nos. 3, 4 and 5 of 2013 (2013) eKLR.

However, the court has a duty to balance justice and where the plaintiff will not be prejudiced the court can allow such evidence.

In this case some of the documents are already marked as DMFI, 2, 3, 4, 5. The plaintiff will not be prejudiced if the documents are produced by the proper persons who are in custody of the same. However, it would be prejudicial to the plaintiff if the defendant was to be allowed to bring in new documents and statements. This court will only allow the production of documents marked for identification during hearing.

The upshot of the above is that I allow the defendant to rely on documents that were marked for identification and that the defendant be at liberty to call an officer from the firm of M/s Kohli, Patel & Raichura and L.G. Menezes or Winam court to produce the same. The witness statement of Sabina Adhiambo Mima and the list of documents filed on 24/2/2021 are hereby expunged from record. Costs in the cause.

DATED AT KISUMU THIS 17TH DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE