



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J.

CIVIL CASE NO. 1 OF 2020

ERICK ANGWENYI ORANGI1ST PLAINTIFF

CJ ONE LIMITED 2ND PLAINTIFF

VERSUS

CLIVE NYAANGA OGWORA1ST DEFENDANT

CJ ONE BAR AND RESTAURANT2ND DEFENDANT

RULING

1. This ruling is in respect of the application dated 25.6.2020 lodged by the defendants herein. The orders sought are;

i. Spent

ii. That the honourable court be pleased to issue an order and or witness summons to Chief Inspector Washington Mwiti based at the Directorate of Criminal Investigations at Kisii to be examined on the contents of the Exhibit Memo Form dated 20.04.2020 signed by him; and Superintendent Michira Ndege based at the Directorate of Criminal Investigations, Embu who has signed and stamped the Directorate of criminal Investigations, Forensic Document Examination report dated 24.04.2020 to attend court either physically or virtually and be cross examined on the contents of the aforesaid documents.

iii. That the honourable court does issue an order that the applicants serve the aforesaid witness summons and or orders upon their issuance.

2. The application is based on grounds seen on the face of the application viz;

a) The applicant herein filed a further affidavit on 11.06.2020 whereat he attached the Exhibit Memo Form dated 20.04.2020 signed by Washington Mwiti and the Directorate of Criminal Investigations, Forensic Document Examination Report dated 24.04.2020 signed and stamped Superintendent Michira Ndege.

b) That when we appeared before the honourable court on 18.06.2020 the honourable court and by consent of the parties directed that Susan Wambugu, Geoffrey Kathurima and John Muinde be availed for cross examination on 8.07.2020 on the contents of the aforesaid documents.

c) That we inadvertently failed to ask for the witness summons of Chief Inspector Washington Mwiti based in Kisii and Superintendent Michira Ndege who countersigned the Directorate of Criminal Investigations, Forensic Document Examination Report dated 24.04.2020 and their evidence and testimony is key in establishing the truth hence we pray that the court issues the summons and or orders as requested.

d) It is in the interest of orderly administration of justice and fairness that the orders sought herein be granted and the grant of the said orders will not prejudice the respondents or make them suffer any hardship.

e) The applicants subject to the court's orders are willing to abide by any such conditions that may be imposed by this honourable court.

f) Such other and/or further grounds and reasons as shall be adduced at the hearing hereof.

3. It is further supported by the affidavit of Clive Nyaanga Ogwora.
4. The application is opposed and grounds of opposition listed below raised;

1. **That the entire application dated 25th June 2020 does and cannot issue at all as the application has been filed by an unqualified person who cannot by dint of Section 31(1) of the Advocates Act, Cap 16 Laws of Kenya cause any summons or process to issue or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.**
2. **That NYANGACHA ENOCK MOTURI (P105/15204/18) does not hold a current practicing certificate for the year 2020.**
3. **That by dint of section 31(2) of the Advocates Act, Cap 16 Laws of Kenya, any person who contravenes section 31(1) of the Advocates Act above, shall be deemed to be in contempt of the court in which he acts or in the suit or matters in relation to which he so acts and may be punished accordingly.**
4. **That accordingly the application should be struck out *in limine* and the offending Advocate suitably and decisively punished.**
5. **That further and in the alternative but without any prejudice to the foregoing, the application herein is bad in law, vexatious, frivolous and utterly misconceived in as much as it seeks to review, set aside, vary and/or vacate consent orders of the 18th June 2020.**
6. **That it is now settled law that consent judgments or orders have contractual effect and can only be set aside on grounds of fraud or collusions.**
7. **That none of these grounds have been urged in this application wherefore the same is incapable of being granted.**
8. **That by dint of section 48(1) and (2) of the Evidence Act, Cap 80 Laws of Kenya, the honourable court is obligated by law, whenever it wants to form an opinion as to the veracity or identity of handwriting, to do so only based upon the evidence of experts, specifically skilled in that science or art.**
9. **That the two officers sought to be summoned by this application do not fall into this category of experts.**
10. **That the roles played by the two officers can only be described as peripheral and inconsequential regard being had to the availability of the experts who have already been summoned.**
11. **That this application is therefore an abuse of the court process. The same is vexatious, misconceived and utterly and totally unmerited.**

5. I have considered the application, the ground and affidavit in support. I have had due regard to the grounds of opposition. I have put into account the applicable law.

6. For determination is whether the named officers should be summoned before court to be examined in respect of their specific roles in the matter.

7. The issue of qualification of Mr. Nyangacha is central to the propriety of the application herein and indeed the entire suit. In my view it ought to have been raised as a preliminary objection on a pure point of law even though nothing is taken away from it by being raised as just a ground of opposition. I will reserve this issue to be canvassed exhaustively at the hearing of the main application.

8. The determination of the authenticity of the contested document is pivotal in the resolution of the dispute before this court. As correctly captured by the respondent, this court is obligated by dint of **section 48(1) and (2) of the Evidence Act, Cap 80 Laws of Kenya**, to, whenever it wants to form an opinion as to the veracity or identity of handwriting, to do so only based upon the evidence of experts specifically skilled in that science or art.

9. Vide a consent of the parties recorded on 18.6.2020, the following persons were to be summoned to court to enlighten it on the authenticity of the filed contested documents;

1. **Mr. John Muinde Head of Forensic DCI**
2. **George Kathurima (C.C.I.O Kisii)**
3. **C.I Susan Ndung'u (DCIO HQs)**

10. The applicant now seeks to have summoned to this court;

1. **Chief Inspector Washington Mwiti (DCI Kisii)**

2. SP Michira Ndege DCI Embu

Chief Inspector Washington Mwiti is to be examined on the contents of the Exhibit Memo Form dated 20.4.2020 signed by him. SP Michira Ndege is to be examined in respect of the forensic document examination report dated 24.4.2020 which he signed and stamped. He is said to have countersigned it.

11. As regards the need to call the officer who prepared the exhibit memo form, I am of the considered view that the handling and handing over of the specimen documents and known handwriting documents from the parties, to the DCI officers and further to the forensic expert is an important matter before the court and which needs to be affirmed and clarified. The trail of the preparations and handover of the exhibit for examination renders credence to the fact that the documents tested or examined were the same documents in issue. To that extent, I find and hold that the summons to Chief Inspector Washington Mwiti of DCI Kisii, should issue to facilitate his examination on his role in the matter.

12. As regards SP Michira Ndege, it is never a requirement that the report of forensic document examiner be countersigned by another expert. The summoning of SP Michira Ndege of DCI Embu would in my considered view only end up burdening the parties and indeed the court with unnecessary and cross examination leading to imprudent use of judicial time and resources. I am not persuaded that the officer needs to be summoned.

13. With the result that, I allow the application dated 25.6.2020 to the extent that summons do issue on Chief Inspector Washington Mwiti of DCI Kisii to be examined on the exhibit memo form. The party calling him to facilitate his examination via video link through Zoom on the 8/7/2020.

14. Costs shall be in the course.

Dated, signed and delivered at Kisii this 6th day of July, 2020.

A.K NDUNG'U

JUDGE

Aduda, Advocate for the 1st plaintiff/applicant

Godia, Advocate for the Respondent