



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 857 OF 2005

JOAN MARIE SCHULTZ.....PLAINTIFF/APPLICANT

-VERSUS-

GEORGE MBURU WACHIRA.....1ST DEFENDANT/RESPONDENT

JOSEPH NGIGE MACHAGA.....2ND DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant took out the Notice of Motion dated 9th May, 2019 supported by the grounds set out on its face and the facts stated in her affidavit. The applicant is seeking for the following orders from this court:

(i) THAT this Honourable Court be pleased to order that the evidence of the plaintiff/applicant as recorded in the attached statement be taken by video-link/skype or any other electronic and/or telephonic manner on such date and manner as the court may direct.

(ii) THAT the costs of the video-link/skype as well as the application be provided for.

2. *Anne Wayamba*, the Legal Officer at Kenyan Alliance Company Limited being the insurer for the 1st defendant/respondent, put in a replying affidavit to resist the Motion.

3. The Motion was thereafter dispensed with through summarized oral submissions presented by the parties' respective advocates.

4. I have taken into consideration the grounds laid out on the body of the Motion; the facts deponed in the affidavits in support of and in resistance to the same and the rival oral arguments.

5. A background of the matter in brief is that the applicant instituted a suit against the defendants herein vide the plaint dated 2nd January, 2005 seeking both general and special damages resulting from a road traffic accident wherein the applicant sustained serious injuries.

6. The record shows that interlocutory judgment was entered against the 2nd defendant who despite having been served with summons to enter appearance, failed to enter appearance and file his statement of defence.

7. On his part, the 1st defendant/respondent put in a statement of defence to oppose the applicant's claim.

8. Before I consider the merits of the Motion, I will address an issue which was raised during oral submissions by *Mrs. Wachira* counsel for the applicant concerning the authority of the deponent who swore the replying affidavit.

9. I have perused the record and noted that Kenya Alliance Company Limited was at all material times the insurer of the respondent, a fact which remains undisputed.

10. Furthermore, I have looked at various documentations and correspondences apparent on the record, including a copy of a statutory notice issued to Kenya Alliance Company Limited by the applicant's advocate in regards to the accident in question. Those documents support the position of a subsisting insurer-insured relationship. In the premises, I concur with the submissions made by *Mr. Nzuki* advocate for the respondent that the deponent who indicated that she was at all material times an employee of the respondent's insurer had the capacity/authority to swear the same on behalf of the respondent.

11. Having settled the above, I now turn to the crux of the Motion which has to do with whether to allow the applicant to give her oral evidence via video link.

12. In her affidavit, the applicant explained the reason for requiring her evidence to be taken through video link as being of a medical nature. More precisely, the applicant averred that following medical examinations which established the need for surgery, her doctor strongly advised against travelling.

13. In opposition, Anne Wayamba on behalf of the respondent stated that the application will defeat a fair trial and further deny the respondent an opportunity to cross examine the applicant, in addition to denying both the respondent and the court the benefit of interrogating the applicant's demeanor.

14. Moreover, it was the deponent's assertion that the respondent's advocate will experience great difficulty in testing the veracity of the documents to be produced by the applicant and that in any event, the applicant intends to introduce new evidence in her statement which was not included in her plaint.

15. In addressing the issue of new evidence, my answer is simply that it is not for this court to examine the merits of the case at this stage.

16. The courts have acknowledged that the Evidence Act, Cap.80 Laws of Kenya does not expressly provide for the taking of evidence by way of video link. That notwithstanding, the same courts have similarly pointed out that the current local laws do not outlaw the taking of evidence in the above manner. As it stands therefore, the procedure and circumstances under which a party can be permitted to give video evidence have not been well established in the country.

17. Courts in Kenya are still faced with the question of how to approach applications of such nature. The High Court in the case of **Republic v Kipsigei Cosmas Sigei & Another-Kakamega High Court Criminal Case No. 19 of 2004** sought to provide an answer in the following manner:

“The absence of specific legislation on video evidence does not, as I have said, outlaw or render inadmissible video evidence. This court has a duty to adopt a commonsense approach in the face of these challenges when faced with questions of admissibility of video evidence notwithstanding that there is absence of regulations to direct the manner in which such evidence should be adduced or admitted. This court has inherent power to do justice in accordance with the law. This is core.”

18. It is noteworthy that this is quite an old matter which unfortunately is yet to proceed for hearing. It is equally well noted that the applicant is an American citizen residing and working for gain in the United States of America (USA).

19. More so, I have looked at the medical documents annexed to the Motion confirming *inter alia*, that the surgery was scheduled to take place on 29th May, 2019 and that thereafter, the applicant would require about 6 weeks for recovery during which time she was advised not to travel to Kenya.

20. It remains unclear whether the surgery took place as scheduled and whether the applicant is now cleared to travel.

21. Be that as it may, I have taken to mind the respondent's reservations set out hereinabove. For clarification purposes, I turn to the case of **Livingstone Maina Ngare v Republic [2011] eKLR** where the court sought to illustrate what constitutes video linking/conferencing with reference to the Article titled **“Recording Evidence Though Video Conferencing in India”** as follows:

“A video conference is a televised telephone call whereby two or more parties can speak in real time and also see each other in real time.”

22. The court in the above case went on to cite **The State of Maharashtra v Dr. Praful [2003] INSC 207** where the Supreme Court of India expressed itself thus:

“Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other.”

23. From the foregoing, I have gathered that advancements in technology have the impact of dispelling the notion that it is compulsory for a party to be physically present in every instance for his or her evidence to be deemed to have been properly taken.

24. The above rendition also goes to show that not only will the respondent have every opportunity to cross examine the applicant in a video conferencing setting, but that both the respondent and trial court will be able to study the demeanor of the applicant while she testifies, hence the respondent does not stand to be prejudiced in my view.

25. Looking at the circumstances of the matter, I am satisfied that video linking is the most expedient way of taking the applicant's evidence. A similar conclusion was arrived at in **Silvano Corsaro v Luigi Formica & another [2018] eKLR** where the court; upon considering the circumstances of that case; found that video conferencing was the only way to advance the case.

26. The upshot is that the application is allowed and the following directions are made:

a) The parties and/or their respective advocates shall appear before the Deputy Registrar within 45 days of this day to arrange and agree on the details and procedures relating to the setting up of the video conferencing as well as to address any related issues that may arise in that regard.

b) The parties shall thereafter appear before this court on a date to be fixed by the Deputy Registrar for purposes of taking further directions on the matter.

c) The plaintiff/applicant shall bear any costs/expenses arising from or incidental to the installation and/or setting up of the video conferencing equipment.

d) Costs of the application shall abide the outcome of the suit.

Dated, Signed and Delivered at Nairobi this 11th day of December, 2019.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Applicant

.....for the 1st Defendant/Respondent

.....for the 2nd Defendant