



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 56 OF 2016

SPERO AFRICA LIMITED.....PLAINTIFF

-VERSUS-

INDEPENDENT ELECTRICAL AND BOUNDARIES COMMISSION.....DEFENDANT

RULING

BACKGROUND

On 15th July 2019, the plaintiff and Defendant highlighted submissions on the issue for determination, whether, the Plaintiff could/dis legally summon witnesses from the Defendant body to testify with regard to the Plaintiff's claim.

PLAINTIFF'S SUBMISSIONS

ISSUES

Whether an adverse party's employees maybe summoned as witnesses for the plaintiff?

The Plaintiff submitted that **Section 125 of the Evidence Act** Laws of Kenya, provides the following;

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause."

That **Section 128 Evidence Act** under provides that;

"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or a penalty or forfeiture of any kind, but no such answer which a witness is compelled to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer."

Section 144 Evidence Act also provides;

"...when either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be admissible.

(2) The court shall admit the evidence of any fact if it thinks that the fact, if proved, would be admissible and not otherwise..."

That **Section 3 of the Evidence Act** provides;

"... 'public officer' except in section 80 of this Act, includes an officer in the service of the Organization."

Section 132 of the Evidence Act further provides that;

“...No public officers shall be compelled to disclose communications made by any person to him in the course of his duty, when he considers that the public interest would suffer by the disclosure...”

In *Dahir Sadik AUSAAD –vs- Modogashe Construction Ltd & 3 Others [2016]eKLR* the Judge stated;

“This court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified as ready for hearing.”

DEFENDANT’S FURTHER SKELETON SUBMISSIONS

In *Peter Agweli Onalo – vs- Eliakim Ludeki & 2 Others (2006) eKLR*; the court stated as follows;

“...in defence of that allegation or allegations, the first respondent would be entitled to summon the officers who worked under him, including inspector John Ndwaga, to contest those allegations. He is therefore a potential witness for the first respondent. Accordingly, the petitioner has no right to have him summoned to give evidence on his behalf.”

The court went on to state that;

“The petitioner is not entitled to summon the presiding officers...because these were officials employed by, and working under the direction of, and answerable to the Electoral Commission of Kenya, the third respondent. The decision as to whether or not to call them as witnesses must be left to the Electoral Commission of Kenya. Summoning them as witnesses for the petitioner would undermine the third respondent’s legal rights as a party to this petition. The request by the petitioner to call these two presiding officers to give evidence on his behalf is accordingly denied.”

That it was the Defendant’s submission that in any event, the provisions of the **Evidence Act** are subservient to the provisions of the Constitution with regard to fair hearing. The employees of the Defendant though witnesses have not drawn witness statements and are defendant’s potential witness.

Section 107 of the Evidence Act, Chapter 80 of the laws of Kenya Provides;

“(1) Whoever desires any court to give judgment or any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

DETERMINATION

The Plaintiff’s claim against the Defendant is that he was contracted with other transporters by the Defendant on 24th May 2013 to transport election materials.

The Plaintiff further alleged that upon request he availed **84 trucks** which were under the command and control of the Defendant’s officers.

The plaintiff also alleged that on 21st March 2014 a meeting was held in which 4 Companies that supplied trucks were invited and attended for negotiations with the Defendants officials.

It is in line with proof of the meeting and interactions that the defendant objects to the summoning of its institution’s witnesses as the Plaintiff’s witnesses.

From the submissions filed and various provisions of the **Evidence Act** highlighted; this court finds as follows;

- a) Generally there no express provision hindering the officers of an adverse party’s institution to testify however, the question is can such witnesses be compellable witnesses?
- b) **Section 32 of the Evidence Act** provides that public officers are not compellable witnesses in Court proceedings.
- c) Secondly, the alleged meeting which the Plaintiff wishes to prove included representatives from other Companies; the Plaintiff can/may call these other parties who attended the meeting and what may have transpired. So that the lack of compelling the Defendant’s witnesses to attend Court and testify will not prejudice the Plaintiff’s case as there are as shown on record vide Minutes of 29th February 2016 who attended the said meeting and what may have transpired.
- d) Thirdly, although the matter was slated for hearing on 6th February 2019 Case Management was not conducted so as to have parties file and exchange witness statements and bundle of exhibits. This process would alleviate the anxiety of the possible information sought by each party against the other as there would be disclosure of the facts to be presented and proved before Court.

DISPOSITION

1) From the above factors, this Court declines the issue of summons to the Defendant's personnel to record statements and testify in Court on behalf of the Plaintiff as they are not compellable witnesses under Section 32 of Evidence Act.

2) The matter to processed in the normal way, case management before Deputy Registrar Commercial Division within 30 days from today and the matter be mentioned thereafter with a view to taking hearing date by the parties.

3) Costs shall be in the Cause.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND OCTOBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR.MWIGWE H/B KABUGU FOR THE PLAINTIFF

MR. GONAHASS H/B MUKELE FOR THE DEFENDANT

MS JASMINE – COURT ASSISTANT