



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

CIVIL SUIT NO. 15 OF 2016

ETHICS ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

ALPHONCE MUNENE MUTINDA.....RESPONDENT/DEFENDANT

RULING

1. The Plaintiff/Applicant filed his application vide a notice of motion dated 1st November 2017. It is brought under Articles 50(1) and 159(2) (d) of the Constitution, sections 1A, 1B, 3A of the Civil Procedure Act and Order 11 Rule 3(2) (c) and Order 50 Rule 1 Civil Procedure Rules. The application seeks the following orders:

(a) That the statement of Henry Musyoki Kilonzi (deceased) be admitted evidence without calling him as a witness.

(b) That the costs of this application be in the cause.

2. It is premised on the grounds on the face of the application plus the supporting affidavit of Mary Gachoka an advocate of the High Court and who is in conduct of this case.

3. The main ground forming the basis of this application is that the person whose statement is sought to be produced is now deceased. His name is **Henry Musyoki Kilonzi**. That this statement was filed jointly with the plaintiff on 13th August 2012 in conformity with the provisions of order 11 Rule 2 of the Civil Procedure Rules.

4. Ms Gachoka has deponed that the recovery suit herein arose from a flawed procurement process where the City Council paid Kshs 283,200,000 purporting to purchase a parcel of land known as L.R No 14759/2 from **Henry Musyoki Kilonzo** (now deceased).

5. That before his demise Henry Musyoki Kilonzo recorded and signed a statement at the plaintiff's offices on 24th April 2009, and even testified as PW6 in Nairobi Anti Corruption criminal case No. 20 of 2010 on 18th November 2014 which is relevant to this case. Marked **MG 1(a) & (b)** are the deceased's statement and a copy of certified court proceedings of the Anti Corruption Criminal Case.

6. That the sole purpose of having the statement produced by the investigating officer is to confirm that indeed the deceased recorded a statement. She further states that the production of the statement will not be prejudicial to the defendant as the trial is yet to start.

7. She asked the court to exercise its discretion and order for the admission of the statement under Order 11 Rule 3(2) Civil Procedure Rules.

8. The defendant/respondent was served with the application but did not file any response to it. This court on 16th April 2018 gave the defendant/respondent more time to file his response and the application was set down for hearing on 14th May 2018. Still on the 14th May 2018, there was no response filed and the defendant/respondent and his advocate were absent. The court heard the application in their absence since the hearing date had been fixed in the presence of the counsel for the defendant/respondent.

9. The Ruling was set for 23rd May 2018, but the defendant/applicant on 21st May 2018 filed an application of even date under certificate of urgency. In it he sought to set aside the proceedings of 14th May 2018. The application was heard inter partes on 23rd May 2018 but the Court declined to set aside the proceedings and re opened the matter to allow Mr. Mogeni for the defendant/applicant to submit on the application but only on points of law.

10. In his submissions he argued that the proceedings which had been expunged from the record on 12/10/17 had again been annexed to the

application dated 1st November 2017. He stated that the annexure **MG 1b** showed that the defendant was not a party to or an accused in the criminal case and the proceedings should not be used against him. Further that the affidavit in support of the application was sworn by counsel who was not the investigating officer. That no evidence of death of Henry Musyoki had been availed. He prayed for the dismissal of the application with costs.

11. In a rejoinder M/s Kibogi submitted that they intended to produce the witness statement just to show that it was recorded and not to prove the contents. Further that the information about the demise of Mr. Henry M. Kilonzi was with the investigating officer.

12. Previously the plaintiff/Applicant had sought to produce some statement of a deceased person under Section 34 of the Evidence Act. On 12th October 2017 Counsel for the plaintiff/Applicant Mrs Ndungu abandoned that line of approach and sought leave to file a supplementary affidavit to introduce the statement. The lower court record which had been filed in respect of the abandoned application was expunged. There was no order barring them from filing the same record.

13. The Court on the same date granted the plaintiff/applicant leave to file the supplementary list of exhibits which culminated in the current application dated 1st November 2017.

14. I have considered the application, affidavits and the submissions. The issue is whether the plaintiff/applicant should be allowed to produce the written statement of Henry M. Kilonzi through the officer in this case.

15. Order 11 Rule 3(2) Civil Procedure Rules provides as follows.

“In addition to any other general power the court may at the case conference-

(c) order admissions of statements without calling of the makers as witnesses and the production of any copy of a statement where the original is un available.” (Emphasis mine).

16. The issuance of an order under Order 11 Rule 3 (2) (c) Civil Procedure Rule is discretionary. The Court must therefore consider all the relevant circumstances before issuing the same. From what has been presented before this Court Mr Musyoki Kilonzi was the owner of the land parcel No. 14759/2 which was at the centre of Nairobi Anti-Corruption Criminal case No. 20 of 2010. He recorded a statement and also testified as PW6 in the criminal case.

17. A copy of his recorded statement and his testimony before the Nairobi Chief Magistrate’s Anti Corruption court have been annexed herein as **MG1a & 1b**. There is no dispute that the said Henry Musyoki Kilonzi recorded and signed a statement during the investigations. He also testified in the Anti Corruption Criminal case stated above as PW6.

18. The plaintiff/applicant relied on two cases which are:

(i) Subramaniam v Public Prosecutor – an appeal from the Supreme Court of the Federation of Malaya, (Court of appeal: [1956] 1 WLR 965

(ii) Kinyatti v Republic [1984] e KLR

19. The first case is quite on point and the Court in it held as follows:

“Held; allowing the appeal, that the Judge was in error in ruling out peremptorily, the evidence of conversation between the terrorists and the appellants. Evidence of a statement made to a witness by a person who was not himself called as a witness was not hearsay evidence and was admissible when it was proposed to establish by the evidence not the truth of the statement, but the fact that it was made.” (Emphasis Mine)

20. Mr Mogeni raised issue with Mrs Ndungu having done the supporting affidavit to the application yet she is not the investigating officer. It is true that Mrs Ndungu is the counsel to the plaintiff/applicant and not the Investigating Officer. All that the counsel sought to do was to be allowed to have the deceased’s statement produced as an exhibit by the Investigating Officer. It is the Investigating Officer who will produce the statement (if allowed by the Court). It is the Investigating Officer who will lay the basis for the actual production and it’s him/her who will produce evidence to confirm the death of the witness.

21. It has been correctly pointed out by Mr Mogeni for the defendant/respondent that the latter was not a party to the Nairobi Anti Corruption case No 20 of 2010. He could not therefore have had an opportunity to cross examine the said witness. Allowing that statement (**MG1b**) as evidence would be prejudicial to the defendant/applicant.

22. On the other hand the statement (**MG1a**) was recorded during the investigations. The plaintiff/applicant seeks to have the statement produced only to show that the deceased made the statement and nothing more.

23. It is not for purposes of confirming the contents of the said statement. Such production would not prejudice the defendant/applicant in any way, as was held in the case of **Subramaniam v Public prosecutor** (supra) and in line with Order 11 Rule 3 (2) Civil Procedure Rules. Secondly, the statement (**MG1**) had been filed together with the plaint in line with order 11 Rule 2 Civil Procedure Rules. It is not therefore taking the defendant/respondent by surprise.

24. I therefore allow the application dated 1st November 2017 in terms of prayer No. 1. The same shall be produced by the Investigating Officer only to prove that the deceased gave the statement and nothing beyond that.

Costs shall be in the cause. Orders accordingly.

Dated, signed, this 7th day of June 2018 in Open Court at Nairobi

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HEDWIG I. ONG'UDI

JUDGE