



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 1154 OF 2015

LUCY WANJIRU NJERU.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH OKWARO OLENDO.....DEFENDANT/RESPONDENT

RULING

1. Vide an application dated 4th February, 2022, the Plaintiff has sought for an order to have her case re-opened and witness summons issued to a police officer known as Mark Lipate to testify in this matter.
2. The application is supported by the affidavit of the Plaintiff who has deponed that when the matter came up for hearing, the court indicated, at the instance of the Defence that a police officer number 64388, Mark Lipate, whose witness statement was extracted from the record of a criminal case, would require to be cross-examined and that the criminal investigation file was the source of the documents that she filed in this matter.
3. The Plaintiff deponed that as at the time of hearing, her advocate had not seen all the witness statements and documents of the defence; that upon being served with the defence documents, she started looking for Mr. Mark Lipate and that the said Mr. Mark Lipate should be summoned to testify in this matter.
4. In response, the Defendant deponed that the present application is an afterthought meant to fill the gaps in the Plaintiff's evidence and undo the effect of the successful cross-examination; that the Plaintiff closed her case on 8th December, 2021 and that while closing the Plaintiff's case, the Plaintiff's advocate informed the court that the Plaintiff will not be calling any other witness.
5. It was deponed by the Defendant that among the documents the Plaintiff sought to admit through her counsel during the hearing was a copy of the statement she alleged was recorded by a police officer; that this court sustained the objection raised by her advocate and that this application has been filed to set aside and/or review the ruling of this Court.
6. The application proceeded by way of oral submissions which I have considered.
7. The record shows that on 20th May, 2019, the Plaintiff, PW2 and her witness, PW1, testified in this matter. The Plaintiff and her witness were cross-examined by the defence counsel on 8th December, 2021. During the hearing of this matter, the Plaintiff attempted to produce documents annexed on her supporting affidavit sworn on 6th March, 2019. The attempt to produce the supporting affidavit together with the annexures as an exhibit was objected to by the defence counsel, and specifically the statement of a police officer by the name Mr. Lipate, which was attached on the supporting affidavit.
8. In my ruling in respect to the production of the statement of Mr. Lipate I stated as follows:

“The statement made by Mr. Lipate and attached on the Replying Affidavit of Pw1 cannot be equated to a public document. It is only Mr. Lipate who can depone on matters in the statement and be cross-examined on the same. In any event, even if the statement is a public document, the same is neither the original nor is it certified as a true copy as contemplated under the Evidence Act. The objection is sustained.”

9. The Plaintiff proceeded to close her case on the same day. The Plaintiff has now sought to re-open her case and call Mr. Lipate to testify on the basis of the statement that he recorded while investigating a criminal matter related to the dispute herein.

10. It is trite that under **order 11** of the **Civil Procedure Rules**, parties are obligated to conduct pre-trial conference. At the pre-trial conference, and before fixing the matter for hearing, parties are obligated to exchange documents and witness statements.

11. **Order 11 Rule 7** of the **Civil Procedure Rules** provides that at least thirty days before the hearing date of the suit, a trial conference shall be convened for the following purposes;

a)

b)

c)

d) Ordering the admission of statements without the calling of the maker as witnesses where appropriate and the production of any copy of a statement where the original is unavailable;

e)

f) Ordering for the examination of any witness by the issue of commission outside court and for the admission of any such examination as evidence in court.

g) Making appropriate orders relating to expert's reports including their exchange and admissibility at the trial.

12. **Order 3 Rule 2** of the **Civil Procedure Rules** provide that all suits must be accompanied by a list of witnesses to be called at trial, provided that statements may with the leave of the court be furnished at least fifteen days prior to the trial conference under **Order 11**.

13. The Plaintiff in this matter knew or ought to have known before the commencement of this suit that Mr. Lipate had recorded a statement in the criminal matter. Indeed, the Plaintiff did attach the said statement on her affidavit which was filed in this court in the year 2019.

14. If the Plaintiff wanted to call the said Mr. Lipate as her witness or as an expert witness, she should have indicated that position before the trial commenced by either filing a list of witnesses where she would have indicated the name of Mr. Lipate or his witness statement or an expert's report.

15. Having not done so, the attempt to introduce the statement of Mr. Lipate which he recorded while conducting investigations, and calling him to testify at this stage will be trial by ambush. The said action goes against the principles of fair trial which is not acceptable.

16. That being the case, it is the finding of this Court that the application by the Plaintiff dated 4th February 2012 is not meritorious. The Application is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 1ST DAY OF MARCH, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

No appearance for the Plaintiff

Ms Madowo for Ochieng for the Defendant

Court Assistant - Okumu