



Technomatic Limited t/a Promopack Company v Kenya Wine Agencies Limited (Civil Case 398 of 2005) [2024] KEHC 3666 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 398 OF 2005
MN MWANGI, J
MARCH 15, 2024**

BETWEEN

TECHNOMATIC LIMITED T/A PROMOPACK COMPANY PLAINTIFF

AND

KENYA WINE AGENCIES LIMITED DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion dated 8th June, 2023 under the Provisions of Article 159(2) of *the Constitution* of Kenya, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 18 Rule and Order 51 of the Civil Procedure Rules, 2010 and all enabling laws, for the following orders-
 - i. Spent;
 - ii. That the Honourable Court be pleased to order that the evidence of the defendant's witness Charles Kabutha Kamau be taken forthwith de bene esse and presented for use in this suit at trial; and
 - iii. That costs of and incidental to the application be provided for.
2. The application is predicated on a supporting affidavit sworn on 8th June, 2023 by Doris Macharia, the Company Secretary and Legal Services Director of the defendant.
3. In the said affidavit, Ms Macharia averred that the plaintiff instituted this suit on 19th July, 2005 based on a contract between the parties herein which was signed on 9th February, 2004, and since the institution of the suit, over 17 years have elapsed but the case had not been prosecuted to its logical conclusion.



4. She deposed that the hearing of this case begun on 9th October, 2015 with the plaintiff's witness who was stepped down midstream cross-examination, and the case has never been set down for hearing again.
5. She further deposed that the plaintiff filed a Notice of Motion dated 26th February, 2021 in this Court seeking stay of proceedings pending the hearing and determination of the appeal filed in the Court of Appeal against the ruling of this Court of 28th November, 2019 refusing leave to further amend the further amended plaint, which application is still pending before this Court for determination.
6. Ms Macharia averred that at the time of the transaction the subject of the suit herein, Mr. Charles Peter Kabutha, the defendant's only witness was working for the defendant as its Production Manager and by virtue of his position in the defendant company, he had first-hand information relating to the transaction, as he was involved in the performance of the defendant's part of the bargain to the contract.
7. The deponent stated that Mr. Charles Peter Kabutha Kamau recorded a statement dated 19th May, 2016 in support of the defendant and he has been attending Court every time this matter is listed for hearing, and for one reason or another, it is adjourned at the instance of the plaintiff.
8. That Mr. Charles Peter Kabutha Kamau retired from the employment of the defendant on 19th March, 2017 having attained the retirement age and is no longer with the defendant, and that he is now at an advanced age and it is necessary that his evidence be taken forthwith de bene esse and preserved in this Court's record.
9. Ms Macharia deposed that although Mr. Charles Peter Kabutha Kamau wrote a statement in support of the defendant's case and duly filed the same, it does not constitute admissible evidence unless and until he testifies and his evidence be tested as required under the Evidence Act, Cap 80 Laws of Kenya.
10. She deposed that she had been informed by the defendant's Advocates, which information she believed to be true, that the plaintiff had filed an appeal against the ruling of the Court delivered on 28th November, 2019, which declined leave to amend the further amended plaint, which appeal is pending hearing and determination.
11. Ms Macharia expressed the view that there is a likelihood that the hearing of this suit will be delayed given that the plaintiff herein is seeking a stay of proceedings of this Court pending the hearing and determination of the appeal in the Court of Appeal, which appeal has not been fixed for hearing, and that will prejudice the defendant.
12. She stated that the defendant's Advocates had informed her, which she believed to be true, that there are unprecedented delays in the hearing of this suit with a litany of applications by the plaintiff at strategic litigation stages which may eventually prejudice the defendant as its only crucial witness may become unavailable given his advanced age and having retired from the employment of the defendant and tracing him may be difficult.
13. Ms Macharia gave instances where there was delay in prosecution of the case by the plaintiff such as on 11th October, 2018 when Charles Peter Kabutha Kamau attended Court and was ready to testify but when the plaintiff's witness was being cross-examined, the plaintiff sought an adjournment for refreshing the memory of its witness.
14. She narrated another occasion when the defendant's witness went to Court ready to testify but the plaintiff sought an adjournment to seek leave to amend its further amended plaint, and on filing the application on the said issue, it was heard, determined and dismissed with costs on 28th November, 2019.



15. She deposed that had the plaintiff been ready on both 9th and 11th October, 2018 to proceed with the hearing of the matter when Mr. Charles Peter Kabutha Kamau attended Court and was ready to testify, he would have testified and he would have been discharged, and the defendant would not be worried about preserving the evidence of the said witness who is the defendant's only vital witness in this suit.
16. The deponent stated that she had been informed by the defendant's Advocate, which she believed to be true, that the plaintiff had filed an appeal against the ruling of the Court delivered on 28th November, 2019, which is pending hearing and determination in the Court of Appeal. That the said appeal had not been given a hearing date and it was uncertain when the appeal would be heard and determined given the fact that the Court of Appeal was hearing older appeals.
17. The defendant averred that it is in the interest of justice and in order to obviate injustice to the defendant that the evidence of Mr. Charles Peter Kabutha Kamau be secured by this Court even as the plaintiff pursues its undoubted constitutional right of appeal.
18. The defendant also averred that the uncertainty on when the appeal will be heard before the Court of Appeal and its eventual effect on the suit coupled with uncertainty on when this suit will be set down for hearing necessitates the taking of the evidence of Mr. Charles Peter Kabutha Kamau de bene esse, while his mind and memory are still sound and fresh on the transaction the subject of this suit and be preserved to form the evidence of the defendant in this suit.
19. That the defendant would be prejudiced if the evidence of Charles Kabutha Kamau is lost given that he was the person who had direct involvement in the transactions leading to the suit herein and its constitutional right to fair hearing would be greatly trampled upon.
20. The plaintiff filed grounds of objection dated 17th July, 2023, raising the following issues-
 - i. The Notice of Motion does not meet the legal threshold set by Order 18 Rule 9 of the Civil Procedure Rules, 2010;
 - ii. The application does not satisfy the conditions and/or guidelines set by the Courts in determining similar applications;
 - iii. The Notice of Motion and the supporting affidavit do not put on record for the Court to consider evidence to support the general statements made herein.
 - iv. The Notice of Motion does not give particulars or evidence to support the statement that the witness is of advanced age and why his age is a factor falling within the Provisions of Order 18 Rule 9;
 - v. The defendant/applicant's application makes an admission that the witness has attended Court even after retiring from the defendant/applicant's service and there is no evidence to support the ground that he may be unavailable in future; and
 - vi. The defendant/applicant has not provided any evidence to indicate to the Court that the witness has a life threatening condition which would most likely lead to the loss of the witness.
21. In its written submissions dated 15th September, 2023, learned Counsel for the defendant reiterated part of the averments made in its supporting affidavit, which averments I have outlined in the preceding pages in detail. Counsel submitted that Order 18 Rule 9 of the Civil Procedure Rules, 2010 makes provisions for preservation of evidence. He stated that the order prayed for herein can be given, if sufficient reasons have been given to show why the evidence of the defendant's witness should be taken



- immediately, and be preserved pending the hearing and determination of the appeal instituted by the plaintiff, who has sought stay of these proceedings.
22. Mr. Wesonga relied on the case of Peter Mugambi Marete v Ngutari Miriti [2012] eKLR, where the Environment & Land Court moved suo moto to take evidence de bene esse by reason of the advanced age of the defendant therein.
 23. Counsel stated that the advanced age of the witness in this case, coupled with the long delay experienced by virtue of the pending appeal in the Court of Appeal constitutes sufficient reason that can be justified in invoking the provisions of Order 18 Rule 9 of the civil Procedure Rules, 2010, so as to collect and preserve evidence that may otherwise become unavailable in future and in the circumstances prejudice the defendant during trial.
 24. Counsel cited the decision in Mary Muthoni Ngari v Joseph Ngari Kamau & 6 others [2016] eKLR, where the Court held that there was need to preserve the evidence of the 1st defendant therein, due to his advanced age and ill health.
 25. Counsel submitted that since the defendant's witness is of advanced age, coupled with his retirement from the employment of the defendant, and being the only traceable person by the defendant who was available at the time the transaction took place, the defendant had demonstrated sufficient cause for taking the evidence de bene esse as its witness may become unavailable.
 26. The defendant contended that it was the plaintiff who had scuttled the hearings that were scheduled for 11th & 13th October, 2018, by filing applications at strategic litigation stages. The defendant expressed the view that no prejudice will be suffered by the plaintiff.
 27. The plaintiff filed written submissions dated 13th September, 2023 to oppose the application. Mr. Kinyua, learned Counsel for plaintiff stated that due to the general nature of the provisions of Order 18 Rule 9 of the Civil Procedure Rules, 2010, they could only rely on the Court's interpretation as to what constitutes sufficient cause, which leads to reliance on case law.
 28. Counsel cited the case of Mukhwana v Sawenja & another [2022] eKLR and stated that the said case summarizes one of the circumstances that can persuade the Court to grant an application seeking the taking of evidence de bene esse.
 29. Mr. Kinyua contended that the instant application does not meet the legal threshold set by Order 18 Rule 9 of the Civil Procedure Rules, 2010 and there is no evidence to support the assertion that the defendant's witness may become unavailable in future, or that he has a life threatening condition which would most likely lead to the loss of the said witness.

Analysis and Determination

30. The issue for determination is if the evidence of the defendant's witness should be taken de bene esse.
31. The applicable provisions are as per Order 18 Rule 9 of the Civil Procedure Rules, 2010, which provide as follows-

- (1) Where a witness is about to leave Procedure Rules, 2010 and the court's interpretation of Rule 9 since the defendant herein only states that the witness is of advanced age but not evidence of age is exhibited and no evidence of any condition, medical or otherwise has been produced to support the general statement that the evidence may be lost.



Counsel submitted that in the application herein the defendant made an admission that the witness had adduced court even at retiring from the defendant's service the jurisdiction of the or other sufficient cause is shown to the satisfaction of the court why has evidence should be taken immediately, the court may upon the application of any party or of the witness, at any time after institute of the suit, take the evidence of such witness in the manner herein before provided;

- (2) Where such evidence is not taken forthwith and in the presence of the parties such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties;
- (3) The evidence taken shall be signed by the Judge and shall be evidence in the suit”.

32. The defendant herein filed a lengthy affidavit to support its application. It gave the history of the case and the reasons as to why it is of the view that the evidence of the defendant's witness should be taken and preserved. Its reasoning is that in view of an appeal that is pending hearing in the Court of Appeal that had been filed by the plaintiff, which had not been assigned a hearing date as at the time of filing the present application, it is necessary to have the evidence of the defendant's witness taken and preserved so that in the case of any eventuality as a result of any delay in hearing of the said appeal, the evidence will be available on record. The defendant's position is that the defendant's witness is advanced in age, and that having retired from the employment of the defendant, he may be unavailable in future to adduce evidence.
33. The defendant was of the view that no prejudice would be occasioned to the plaintiff if the evidence of the defendant's witness is taken and preserved.
34. The defendant also alleged frustration by the plaintiff in having this case proceed for hearing from the point where it has reached as the plaintiff keeps on putting roadblocks on the way by making applications at strategic parts of the hearing, so as to stall the hearing of the case. It was stated that the defendant's witness had been to Court several times to adduce evidence but he could not proceed due to the several applications made by the plaintiff.
35. On its part, the plaintiff did not address the issue of the delay in having the case heard due to the pending appeal and the applications it has allegedly been making to adjourn the case.
36. The plaintiff's objection to having the defendant's evidence taken de bene esse is on the ground that sufficient cause has not been shown that the defendant's witness is of an advanced age and/or that he is suffering from a debilitating disease that will render him unavailable to adduce evidence.
37. In the case of Peter Mugambi V Ngutavi Muriti [2017] eKLR, the Environment and Land Court moved suo moto to take evidence due to the advanced age of the parties and because the defendant was very sick and was on the verge of passing on.
38. In this case, the circumstances are different, as the defendant's witness is not said to be sickly. As in the year 2023, he was 66 years old, as per the copy of his identity card marked as exhibit DM2 annexed to the defendant's affidavit. Although he is not sickly, this Court takes judicial notice of the fact that as human beings advance in the age, their memories at times fade. There is therefore a possibility that the memory of the defendant's witness will fade due to the passage of time, and the delay in having the defendant's case heard. Such passage of time, will prejudice the quality of evidence that the said witness is likely to adduce on behalf of the defendant.



39. Since the said witness is no longer in the employment of the defendant, he is likely to become weary by the numerous Court attendances he has made in the past, and the adjournments that have been occasioned by the plaintiff due to the applications it made that led to adjournment of the case. Such adjournments are likely to discourage the defendant's witness from attending Court as there is nothing binding him to the defendant, save for his willingness to testify and elucidate the facts of the case from the defendant's perspective.
40. The plaintiff filed grounds of objection to oppose the application. Grounds of objection can be equated to grounds of opposition as what was filed by the plaintiff is not a Notice of Preliminary Objection. Since I equate the grounds of objection filed herein to grounds of opposition, it is necessary to cite the decision in the case of Isaac Njiru v Kangaari South Farmer Co-op Society Ltd. [2012] eKLR, where Odunga J., (as he then was) stated the following-

“It is important at this stage to distinguish grounds of opposition from a replying affidavit. Affidavit is evidence and where a respondent intending to dispute factual averments in the supporting affidavit he should file a replying affidavit. Where, however, it is intended to oppose an application on legal issues only, a respondent should file a statement of grounds of position where, on the other hand a respondent intends to oppose an application on both law fact, he may file both a replying affidavit and grounds of opposition.

However, the Courts do frown upon affidavits which are couched in legal pronouncements rather than factual matters. Similarly, statements of grounds of opposition which are meant to controvert factual matters in a supporting affidavit are unacceptable. Without the facts being contained in an affidavit, the same are worthless.”

41. From the grounds of objection filed by the plaintiff herein, which I reproduced earlier in this ruling, it is evident that paragraphs 3, 4, 5 and 6 of the said grounds are on factual issues. The plaintiff herein should as such have filed a replying affidavit to controvert factual issues and should have left the issues in paragraphs 1 and 2 of its grounds of objection as such, as the same raise legal issues.
42. The case of Peter Nyakundi & 68 others v PS, State Department of Planning [2016] eKLR cited by the Court of Appeal in the case of Daniel Kibet & 9 others V AG [2019] eKLR is applicable. Failure by the plaintiff herein to file a replying affidavit leads to the conclusion that all the averments made by Doris Macharia in her affidavit sworn on 8th June, 2023 in support of the application, remain uncontroverted.
43. Given the said circumstances, the application dated 8th June, 2023 is hereby allowed in the following terms-
- i. That the evidence of the defendant's witness Charles Peter Kabutha Kamau shall be taken de bene esse on 8th April, 2024 and preserved for use in this suit at the trial; and
 - ii. Costs are awarded to the defendant.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. E. Wesonga for the defendant/applicant



Mr. Kinyua for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

