



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 410 OF 2012

ELIZABETH GUTTMAN.....1ST PLAINTIFF

MATHEW SHELTON.....2ND PLAINTIFF

VERSUS

IITAYASON NEEPE.....1ST DEFENDANT

LADY LORI KENYA LIMITED.....2ND DEFENDANT

ORYX SAFARI LIMITED.....3RD DEFENDANT

RULING

The plaintiffs herein seek to introduce a witness by the name Keith Mackey said to be an expert in helicopters and aviation in place of one Robert S. Tucker, Jr earlier identified to give evidence in that regard. That move has been strenuously opposed by the defence and there is on record a notice of preliminary objection dated 4th and filed on 8th May, 2018. There is no dispute that the statement by the said Keith Mackey was filed on 4th May, 2018 and served upon the defence on the same day. Earlier on 30th April, 2018 counsel for the plaintiffs and the defendants had exchanged correspondence relating to the introduction of the said statement. The plaintiffs therefore knew that there would be objection to the introduction of this witness.

The objection by the defence is based on the fact that this witness is being introduced late in the day and it would be prejudicial for him to testify because the defendants have been taken by surprise and counsel has not had time to read, or refer the said statement to his clients and therefore will be handicapped in cross examining the witness.

On the other hand, the plaintiffs state, other than the introductory statements by the intended witness all other details are the same as those that appear in the statement of Mr. Robert Tucker earlier filed and served upon the defendants.

The plaintiffs have submitted on the reasons for non-availability of Mr. Tucker and the move to introduce Mr. Mackey as a replacement. They have also referred to the provisions of the Evidence Act, Cap 80 Laws of Kenya, Sections 48, 107 to 109 thereof.

Counsel for the defendants has alluded to several rulings by the court in the course of the trial where objections have been dismissed due to the fact that the issues raised should have been made at the pre-trial stage. That being the case, the same position should be visited upon the plaintiffs otherwise the defendants would be justified to impute bias on the part of the court.

I must observe at this stage that, any allegations of double standards or bias on the part of the court are not only unfortunate but unfounded. Let it go on record that this court shall be, as it has always been, guided by the pleadings, the evidence, the law and nothing else in making its determination.

I have gone through the statement of Mr. Robert Tucker and that of Mr. Keith Mackey. Other than the introductory statements stating the respective experience, all other details are the same word for word except paragraph 41 in the statement of Mr. Tucker which has slightly more details than that of Mr. Mackey.

In that regard therefore, one may confidently state that as relates to the cause of action as pleaded in the plaint, the defendants shall not be impaired in addressing the statement of Mr. Mackey. In addition, the two documents that have been annexed to the statement of Mr. Mackey and which have been objected to alongside his statement by the defence, are not a surprise to the defence. I say so because, in the supplementary list of documents filed by the plaintiffs on 2nd March, 2017 the two documents appear at pages 18 to 40. The defence has had these documents for over one year.

This court delivered a ruling on 30th August, 2017 relating to similar objections and held that the expert evidence would be admissible. That evidence was contained in the statement, inter alia, of Mr. Tucker. It is my assumption that the defence counsel must have taken instructions relating to Mr. Tucker's statement. If that be the case, and considering the contents are more or less the same as those contained in the statement of Mr. Mackey, and further that the other documents in the supplementary list have been in their possession all along, I see no prejudice that shall be visited upon the defendants by allowing Mr. Mackey to testify.

I reiterate my observations in my ruling of 30th August, 2017 that it is the evidential value of the testimonies that shall be considered, and that the defendants have an opportunity to cross-examine Mr. Mackey apart from even calling witnesses in that area of expertise.

In view of the foregoing, the objection is dismissed and the plaintiffs shall call Mr. Keith Mackey as a witness in this trial.

Dated, signed and delivered at Nairobi this 10th Day of May, 2018

A. MBOGHOLI MSAGHA

JUDGE