



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

MOMBASA LAW COURTS

ELC NO. 190 OF 2016

SAADIYA SHEIKH MUHIDDIN.....1ST PLAINTIFF

ZAKARIA MOHAMED SHEIKH BANA.....2ND PLAINTIFF

- VERSUS -

NESSEN SALIM KARAMA.....1ST DEFENDANT

COUNTY GOVERNMENT OF MOMBASA.....2ND DEFENDANT

RULING

I. PRELIMINARIES

1. On 26th January 2022, the part heard matter herein came up for further hearing of the Defence case through physical means. Indeed, the matter proceeded on smoothly whereby a Defendant's Witness – 2, Mr. Hashim Got Sat - testified in examination in chief was extensively and intensively cross examined by the Plaintiff s Learned Counsel, Mr. Khalid and re – examined by Counsel for the 1st Defendant thereof. Immediately after the examination of Defendant Witness - 2, Mr. Aziz Counsel for the 1st Defendant informed court that he intended to summon Mr. Edward K. Kiguru, a Qualified and Registered Land Surveyor as the next witness for the 1st Defendant.

II. The Objection by the 1st Defendant's Advocate

2. At this juncture, Mr. Khalid the Learned Counsel holding brief for M/s Nafula, was up in arms and raised an objection. He vehemently, objected on having the intended Defendant witness – 3 be summoned on the rounds that he was unqualified and should be declared so. The Learned Counsel argued that the said 1st Defendant's witness had been physically seated and present in court. The Counsel averred that he had witnessed the witness being court throughout the hearing and proceedings of the Court as DW – 2 was testified. He asserted that he sat pretty there in open court while this witness tendered his evidence and hence his evidence would be marred with biasness and prejudice to the Plaintiff whatsoever. He contended that was contrary to the provisions of as stipulated under “**The Evidence Act**” Cap. 80 of the Laws of Kenya . He stressed that would prejudice the Plaintiff's case and pressed the court to disqualify the witness.

III. Responses by the Plaintiff's Advocates.

3. Mr. Aziz Advocate for the 1st Defendant opposing the objection, made a brief response. He disagreed with the submission by the Plaintiff's Advocate urging the Honorable Court to disqualify the Defendant's Witness – 3 from testifying on grounds of being present during the proceedings and while DW – 2 testified. He termed the DW – 3 as being an expert and professional witness as being a vital one and who formed the integral part of the 1st Defendant's case. He was the one who prepared a Land Surveyors report which was a pivotal to the case. In his own words, he submitted verbatim that:- ***'it was his report that was used to make the matter to be where we are. Without his testimony it will make the whole testimony an empty shell'***. He also contended that, while the Plaintiff would not be prejudiced in any way by the evidence of this witness as they would have all the ample time and right to cross examine him on the veracity of the evidence. On the contrary, he argued that its 1st Defendant who stood to be prejudiced for prosecuting a case without an expert and urged court to use its discretionary powers and allow the witness to testify.

4. In quick rejoinder, Mr. Khalid reprimanded the Defendants for breaching the law, by seeking to call a witness who had sat throughout the cross examination of DW - 2. He reiterated his plea to court to disqualify the witness as no prejudice would be suffered by the Defendant for not summoning him.

III. Analysis and Determination

5. Having heard the oral submissions made by both the Learned Counsels for the Plaintiffs and the 1st Defendant herein, I have taken into consideration all the relevant provisions of the law and available precedent on the issue surrounding the objection raised by the Learned Counsel by the 1st Defendant.

6. I now wish to make a determination on the issue of whether or not court ought to disqualify a witness that is physically present in court during the hearing of another or other witnesses adducing evidence.

7. I must admit that, not much has been well established as far as this issue is concerned in our Jurisprudence. This is so particularly in Civil cases. From the myriad of case laws, the surrounding inferences are only prevalent in some few cases of disqualification of Advocates from appearing or acting for certain opposing parties as stated out under “**The Rules 8 of The Advocates (Practises) Rules of 1966.** (“*In CA – Delphis Bank Limited – Versus – Channan Singh Chatthe & 6 others (2005) eKLR; Ellis Maunday & Clarke (1912) CH 831; Mohan Galot & 5 Others – Versus – Kenya National Capital Corporation Limited (2016) eKLR; William Audi Ododa & Another – Versus – John Yier & Another CA no. Nai. 360 of 2004 (UR); ELC (Eldoret) No. 2 of 2021 – Aspire Limited – Versus – Zedra Technical Services Limited & Another (2021) eKLR; and Uhuru Highway Development Limited & 3 Other – versus Central Bank of Kenya & 4 Others (2003) eKLR*).

8. On the other hand, this Court takes cognizance that such objections are commonly and repeatedly raised in Criminal practice. But even then, it appears that most the provisions which governed this rule mostly founded under Sections 282 to 290 of the Criminal Procedure Rules. Cap. 75 of the Laws of Kenya have been repealed. **See the Criminal Case of Republic – Versus Silas Mutuma Marimi & 2 Others (2016) eKLR** In the given circumstances, it leaves the issue to be much of a discretionary one by Court than not. Nonetheless, from the common law, the position is that a witness stands disqualified if that witness was present in court during the hearing of other evidence. At least, in the write up piece by “**Fraser P. Davidson, LL.B, Ph.D, Evidence, Thomson W. Green, Scottish Universities Law Institute, 2007, page 309** expounded on witnesses present in court thus:-

‘Where a witness has, without the permission of the court and the consent of the party objecting, been present in court during the proceedings, the court has discretion to admit him where it appears to the court that his presence was not the result of the culpable negligence or criminal intent, that he has not been unduly instructed or influenced by what took place in his presence, and that injustice will not be done by his examination. It is for the party who wishes to lead the witness to satisfy the court on such points.’

9. In the instant case, the proposed witness, DW – 3, is an expert witness in relation to the case herein. An expert witness though cited by a party, owes a duty to the court to present expert evidence in a professional, an independent, objective and non - biased beyond reproach manner. The expert witness is expected by court to provide a well - informed and balanced opinion on his area of expertise and not become an advocate or take sides with the opposing parties in the matter, but rather state the facts and assumptions upon which his opinion is based.

Further on from the write up of **Fraser P. Davidson, LL.B, Ph.D, Evidence, Thomson W. Green, Scottish Universities Law Institute, 2007, page 311**, the following was said on an expert witness present in court *‘It is well established that expert witness, given that they do not testify on matters of facts, may be present in court during the hearing of other evidence, so long as the other side does not object, though there are suggestions that they should not be allowed to remain in court when other experts are testifying to matters of opinion. Where a party objects, then the expert will be excluded, but it is probably the case that this is a matter of practice rather than of law...the court should at least have a discretion in this matter.’*

10. In a recent English case of “**Luckwell – Versus - Limata, [2014] EWHC 536**, where an application to exclude and/or disqualify a witness from court was made, Justice Holman had this to say:-

“If a court is, in fact, sitting in public, and if an application is made to exclude a witness or witnesses, then the court may exclude them. But it should only exclude them if the court is satisfied, on the facts and in the circumstances of the particular situation, that it would, for good reasons, be an appropriate step to take. The threshold may not be a high one. The reason may not need to be a very cogent one. But if a court is sitting in public, no one who wishes to be present should be excluded, not even a witness, without some good reason for doing so. I propose to apply that approach and direct to myself in that way in making the present ruling.”

11. The assessment of the credibility of a witness on the ground that he was present in court when other witness adduced evidence is based on the protection against deliberate falsification and also protection against the normal trait of memories changing based on post event information. In criminal cases, it’s paramount for witnesses to be excluded to prevent them from tailor making their evidence to the previous witness. In civil cases, as I had mentioned above, common law provides that it’s at the discretion of court to determine whether or not to disqualify the witness.

12. Additionally, In this era of Technological advancement through Information Technology – Facebooks, Social media, You Tube and Twitter devices it is becoming extremely complex to monitor who sits in a proceedings or not. It is almost a pipe dream, an impossibility and a facade to imagine that court proceedings are limited to those in it, yet information can be relayed in a nick of a second through texting. I even for see the situation getting more complex in the near future. Ideally, taking the transformational strides that the Judiciary is currently making to embracing technology where most of the proceedings are conducted using virtual means, a total ban on witness from being present in court while another witness is giving evidence cannot be perfectly sustainable nor fathomable. The Court sessions are public and the links are available locally and abroad to anyone interested to access or just gets logged in.

13. In the present case, there exists no good and justifiable reason to disqualify the proposed witness. The Advocate for the Defendant seeking the exclusion of this witness has not demonstrated to court that his presence as a result of culpable negligence, willful bad intention or how he will be unduly influenced by what took place in his presence. This Court fully Concurs with the Defendant’s Advocates, Mr. Aziz in that the Plaintiff stands to suffer no injustice nor prejudice as he will have the right to cross examine the expert witness, who as stated is

expected to give an objective and non - biased above board opinion to court. Besides, this Court have taken cognizance of the objection and the Witness will be cautioned from making or adducing any biased, unprofessional and/or lopsided evidence as the same will be automatically expunged from the records at his own chagrin and that of the Defendant. The Honorable Court is fully wary of this witness and his evidence to be adduced. It will exercise great circumspection on it thereof.

14. In conclusion, I state that I do not see how the continued participation and testifying in this case by Mr. Edward K. Kiguru would prejudice or embarrass the case of the Plaintiff. Besides, as indicated, the expert witness, is placed on a higher plane of preciseness and accuracy of facts supporting his opinion than other witness, and on that ground I do find that his evidence is of importance in the final determination of the dispute between the parties. The end result is that, I hereby proceed to dismiss the objection by the Plaintiff's Counsel to disqualify Mr. Edward K. Kiguru as an expert witness from testifying as a witness with no order as to costs.

15. IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY 2022

JUSTICE HON. L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT,

MOMBASA

In the Presence of:

M/s Yumna, Court Assistant.

Mr. Khalid Advocate for the Plaintiff.

Mr. Aziz Advocate for the 1st Defendant.

Mr. Amadi for the 3rd Defendant