Taibjee & another v Kanabar & another (Environment & Land Case 154 of 2019) [2023] KEELC 22618 (KLR) (4 July 2023) (Ruling)

Neutral citation: [2023] KEELC 22618 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 154 OF 2019

JO MBOYA, J

JULY 4, 2023

BETWEEN

AZIM TAIBJEE ..... 1ST PLAINTIFF

MADHAV BHALLA ..... 2ND PLAINTIFF

AND

HARISH KUMAR BHAGWANDAS KANABAR ..... 1ST DEFENDANT

NCBA BANK KENYA PLC ..... 2ND DEFENDANT

RULING

Introduction and Background

1. The instant matter was fixed and scheduled for hearing of the main case today, the 4th July 2023. However, even though the Advocate for the respective Parties initially confirmed that same were ready to proceed with the substantive Hearing, Learned Counsel for the 1st Defendant thereafter intimated to the court that same had a preliminary issue pertaining to certain paragraphs of the Supplementary Witness Statement filed by and/or on behalf of the 2nd Plaintiff.

2. For good measure, Learned Counsel pointed out that same was seeking to strike out and expunge from the record of the Honourable court Paragraphs 7, 15 (c), 17, 18, 27, 28, 43, 44, 45 and 46 of the impugned Witness Statement dated Nove 19, 2019.

3. Arising from the position taken by Learned Counsel for the 1st Defendant, it became necessary that the court does take the arguments pertaining to and or concerning the question of whether or not the impugned paragraphs of the Supplementary Witness statement of the named Plaintiff ought to be struck out or expunged or otherwise.

4. Premised on the foregoing, the advocates for the respective Parties thereafter proceeded to and rendered their submissions for and in opposition to the intended striking out of the impugned paragraphs of the Supplementary Witness statement.

Submissions By The Parties

1st Defendant's Submissions:

5. Learned Counsel for the 1st Defendant contended that the Supplementary Witness Statement dated November 19, 2019; but which was sworn as if same is an affidavit, contained and alluded to matters which were offensive and impugned not only the character of the 1st Defendant, but also the character of Learned Counsel himself.

6. Further and in addition Learned Counsel contended that paragraph 15 (c) of the said Supplementary witness statement charged him (Legal counsel) with commission of fraud and related offences, arising out of and touching on the transactions in respect of the property before court. According to counsel, the accusation and allegations of fraud which have been made against himself are malicious, mischievous and offensive and to this extent, same ought to be struck out or expunged.

7. Secondly, Learned Counsel also cited and referred to the other paragraphs of the Supplementary Witness Statement, namely, paragraphs 7, 17, 18, 27, 28, 43, 44, 45 and 47 thereof and contended that same relate to information that were gathered, obtained and acquired by the Plaintiffs during the time when the Plaintiffs, in their capacities as advocates; acted for the 1st Defendant and 15 other companies, which are related and closely associated with the 1st Defendant.

8. It was the contention by and on behalf of Learned Counsel for the 1st Defendant that in so far as the impugned information was procured during and in the course of retention as Advocate, the Plaintiffs herein cannot now be allowed to use and deploy the said information with a view to defeating the Interest of the 1st Defendant.

9. Furthermore, Learned Counsel submitted that to allow the Plaintiffs herein to rely upon and deploy the information in question, while prosecuting the instant matter will be tantamount to breaching and violating the 1st Defendant's right and protection offered by dint of Section 134 of the *Evidence Act*, Chapter 80, Laws of Kenya.

10. Further and in any event, Learned Counsel submitted that the import and tenor of the provisions of Section 134 of the *Evidence Act*, is such that an Advocate who has hitherto acted for a party, cannot be allowed to use the information acquired during and in the course of executing professional duties, to use such information to the prejudice of the client, unless the client has since granted permission and/or consent.

11. Nevertheless, Learned Counsel contended that in respect of the instant matter the 1st Defendant who was the client of the Plaintiffs in respect of the previous matters have not consented to the Plaintiffs' using and/or disclosing the information contained at the foot of the impugned paragraphs, which are the subject of the application for striking out.

12. Thirdly, Learned Counsel for the 1st Defendant has submitted that unless the offensive information are struck out and expunged; the rights and interests of the 1st Defendant and the various other companies who have also been adversely mentioned, shall stand prejudiced in contravention of the provisions of the Article 50 (1) of the 2010.

13. In view of the foregoing, Learned Counsel has therefore implored the Honourable court to find and hold that the impugned paragraphs of the Supplementary witness statements are inappropriate, offensive and thus merits striking out from the record of the court.

Plaintiffs' Submissions:

14. Learned Counsel for the Plaintiffs submitted that the application that has been made by and on behalf of the Counsel for the 1st Plaintiff is not only mischievous, but the same is misconceived and otherwise and abuse of the Due process of the Honourable court.

15. First and foremost, Learned Counsel has submitted that the document whose contents has been sought to be struck out and/or expunged is a witness statement and not an affidavit or pleading, as known to law.

16. Premised on the foregoing, Learned Counsel for the Plaintiffs has submitted that there is no law that allows for the striking out of any paragraphs of a Witness statement, in so far as a witness statement relates to the intended Evidence of a particular witness, who shall upon adoption thereof, be subjected to cross-examination on the basis of inter-alia, source of information and veracity thereof.

17. Secondly, Learned Counsel for the Plaintiffs has submitted that in so far as the impugned document constitutes a witness statement, same is not an affidavit, either as mistakenly perceived by Learned Counsel for the 1st Defendant or otherwise. In this regard, Learned Counsel has added that the provisions of Order 19, Rule 6 of the *Civil Procedure Rules*, which have been quoted and relied upon by Learned counsel for the 1st Defendant are irrelevant and inapplicable.

18. Thirdly, Learned Counsel for the Plaintiffs has further submitted that the provisions of Section 134 of the *Evidence Act* which have been cited and relied upon by Learned counsel for the 1st Defendant herein, to attack the supplementary witness statement, are inapplicable in a dispute where Parties are litigating in their own capacities over a particular matter, which requires hearing and determination by a court of law.

19. To the contrary, Learned Counsel for the Plaintiffs has submitted that the provisions of Section 134 of the *Evidence Act*, Chapter 8 laws of Kenya, are only relevant where an advocate, who has previously acted for a client, seeks to act for an adverse party against the previous client and in respect of which the information hitherto obtained and procured from the previous client shall be used to the prejudice of the previous clients.

20. It was further the submission of Learned Counsel for the Plaintiffs that if the submissions by counsel for the 1st Defendant were to hold sway, then it means that no Advocate can ever file Advocate- client suit against a former client or client, whatsoever.

21. Fourthly, Learned counsel submitted that the current application has been premised on several grounds but which grounds constitute evidence. However, learned counsel has contended that instead of filing a formal application, Learned counsel for the 1st Defendant has chosen to mount and propagate an informal application, which by itself is contrary to and in contravention of the provisions of Order 51, Rule 1 of the *Civil Procedure Rules, 201*0; which underscore the necessity to file formal applications.

22. Arising from the foregoing submission, Learned counsel for the Plaintiffs has therefore contended that the instant application, which has been made on the face of a hearing, was merely calculated to defeat and/or otherwise obstruct the scheduled hearing of the suit.

23. Consequently and in the premises, Learned counsel has submitted that the entire application indeed constitutes an ambush and a desire to litigate by installment, on behalf of the 1st Defendant and hence such an application ought not to be allowed by the court.

2Nd Defendant's Submissions:

24. Learned counsel for the 2nd Defendant was present during the arguments pertaining to and concerning the striking out or otherwise of the various paragraphs of the Supplementary witness statement dated November 19, 2019.

25. However, Learned counsel took the position that the issue in dispute were between the Plaintiffs on one hand and the 1st Defendant on the other hand and hence same intimated to the Court that the 2nd Defendant would not wish to make any submissions thereon.

26. Instructively, Learned counsel for the 2nd Defendant therefore left the matter in the hands of the court to adjudicate upon and to determine same, albeit subject to the obtaining legal position.

ISSUES FOR DETERMINATION

27. Having reviewed and considered the oral submissions that were ventilated by and on behalf of the advocates for the Plaintiffs and the 1st Defendant respectively, the following issues do arise and are thus worthy of determination.

    i. Whether the contents of a Supplementary Witness Statement, irrespective of whether same is prepared of the format of an affidavit, is amenable to striking out.

    ii. Whether an Application which is premised and anchored on the provisions of Sections 134 of the *Evidence Act*, Chapter 80, Laws of Kenya; can be mounted informally and in the absence of Evidential anchorage.

    iii. Whether the provisions of Section 134 of the *Evidence Act* does apply as against Parties to a suit, like the one before hand.

Analysis And Determination

Issue Number 1 - Whether the contents of a Supplementary Witness Statement, irrespective of whether same is prepared of the format of an affidavit; is amenable to striking out

28. It is common ground that every witness who desires to attend court and ultimately testify before the court in any matter or issue, which is the subject of proceedings before the court, must file a witness statement before hand. For good measure, if the intended witness is a witness for the Plaintiff then the witness statement forms part of the documents which are required to be filed with the court in accordance with provisions of Order 3, Rule 2 of the *Civil Procedure Rules*.

29. On the contrary, if the intended witness is a witness for the Defendants, then the witness statement is one of the documents which is provided for and espoused by dint of Order 7 Rule 5, of the *Civil Procedure Rules*.

30. Be that as it may, there is no gainsaying that a witness statement, which has been filed by a witness is neither a pleading nor an affidavit. Further and in addition, the witness statement itself does not become evidence, until and unless same has been adopted by the maker thereof, upon administration of oath, in the conventional way.

31. In so far as a witness statement is not an affidavit, the provisions of Order 19, of the *Civil Procedure Rules,* do not apply to a witness statement. Instructively, the provisions of Order 19 of the Civil Procedure Rules only relate to and govern affidavits which have been filed in support of an application or such other matter, where the law allows a dispute to be determined on the basis of affidavit evidence.

32. However, in respect of the instant matter, what is before the Honourable court is a witness statement, which the maker would wish to rely on and adopt and thereafter be cross-examined thereon.

33. Whereas the maker of the witness statement may allude to and enumerate issues that may be offensive to the adverse party, but the central issue relates to whether the maker of the witness statement would be able to justify the contents of the averments alluded to.

34. To my mind, the witness statement cannot be the subject of an application to strike out and/or expunge paragraphs thereof. Invariably, if Learned Counsel for the 1st Defendant is unhappy or better still offended by the contents of the witness statement, then the only available mechanism to deal with the contents of the witness statement is to subject same to thorough going cross-examination and to impeach the credibility of the witness, in the manner provided for under the law.

35. On the other hand, the other available avenue is for Learned counsel to allow the witness to testify and to adopt the witness statement and thereafter if upon cross-examination, it turns out that the averments at the foot of the witness statement were false and offensive, then Learned counsel for the 1st Defendant can invoke and apply the provisions of Section 108 of the *Penal Code,* Chapter 63, Laws of Kenya, relating to the offence of perjury.

36. However, I am afraid that Learned counsel for the 1st Defendant cannot take it up upon himself and seek to prohibit the production/ adduction of evidence on the basis of the witness statement or otherwise.

37. Consequently and in view of the foregoing, I come to the conclusion that a witness statement, which is neither a pleading nor an affidavit, cannot be the subject of striking out and/or expunction, either in the matter adverted to or at all.

Issue Number 2 Whether an Application which is premised and anchored on the provisions of Sections 134 of the *Evidence Act*, Chapter 80, Laws of Kenya; can be mounted informally and in the absence of Evidential anchorage

38. The second critical question to be addressed and considered relates to whether an application that relies on the provisions of Section 134 of the *Evidence Act*, Chapter 80 Laws of Kenya, can be raised and canvassed in an informal manner, albeit in the absence of affidavit evidence, whatsoever.

39. To start with, Learned Counsel for the 1st Defendant has submitted that the Plaintiffs herein, who are themselves Advocates of the High Court of Kenya, had acted for the 1st Defendant as well as five other related companies.

40. Further and in addition, Learned Counsel for the 1st Defendant has also submitted that in the course of acting for the 1st Defendant and the related companies, the Plaintiffs herein procured and obtained critical information from the 1st Defendant which the Plaintiffs are now seeking to deploy and rely upon to propagate the current suit.

41. Additionally, Learned Counsel has submitted that the information which was obtained by the Plaintiffs" herein was confidential and bound by the provisions of Section 134 of the *Evidence Act*, and

to this extent, such information cannot be used, deployed and/or disseminated without the consent of the client, namely, the First Defendant herein.

42. Finally, Learned Counsel for the 1st Defendant has submitted that as a result of the usage and deployment of the information under reference by the Plaintiffs herein, the 1st Defendant and the five other related companies, are bound to be prejudiced.

43. Be that as it may, what is important to mention is that all the averments and allegations, whose details have been reproduced in the preceding paragraphs, have all been made from the bar.

44. Clearly and to my mind, it is common knowledge that issues of evidentiatl nature can only be adverted to and be brought before the court on the basis of an affidavit. Consequently, if Learned Counsel for the 1st Defendant was keen to propagate all the allegations, which were ventilated from the bar, then it was incumbent upon counsel to procure and obtain the requisite affidavit evidence, either sworn by himself or client.

45. However, it is imperative to state and reiterate that an Advocate cannot use the privileged and hallowed position to propagate allegations, which are devoid of factual anchorage or otherwise.

46. Furthermore, it is also not lost on this Honourable court that an Advocate can also not usurp and/or arrogate unto himself the mandate of the client and thereafter purport to tender and adduce evidence relating to issues which are in controversy, interestingly from the bar.

47. In my humble, albeit considered view, the submissions which were made by Learned counsel for the 1st Defendant, though disguised as submissions, were actually factual allegations and/or averments, which unfortunately were being ventilated from the wrong forum.

48. For good measure, the issues which were adverted to required adduction or production of evidence, whether by way of affidavit or viva voce, subject to the provisions of the *Evidence Act* or such other law that allows production of evidence. However, because same were ventilated from the bar, no evidence could ensue and in this regard, the court is left in conundrum.

49. Be that as it may, there is no gainsaying that submissions by Learned counsel for the parties and in this respect, the submissions of Learned counsel for the 1st Defendant, in a bid to prove breach and violation of the provision of Section 134 of the *Evidence Act* by the Plaintiffs, would not with humility, take the place of Evidence.

50. To buttress the foregoing observation, it suffices to take cognizance of the ratio decidendi in the case of *Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi* (2014)eKLR, where the Court of Appeal stated and held as hereunder;

> " Submissions, we reiterate, do not constitute evidence at all."

Issue Number 3 - Whether the Provisions of Section 134 of the *Evidence Act* does apply as against Parties to a suit, like the one before hand.

51. Learned Counsel for the 1st Defendant herein has invoked and relied on the provisions of Section 134 of the *Evidence Act* and thereafter contended that the 2nd Plaintiff, who is a principal party in the instant proceedings, ought not to be allowed to use, rely on and/or deploy any information acquired during the time when same acted for the 1st Defendant in the previous transactions.

52. Nevertheless, it is imperative to state and observe the 2nd Plaintiff herein is not acting as an Advocate in this matter. To the contrary, the 2nd Plaintiff is a Party who is pursuing or exercising his constitutional

right of having a dispute with the 1st Defendant to be heard and determined by a court of law, in the manner espoused and entrenched in Article 50, (1) of the *Constitution* 2010.

53. To my mind, the provisions of Section 134, were couched to ensure that an Advocate who is acting in a particular matter cannot use information procured and obtained from the previous client, in any matter where the previous client is a Party and to the detriment of such a Party/ Former Client.

54. Nevertheless, the provision of Section 134 does not apply in a disputes where the Parties, whether hitherto advocate-client, have brought before the court their dispute for hearing and determination and same have variously engaged and retained separate advocates.

55. Consequently and in my humble view, the provisions of Section 134 of the *Evidence Act*, which has been cited and relied upon by Learned counsel for the 1st Defendant, with a view to striking out certain paragraphs of the 2nd Plaintiff's Supplementary witness statement, are inapplicable and at best, irrelevant.

56. Be that as it may and in view of the foregoing, I have struggled to understand and appreciate the true import and tenor of the informal Application, made and mounted by Learned counsel for the 1st Defendant.

57. Notably, it appears that Learned Counsel was merely intent on aborting the scheduled proceedings. For good measure, the nature of the arguments that were ventilated before the Honourable court and which essentially sought to strike out paragraphs of a proposed witness statement, did not appear legitimate or otherwise, taking into account that a witness statement relates to what the witness intends to bring before the court and thereafter be cross-examined on.

Final Disposition

58. Having reviewed the totality of the arguments and submissions that were made before me and having taken into account the import and tenor of the various provisions of the law, which were cited and relied upon, I come to the conclusion that the informal application which was premised on factual allegations, (though disguised as submissions), is clearly misconceived and legally untenable.

59. In a nutshell, the informal application be and is herby dismissed with costs assessed and certified in the sum of Kshs 20,000/= only, payable to the Senior Counsel for the Plaintiffs; and Kshs 15,000/= only to Counsel for the 2nd Defendant.

60. For good measure, the costs details in terms of the preceding paragraphs shall be payable within fourteen (14) days from the date hereof and in default, Learned Counsel for the 1st Defendant shall have no right of audience before the Honourable court on the return date.

61. Lastly, the 1st Defendant shall also pay the requisite court adjournment fees, taking into account that I have observed that the impugned application was tactically raised and ventilated with the sole intention of defeating the scheduled hearing, which intention was indeed achieved.

62. Further and in this respect, I order and direct that the 1st Defendant shall also pay the sum of kes.10, 000/= on account of court adjournment fees, given that the subject matter was indeed scheduled for hearing and in any event; all the concerned Parties, had hitherto participated in the confirmation of same for hearing during the initial call over.

63. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Taib Ali Taib SC for the Plaintiffs.

Mr. Kyalo Mbobo for the 1st Defendant.

Mr. Emanuel Mumia for the 2nd Defendant.