



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1356 OF 2014

KEROKA HIGHWAY SERVICE STATIONPLAINTIFF

- VERSUS -

MAURICE ODONGO OGOTDEFENDANT

RULING

1. This matter proceeded for hearing on **2nd February, 2022** when the Defendant, DW1, testified. After his testimony, the Defendant's witness DW2 took the witness stand, however before he could be sworn in, the Plaintiff's Counsel **Mr. Kang'ethe** objected to his testimony being taken for the reasons that he was in court throughout the entire period when the Defendant was testifying.

2. The Plaintiff's counsel raised an objection to the effect that sound practice demands that a witness should not sit in court while another witness, or a party to the suit, is testifying. Counsel argued that such a witness will not be credible and that allowing his testimony to be taken will be prejudicial to their case.

3. On his part, the Defendant's Counsel **Mr. Mugambi** submitted that it was an oversight that the Defendant's witness was present in court while DW1 was testifying, that he was also surprised that DW2 never went outside the court room and that DW2 had a pre-recorded statement whose contents the Plaintiff already knows.

4. Counsel further submitted that no prejudice will be suffered by the Plaintiff since they already have a copy of the witness statement of DW2. It was the Defendant's counsel further submission that there would be greater harm suffered by the Defendant if their witness is shut out and barred from testifying in the matter, Counsel even made a comparison of how during this modern era of virtual court proceedings, the witnesses are normally in the same room following the proceedings while another party or witness is testifying. This Ruling is therefore in respect to the objection raised by the Plaintiff on whether DW2 can testify in this matter.

5. Indeed, as correctly argued by the Plaintiff, the practice of this court requires a witness to sit outside the court room while a party or another witness is testifying. This practice is meant to assist the court and the parties to assess the credibility of the evidence that is given by each witness, independent of the evidence of the other witness. It is only when this practice is upheld and observed that the principle of corroborative evidence, which is key in a trial, would be helpful to the court in arriving at a fair decision.

6. The question that the court has to grapple with is whether such a witness can be locked out completely from testifying. This issue was considered by the court in the case of ***Waithaka & Another vs. Republic (1972) E.A 184*** in which the court held that the evidence of such a witness should be taken and the fact of his or her presence in court would then go to the weight to be attached to such evidence.

7. The ***Waithaka*** (*supra*) decision was adopted by in ***John Oroo Oyioka & Another vs. Independent Electoral Boundaries Commission & 2 Others (2013) eKLR*** as follows:

“I entirely agree with the view held by the court in the Waithaka case and hold that the presence of Atandi Machuka in court during the hearing of the evidence of the Petitioner in EP No. 2 of 2013 shall only affect the weight to be placed on that evidence by this court.

8. Just like in the ***Waithaka*** and ***John Oroo*** (*supra*) case and further being guided by the provisions of **Article 159 (2) (d) of the Constitution**, I am of the same view that a witness cannot be locked out from testifying just because he was in court when the Defendant was testifying. However, the weight to be placed on his testimony will be less than the weight that would have been placed on the evidence that he would have given had he not sat in court while the Defendant, or any other witness was testifying.

9. The upshot is that the objection is overruled. The witness is at liberty to proceed to testify. The costs of the objection shall be in the cause.

10. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Charles Kange'the for the Plaintiff.

Mr. Lawrence Mugambi for the Defendant.

Court Assistant; Caroline Nafuna.