



REPUBLIC OF KENYA



Obado v Anayo (Civil Suit E005 of 2022) [2025] KEHC 7212 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 7212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL SUIT E005 OF 2022
A. ONG'INJO, J
FEBRUARY 13, 2025**

BETWEEN

HON ZACHARY OKOTH OBADO PLAINTIFF

AND

EDDY ANAYO DEFENDANT

RULING

1. By a Notice of Motion dated 29/6/2024, Hon. Zachary Okoth Obado (the plaintiff) seeks the following orders:-
 - a. Spent;
 - b. That this court be pleased to issue an order allowing the plaintiff to file the Mpesa print out statement of transaction forming the matters in issue in case printed out by a witness known as Hon. Peter Mijungu whose witness statement appears on page 17 –19 on the plaint filed in court on 22.12.22.
 - c. Costs be in the cause.
2. The application is based on the grounds found on its face and is supported by the affidavit of the plaintiff sworn on 29/6/2024. It was deposed that the evidence the plaintiff seeks to produce is relevant and forms the substratum of his case since the issues are already raised in the plaint; that the said evidence shall help the court in determining the real issues in controversy in this case; that no prejudice will be suffered by the defendant in the event the prayers sought are granted.
3. The Application was opposed by the grounds of opposition dated 29.10.24
4. The application was further supported by the Supplementary affidavit of the plaintiff sworn on 4/11/2024 in which he averred that the grounds of opposition dated 29.10.24 are based on misinterpretation of the law and procedure and that the Mpesa statement sought to be filed are to be



produced by a witness who is yet to testify and that there cannot be any trial by ambush as wrongly alleged by the defendant

5. The Plaintiff averred further that evidence sought to be adduced has been pleaded in the plaint and forms the substratum of the case and that the court has wide discretion to allow the application in order to serve the ends of justice without hindrance both under the rule of pre-trial disclosure and pursuant to the overriding objective found in Article 159 of *the Constitution*.
6. The plaintiff has explained that at the time of filing the suit the Mpesa statement were not available as shown in the print outs that are intended to be produced. GH e also averred that no prejudice will be suffered by the defendant in the event that the prayers are granted.
7. Both parties filed their respective submissions. The plaintiff filed his written submissions dated 6/12/2024 while the defendant filed written submissions dated 15/1/2025.
8. The plaintiff in his submission reiterated the grounds on the face of the application and the averments in the supporting affidavit as well as the supplementary affidavit and relied on the holdings Mohamed Abdi Mahamud vs. Ahmed Absullahi Mohamed and 3 others 2018eKLR and Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1987 KLR 51; [1986-1989 EA 593 to support its application for allowing additional evidence and to contend that this court has residual jurisdiction to grant the orders being sought as it is necessary to achieve ends of justice.
9. The defendant submitted that parties ought to disclose their full case at an early stage and that the applicant did not explain why the documents were never filed and served on the respondents since the suit was filed way back in 2022. The relied on the holdings Johanna Kipkemoi Too vs. Hellen Tum (2014) eKLR.
10. It was argued that allowing the application would amount to trial by ambush and litigation by instalments will cause delay and shall subject the defendant to unnecessary costs which he shall not be able to recover from the applicant in the peculiar circumstances of this case. That allowing the application will render the provisions of Order 11 of Civil Procedure Rules useless.
11. The defendant argued that the plaintiff had already testified and he stands to suffer prejudice since he has been facing and defending a different case other than the real one which will be introduced At this late stage by the filling of the document and this will be a violation of his right to fair trial which is non derogable. It was further submitted that allowing the submission shall result in reopening of the pleadings which shall impose an extra burden and unnecessary cost in this ligation.
12. The defendant / respondent claimed that the application is frivolous vexatious and an abuse of the court process as he had admitted that he paid cumulatively to one Peter Mijungu the sum of Kshs. 400,000= and explained the circumstances pursuant to which he made the payment and it is not necessary to file an application to prove that the said payment was made more so when the same is coming long after pleadings had closed.
13. The Respondents have also argued that there are no exceptional circumstances to warrant this court to allow the admission of the document at this late stage as the plaintiff /applicant should have exercised due diligence in making sure that he complied with the procedure set out in the rules at the time of intuition of the suit by filing and availing all documents he desired to rely on at the trial. The court was argued to dismiss the application.
14. I have carefully considered the application, the grounds of opposition the rival submissions of the parties together with the case law cited. The issue for determination is whether the plaintiff has satisfied



the court for grant of an order allowing him to file Mpesa print out statement of transaction referred to in the statement of Hon. Peter Mijungu.

15. The order that the plaintiff is seeking for requires the exercise of the courts discretion to grant in appropriate circumstances. However, in exercising such discretion the same should be exercised judiciously with a view of doing justice to the parties. The plaintiff testified and he was subjected to both cross and re – examination but he now seeks to be allowed to file a document which he says was not in his possession at the time of filing the suit as is required under Order 3 rule 2 (d) of the Civil Procedure Rules.

Order 3 Rule 2(d) of the Civil Procedure Rules provides as follows: -

All suits filed under Rule 10 including suits against the government, except small claims, shall be accompanied by-

- (a) the affidavit referred to under Order 4 Rule 1 (2);
- (b) a list of witnesses to be called at the trial;
- (c) written statements signed by the witnesses excluding expert witnesses; and
- (d) copies of documents to be relied on at the trial including a demand letter before action.

16. The purpose and import of Order 11 of the Civil Procedure Rules is for the court and parties to set the ground rules to facilitate a smooth and expeditious hearing to its logical conclusion with minimal interruptions. Another school of thought of the importance of Order 11 is to give parties an opportunity to give full disclosure and the other party is given time to prepare to meet the case before it. In *Nakuru Automobile House Ltd vs Lawrence Maina Mwangi & another* (2017) eKLR the Learned Judge was of the view that:-

...Order 11 of the Civil Procedure Rules 2010 has elaborate provisions aimed at preparing suits for trial. The whole idea is that each party should approach litigation with full disclosure such that the opponent knows the exact case that they will meet. Our system of litigation no longer has room for the old practices where litigants would hold their cards close to their chests only to spring a last minute surprise on the opposite party. An application to re-open a case so as to adduce additional evidence must now be viewed against the new regime requiring full disclosure...”

17. This court has perused the plaint and established that Hon. Peter Ochieng Mijungu who is listed as one of the witnesses alluded to a transaction which the plaintiff seeks to be allowed to file and the defendant has admitted that indeed there was a transaction between him and the said Peter Mijungu for the amount of Kshs. 400,000/=. This court therefore finds that the said transaction having been alluded to at the onset of the suit in the statement dated 7/9/22 the filing of a document to evidences the same cannot prejudice the defendant in any way. The application is therefore allowed with no costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 13TH DAY OF FEBRUARY, 2025

A. ONGINJO

JUDGE

Ruling delivered in the presence of:-

