



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 42 OF 2014

EUNICE JACQUELINE CHEBUKWA WANJALA..PLAINTIFF/APPLICANT

-VERSUS -

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

The application dated 25th November 2020 is supported by the applicant's affidavit and it seeks the following orders:-

- 1. THAT the plaintiff/applicant be granted leave forthwith to file additional documents in support of her case and the court gives further directions on hearing.**
- 2. THAT the costs of this Application be provided for.**

The 1st respondent opposed the application and filed grounds of opposition dated 13th May, 2021.

Mr. Ochola, Counsel for the applicant urged the court to allow the plaintiff/applicant to file additional documents in form of further evidence. The fresh documents relate to the plaintiff's character. According to the applicant, the defence has attached her character and she would like to provide evidence to counter the defence. It is submitted that Section 53 of the Evidence Act enables evidence on character to be admissible. No prejudice will be suffered by the respondents.

Miss Cheruiyot, Counsel for the 1st defendant/respondent opposed the application and relied on the grounds of opposition. Counsel submitted that the additional documents go into the character of the plaintiff and this is part of the defence raised by the 1st defendant. The plaintiff has already testified and is trying to revise her case. The defendants will not have an opportunity to cross examine her on the additional documents.

The plaintiff's main issue is that the defence attacks her character and that is why she would like to introduce the fresh documents so as to respond to those attacks. The list of documents to be introduced are:-

- 1. Certificate of Recognition by Ministry of Sports Culture and the Arts.**
- 2. Letter from the Chief Khalaba Location, Ministry of Interior and Co-ordination of National Government.**
- 3. Letter from the Vicar General, Diocese of Bungoma, Anglican Church of Kenya.**
- 4. Letter from the National Chairman Tachoni Cultural Society.**

The certificate of recognition from the Ministry of Sports, Culture and Arts was issued on 20th October, 2016. This suit was filed in 2014. The letter from the chief, Khalaba location is undated. It indicates that the plaintiff was recognized as a **shujaa** in 2012 and 2016 having been nominated by Bungoma County. The letter from the Anglican Church of Kenya was issued on 20th December, 2019 during the pendency of this suit while that from the Tachoni Cultural Society (TACUSO) was issued on 6th February, 2020. This letter indicate that the plaintiff was a woman leader in the society between 2012 and 2017.

The plaintiff contends that the evidence on character will only relate to quantum of damages and no prejudice will be suffered by the defendants.

Section 58 of the Evidence Act defines “character” as follows:-

“In sections 55, 56 and 57 of this Act the word “character” includes both reputation and disposition; but, except as provided in section 57, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.”

Section 55 of the same Act states:-

“(1) In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is inadmissible except in so far as such character appears from facts otherwise admissible.

(2) In civil cases, the fact that the character of any person is such as to affect the amount of damages, is admissible.”

Section 146(4) of the Evidence Act states:-

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

The record show that the plaintiff testified on 26th November 2014 before Justice Thurania Jaden. Mr. Ochola, Counsel for the plaintiff applied for adjournment to call one more witness. The case was adjourned to 4th March 2020 but it did not proceed as Mr. Mustoli who appeared for the 2nd defendant applied for adjournment. It is therefore clear that the plaintiff has not closed her case. Even if the plaintiff’s case was closed, the court can still open it up and have a particular witness re-called for further examination in chief or cross-examination or re-examination as provided by Section 146 of the Evidence Act. The contention by Counsel for the 1st defendant that the defendants may not have an opportunity to cross examine the plaintiff is taken care of by Section 146 of the Evidence Act.

In the case of **MZEE WANJE & 93 OTHERS –V- A.K. SAIKWA & OTHERS (1982-88) KAR, 462**, Chesoni Ag JA (as he then was) observed as follows:-

“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd vs. Marshall [1954] 1 WLR 1489 at 1491 and those principles are:

- (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;**
- (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;**
- (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”**

In the case of **MOHAMED ABDI MAHAMUD –V- AHMED ABDULLAHI MOHAMED & 3 OTHERS (2018) eKLR** the Supreme Court stated as follows at paragraph 79:-

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;**
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;**
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;**
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;**
- (e) the evidence must be credible in the sense that it is capable of belief; (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;**
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;**

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

I have noted the documents the plaintiff wishes to file as additional evidence and do appreciate that there will be need for the defendants to cross examine the plaintiff on those documents. In my view, the court should allow a party to prosecute his/her case to the party's satisfaction. This include the calling of witnesses and production of documents a party deems necessary in proving or aiding his case. The production of the documents by the plaintiff will not prejudice the defence case. The applicant's intention is to cleanse herself of the attack on her character and I do find that such evidence falls within the parameters set by the Supreme Court in the Mohamed Abdi Mahmud case (Supra).

Although part of the proposed additional evidence was obtained after the filing of the suit, I do find that the application dated 24th November, 2020 is merited and the same is hereby allowed. I do further order that the plaintiff shall be recalled for purposes of producing the documents and further cross-examination. Since this matter is part heard before Justice Thurania, it would be prudent for it to be finalized by the same Judge who is still at the Civil Division. Costs shall follow the outcome of the main suit.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JULY, 2021

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S. CHITEMBWE

JUDGE