



Pebler Holiday Homes Limited v Mwadago & 2 others (Environment & Land Case E048 of 2022) [2024] KEELC 6027 (KLR) (17 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6027 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E048 OF 2022**

**AE DENA, J
SEPTEMBER 17, 2024**

BETWEEN

PEBLER HOLIDAY HOMES LIMITED PLAINTIFF

AND

HUSSEIN MWALIMU MWADAGO 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

MADIHA FAHMY HINAWY 3RD DEFENDANT

RULING

1. This suit was instituted by way of plaint dated 26th October 2022 and filed on 20th October 2022. The 1st defendant responded to the suit vide a Statement of Defence and Counterclaim filed on 20th February 2023. The Defendant also filed on 27th September 2023 Statement of Defence and Counterclaim.
2. The subject of this ruling is a notice of objection filed on 6th March 2024 by the 3rd Defendant. The 3rd Defendant objects to the inclusion of the Plaintiffs further list and bundle of documents dated 12/2/24 and filed on 13/2/24. The same are WhatsApp correspondence allegedly between the plaintiff's advocate and the 3rd Defendant.
3. The Plaintiff responded to the objection vide a replying affidavit of its Chief Executive Officer Nicodemus Kimatu Master filed on 2/4/24. Referring to the events leading to the service of the 3rd Defendant it is deponed that on 12/6/24 the Plaintiff obtained the Defendants telephone number from a DCI officer one Mr. Chemosit when it also emerged the 3rd Defendant resides in the United Services. That he then shared the number with the advocate of the Plaintiff for purposes of facilitating the said service. That the advocate is an officer of the court who is on oath to assist the court in the administration of justice and has full authority to serve court documents.



4. That there was no previous communication between the Plaintiffs advocate and the 3rd Defendant other than during the time of service and the allegations that the Plaintiffs advocate was with malice soliciting for information on a different subject other than service were unfounded. That the advocate disclosed clearly that the communication was solely for service. The information given was out of the 3rd Defendants volition and he cannot try to disown his own assertions that he was conned by the 1st defendant. It is further stated that the information given was pivotal to the allegations of fraud as pleaded by the Plaintiff. That fraud by the 1st defendant is also pleaded by the 3rd Defendant. To the extent that the WhatsApp message shed more light on the pleadings herein the same cannot be termed offensive.
5. Further it is deponed that the same WhatsApp communication have been filed together with the affidavit of service and form part of the record as early as 26/7/23 before the courts directions of 9/10/23.
6. Parties appeared before the Deputy registrar on 18/4/24. Mr. Omulanya informed the court that the Plaintiff would be relying on its reply dated 2/4/24. Ms. Langat on behalf of the Land Registrar indicated that they will not be participating in the objection. The 3rd Defendant submissions are on record dated 15/03/23(sic). The 1st Defendant did not file submissions though Ms. Ogotti was present in court when directions were issued.

Determination

7. After considering the objection, the responses thereto, pleadings and submissions on record the main issue for determination is whether the objection should be upheld.
8. The thrust of the objection is captured in the 3rd Defendants submissions. That Mr. Omulanya has filed as part of the Plaintiffs list of documents personal communication between him and the 3rd defendant obtained during service when he is not the Plaintiff neither does he have a claim against the 3rd Defendant. That the only conclusion to be drawn is that the evidence is filed by the advocate in support of the Plaintiffs case. That consequently Counsel ought to decide if he will recuse himself and become a witness for the Plaintiff to produce the said communication as the maker. The court has been referred to Section 35 of the [Evidence Act](#) Cap 80 of the laws of Kenya.
9. The impugned documents are listed under item 11 of the Plaintiffs Further list and bundle of documents dated 12/2/24 and form pages 85-87 of the Plaintiffs trial bundle which was consolidated and paginated and filed on 13/2/24. The same are WhatsApp communication between Mr. Moses Omulanya and the 3rd Defendant. I must state there is nothing barring Counsel from effecting service as an officer of the court. Order 5 is on issue and service of summons. Order 5 Rule 1 (b) and (3) are pertinent in this regard. Order 5 Rule 22C permit service by mobile enabled messaging applications such as the WhatsApp communication herein.
10. As pointed at page 85 are the documents, being pleadings and a hearing notice sent with the cover message 'Please find the above documents for your service.' The affidavit of service was duly filed under the order 5 Rule 22C (4) by the Advocate being an authorised officer of the court. I have looked at the conversation and to me it was just a matter of courtesy on the part of Mr. Omulanya to respond and I would not attribute any ill motive as the conversation was initiated by the 3rd Defendant.
11. In my view focus should be on why the conversation is being introduced as part of the Plaintiffs evidence when the same was obtained during service and has already been attached and rightly so to the affidavit of service sworn by Mr. Omulanya. This is where the problem lies causing the discomfort



herein. I think it would be unacceptable for this communication to be used as part of the Plaintiffs evidence and I will demonstrate why.

12. I have noted the submission by the Plaintiff that the information given in the WhatsApp was pivotal to the allegations of fraud as pleaded by the Plaintiff and would shed more light on the pleadings. I respectfully disagree with this proposition. I say so because the WhatsApp platform was not the legal forum for the 3rd Defendant to respond to the pleadings served upon him. His proper record for purposes of the matter would be what is contained in the statement of Defence and List documents filed in court by the 3rd Defendant. In my view this would not be evidence properly obtained by the Plaintiff and its admission would render the trial unfair. Article 50 (4) of *the Constitution* provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.
13. I'm further guided by the holding in *Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae) (2019) eKLR*, where the court referred to the South African case of *Gumede vs. S (800/2015) (2016) ZASCA 148*, where it was held as follows:

Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.
14. The court has also reviewed the pleadings and in my view the issues of fraud are captured and very elaborately by the Plaintiff and other parties. The Plaintiff cannot therefore contend that the said communication sheds light on the pleadings and that expunging them would be a deliberate attempt to cripple the pleadings. At the trial the Plaintiff will have ample opportunity to cross examine the 3rd Defendant on the veracity of his testimony based on the pleadings and documents filed as this is the proper path.
15. The upshot of the foregoing is that the objection is sustained and the documents forming item 11 on the Plaintiffs further list and Bundle of documents dated 12/2/24 be and is hereby struck out from the said list and bundle.
16. Costs shall follow the outcome of the main suit.

It is so ordered.

RULING DATED SIGNED AND DELIVERED THIS 17TH DAY OF SEPTEMBER 2024.

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A.E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

Mr. Omulanya for the Plaintiffs



Ms. Ogotti for the 1st Defendant

Ms. Langat for the 2nd Defendant

Mr. Daniel Disii - Court Assistant

