



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL 56 OF 2006

PHYLIS JEROTICH KIMUTAI.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

R U L I N G

This matter was cause listed for hearing before me on 4th November 2019. The record shows that Hon. Lady Justice Mulwa had dealt with an interlocutory application and delivered the ruling on 15 September 2016. The matter had also been handled by Hon. Lady Justice Korir, Hon. Lady Justice Ngetich, who is said to have dealt with the Order 11 procedures then Justice Ngugi – who actually set the date for hearing.

We have here at the High Court an evolving system of case allocation with a weekly cause list for the various matters grouped together as family, murder, civil, JRs, Petitions and civil appeals, Criminal Appeals et al. Previously there had been divisions where Mulwa J had dealt with all civil matters. In the new system, these matters are being re distributed. Hence, it was not strange for me to have this matter before me.

In this matter, trouble started when counsel for the defendant Mr. Clapton raised objection based on a ruling Mulwa J had made on the 26th February 2019 rejecting the introduction of new documents by the plaintiff. After hearing, both Mr. Clapton and Mr. Aim for the plaintiff, I expressed the view that perhaps the matter required to be placed before the Hon. Mulwa J for interpretation. However, counsel chose to proceed based on my interpretation of the ruling: that the Judge had rejected the introduction of new documents, because in any event they were not different from what had been filed with the plaintiff.

Therefore, we heard PW1, who was cross-examined at length.

Little did I know that the bigger trouble was looking ahead, when, the plaintiff was about to call the expert witness, Mr. Clapton raised another objection, was off the record to the expert witnesses reliance on some other documents. Mr. Aim felt that Mr. Clapton was now directing the manner in which the plaintiff was prosecuting his case. I expressed the view that those documents were not part of the ones the Hon Judge had rejected in her ruling. That was not taken kindly as counsel both in his verbal and non-verbal responses, stated that that my view was prejudicial to his client.

It is then I directed that his objections be raised on record so that Mr. Aim for the plaintiff could respond. Mr. Clapton was quick to say that he was no longer raising any objection. He was ready to proceed with the second witness.

I found that to be unacceptable and respectfully stated the same. Mr. Aim was of the view that Mr. Clapton ought to be reprimanded. I heard and recorded his objection. Basically that the Hon. Lady Justice Mulwa had heard and considered his objections on the introduction of the expert witnesses documents dated 4th April, 2019 and had rejected the same as they differed materially to those filed by the plaintiff previously.

Mr. Aim argued that the documents had been served on Mr. Clapton's law firm together with the pre-trial notice for 13th May 2019. That Mr. Clapton's firm had not objected to that bundle of documents – hence his objection at this stage was unfounded.

I have carefully considered the issues raised by Mr. Clapton, the manner in which he raised them. I have taken into consideration the fact that I heard one witness – and we sat through lunch to just after 3.00 p.m. I have considered Mr. Clapton's concerns and Mr. Aim's responses. I have also considered the fact that all these objections arise out of Justice Mulwa's decision of 26th February 2019. The Honorable Judge is still in this station. Despite the precious judicial time expended on it on 4th November, 2019, it may not be in the interests of justice to continue hearing this matter. .

Hence, I have come to the only conclusion available to me. I need not make a ruling as to whether the expert witness documents dated 4th April, 2019 ought to be allowed in evidence or not, no, that decision, together with the decision on what to do with the proceedings of 4th November, 2019 will come from Lady Justice Mulwa.

I recuse myself from this matter and direct the parties to appear before the Honorable Judge today for directions.

The counsel for plaintiff sought an order for costs. In my view, that will depend on the Honorable Judge's determination of the issues.

Dated, delivered and signed at Nakuru this 6th day of November, 2019.

Mumbua T. Matheka

Judge

In the presence of:

Aim for plaintiff

Plaintiff present

No appearance for Mr. Clapton for defendant