



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 194 OF 2007

JOSEPH MWANGI WAHOME.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT

CYPRIAN MUTABARI M'EKANDI2ND DEFENDANT

RULING

1. There is no doubting the validity of the proposition that;

“Any party is entitled to cross-examine any other party who gives evidence or his witnesses: and no evidence affecting a party is admissible against the party unless the latter has had an opportunity of testing its truthfulness by cross-examination”. (Halsbury’s Laws 3rd Edition Vol. 15 page 443, paragraph 800 quoted in *Triloknath Bhandari & Another vs S.R. Gautama (1964) EA 606*).

2. The right to challenge evidence through cross examination is indeed a tenet of fair hearing (Article 50(2)(4) of the Constitution), and this would be in respect to both criminal trials and civil proceedings.

3. Joseph Mwangi Wahome (the Plaintiff herein and now deceased) died on 20th May 2013. Prior to his death, he had given his evidence before Muga Apondi J. on 10th March 2011 and 11th June 2011. Unfortunately, he died before he was cross-examined on his evidence. The Defendants asked this Court to expunge his evidence on the ground that it is untested evidence and that it would prejudice the defence case.

4. Upon his death, Charles Maina Mwangi, who holds letters of administration ad litem to the Deceased’s Estate, substituted the deceased and is now the Plaintiff. He resists the attempt to expunge the Deceased’s evidence. He asks this court to treat the evidence under the provisions of Section 35 of the Evidence Act.

5. As observed earlier, the right to challenge evidence by way of cross-examination is a tenet of fair hearing. It is in infact an integral part of trial because this can assist a court assess or evaluate the credibility of a witness, his ability to remember facts or the truthfulness or veracity of his testimony. And so where a witness has given his evidence in chief, and is available, then a party’s right to test that evidence through cross-examination cannot be denied.

6. Yet in the circumstances of this case, the original Plaintiff is not available as the cruel hand of death has put him beyond the reach of Court. What is to be done to the evidence he tendered before his death? Ought it be expunged and treated as though it was never on record?

7. I agree with the Plaintiff’s Counsel that the provisions of Section 35 and 36 of the Evidence Act read together aids the Court in the approach to take. These reads:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

(3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

36. (1) In estimating the weight, if any, to be attached to a statement rendered admissible by section 35 of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible by section 35 of this Act shall not be treated as corroboration of evidence given by the maker of the statement”.

Whilst these provisions are in regard to production of documentary evidence, they set out important principles on how to treat documents made by persons who are unavailable to give evidence. Section 36 of The Act is of singular importance.

8. While the evidence of the Deceased should not be expunged, the weight to be attached to his evidence and any documents he may have produced will be the weight that is attached to untested evidence. The trial Court will consider whether, having regard to all evidence adduced, any probative value should be given to that evidence. The trial Court will consider the relevant factors which may include those explicitly set out in Section 36 of The Evidence Act. In doing so, the court will be keenly aware that the evidence is unchallenged and will be cautious that it does not cause undue prejudice to the opposing side.

9. The Court declines to expunge the testimony of the Deceased that is already on record. The application for expungement is disallowed.

Dated, delivered and signed in an open court this 12th day of March, 2019.

F. TUIYOTT

JUDGE

In the presence of:

Mbigi for the Plaintiff

Wilson for the 1st Defendant

Masinde for the 2nd Defendant

