REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 292 OF 2010

ALESSANDRO TORRIANI

MARINE POWER HOUSE LIMITED

t/a THE FUNZI KEYS.....PLAINTIFFS

VERSUS

CHRISTOPHER HAPPE.....DEFENDANT

AND

JAMAL ALI VUYAA.....INTENDED INTERESTED PARTY

RULING

1. Through an application dated 25th September, 2017 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, the Intended Interested Party (applicant) seeks the following orders:-

a) That the Honourable court be pleased to grant leave for the Applicant to be enjoined in these proceedings as a necessary and/or Interested Party;

b) The Applicant be allowed to retract his statement and affidavit sworn on 23rd August, 2010; and

c) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of it and the supporting affidavit of the applicant, Jamal Ali Vuyaa sworn on 25th September, 2017. The application is opposed through a replying affidavit sworn by the defendant, Christophe Happe on 24th October, 2017 and a supplementary affidavit by F. Kinyua Kamundi, the defendant's Advocate, sworn on 23rd October, 2017.

SUBMISSIONS

3. The applicant's Counsel filed his written submissions on 28th April, 2018. The defendant's Counsel filed his on 8th May, 2018.

4. Mr. Aming'a, Learned Counsel for the applicant submitted that the statement in issue and supporting affidavit have no probative value at this point in these proceedings since the two documents only form part of the court record. He argued that the documents become valuable when the maker has testified, the documents have been admitted by the court and the witness subjected to cross-examination. Counsel for the Intended Interested Party referred the court to the case of **Rose Wambui Wahito v John Ian Maingey [2013] eKLR** where the court stated as follows with regard to the probative value of a witness statement:-

> ***"While it is important that a witness statement needs to be made and verified to be true by a witness, in the circumstances of this case the Court will draw adverse inference from the DW1's actions probating and reprobating on its witness statement, as it implies that the witness is not being truthful…in any event the said evidence has no probative value as it has been expressly denied by the defendant's only witness."***

5. With regard to the supporting affidavit, Mr. Aming'a submitted such evidence is not relied upon by merely filing the affidavit but by reading the affidavit to the court. He contended that the applicant's affidavit had not been read out to the court hence it cannot be regarded as evidence by the court.

6. Mr. Kinyua Kamundi, Counsel for the defendant submitted that the impugned statement and supporting affidavit cannot be retracted as the statement makes reference to the email dated 26th June, 2010 which forms the basis of this suit. Counsel contended that the allegations made by the Plaintiffs are based on the contents of the aforementioned email that was written by the applicant. Counsel suggested that the applicant has no choice on whether to testify or not as he can be compelled to do so under the provisions of Section 128 of the Evidence Act. He also submitted that the court should direct that the applicant be charged with perjury as he has confirmed to this court that he no longer believes the facts in his statement to be true.

7. As to the allegation that the statement and supporting affidavit have not been produced in court hence cannot form part of the court record, Mr. Kinyua submitted that the two documents had been relied upon by the plaintiffs and the defendant in numerous pleadings before court.

8. As to whether the applicant should be enjoined as an interested party in this matter, Mr. Kinyua opined that the applicant is not a necessary party and enjoining him would make the proceedings very unmanageable.

9. On the issue of deflecting liability from the defendant to the applicant, Mr. Kinyua submitted that this was not possible. Counsel stated that any suit by the plaintiffs against the applicant would be time barred. Counsel also added that the court can imply from the plaintiffs' actions that they do not intend to enjoin the applicant as a third party in this matter.

ANALYSIS AND DETERMINATION

10. The issues for determination are:-

(i) Whether the applicant should be enjoined to these proceedings as a necessary and/or Interested Party; and

(ii) If the applicant should be allowed to retract his statement and affidavit sworn on 23rd August, 2010.

11. My understanding of the reason why the applicant seeks to be enjoined to these proceedings as an Interested Party is to enable him retract the supporting Affidavit sworn on 23rd August, 2010 and his witness statement. According to the Black's Law Dictionary, 9th Edition, the term **"Interested Party"** refers to:

"A party who has a recognizable stake (and therefore standing) in a matter".

12. According to the above definition not every party can be enjoined to a proceeding as an Interested Party. A party must prove that he or she has a stake in the matter at hand before enjoinment. While the definition offers one element that must be proved before admission of a party as an Interested Party, the Supreme Court in the case of **Francis Karioki Muruatetu & Another vs Republic & 5 Others [2016] eKLR** enumerated the following elements to be applied when a party seeks to be enjoined as an Interested Party:-

(i) One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

(a) ***The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.***

(b) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

(c) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that the submissions are not merely a replication of what the other parties will be making before the Court.

13. In addition to the above, the court in the case of **Meme v Republic [2004] 1 EA,** p. 124 outlined the following principles for enjoinment of an Interested Party:-

(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

(ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; and

(iii) Joinder to prevent a likely course of proliferated litigation."

14. On the request for the applicant to be allowed to retract his statement, this court resorted to criminal law to draw the meaning of a retracted statement. The Court of Appeal for Eastern Africa in **Tuwamoi -Vs- Uganda [1967] EA 84 p. 88**, described a retracted statement as follows:-

"…..a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one."

15. The said definition can be applied to civil matters by replacing the word "accused person" with the word "a witness".

16. In the instant case the applicant alleged that he was unduly influenced by the defendant into signing the statement and further that the said statement was meant to deflect liability from the defendant to the applicant. The applicant, however, did not show how the defendant unduly influenced him save for alleging that he was promised some money which was not forthcoming. The applicant also did not prove that the statement was meant to deflect liability from the defendant to him. It is difficult to establish deflection of liability as no separate proceedings have been commenced against the applicant by the plaintiffs. The plaintiffs have also not declared an intention to enjoin the applicant to these proceedings as a defendant.

17. Section 35 of the Evidence Act provides for the admissibility of documentary evidence in civil proceedings. It reads as follows:-

> **(*1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—***
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> > ***(a) if the maker of the statement either—***
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> > > ***(i) had personal knowledge of the matters dealt with by the statement; or***
> > >
> > > ***(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and***
> >
> > ***(b) if the maker of the statement is called as a witness in the proceedings:***
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> > > ***Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable….***
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> ***(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.***
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> ***(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.***

18. The applicant does not dispute that he is the author/maker of the impugned statement and supporting affidavit. However, he claims that he cannot vouch for the truth of the contents of the statement and supporting affidavit. Section 35 of the Evidence Act gives instances where a statement by a witness may be admissible even without calling the maker to testify. The impugned documents by the applicant do not fall in this category as the applicant claims that the contents therein are untrue.

19. There is no provision in the Evidence Act that addresses the issue of whether a witness in a civil suit can retract his or her statement prior to testifying. However, in criminal cases by virtue of several decided cases, it is now settled law that witnesses can retract their statements. Such statements, however, remain on record. The courts have proceeded to analyze the evidentiary value of such retracted statements. In the case of **Daniel Ohiambo Koyo v. Republic [2011] eKLR** the Court held as follows with regard to such statements:-

> ***"The law on such witness is clear. The probative value of his evidence is negligible."***

20. Further, in **Tuwamoi vs Uganda (supra)** the court while making reference to a retracted confession observed that a retracted confession may be relied upon if it is corroborated or if the court is satisfied that the statement is indeed true. The court held thus:-

> ***"The present rule then as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true……."***

21. While the above cases relate to criminal matters, the principles therein, in my considered view, can be applied to retracted statements in civil cases. The court in allowing retraction must consider the evidentiary value of the statement. In most cases, such a statement would have little evidentiary value since the witness has not been subjected to cross-examination on the issues in the statement to test the veracity of the statement and the credibility of the witness.

22. However, in the instant case it is my finding that Counsel for the defendant took extra caution when recording the impugned statement and supporting affidavit. In the supplementary affidavit sworn on 23rd October, 2017 he explained in detail the steps he took before and while recording the impugned documents. The said Advocate stated categorically that the applicant who is allegedly fluent in both Kiswahili and English understood the contents of the documents and suggested some amendments, which were made thereon. The applicant then appended his signature on every page of the statement in the presence of one Mr. Wachira, an Advocate and Commissioner of Oaths. The applicant then instructed the defendant's Counsel to write three letters on the issues raised in this matter to three different recipients. The applicant did not dispute the averments of the defendant's Counsel in the said affidavit. This court therefore infers from the aforementioned

affidavit and the actions of the applicant that he did not record the statement and affidavit under duress. The court also infers that as it stands, the contents of the said documents are true unless otherwise proved through the rigors of cross-examination.

23. If this court allows the applicant to retract the impugned documents the outcome will be that the applicant will not testify in this matter and his retracted evidence will be termed as **"uncalled evidence".** In the Australian case of **Marsden v Amalgamated Television Services Pty Ltd [2001] NSWSC 510,** the Supreme Court of New South Wales elaborated on the effect of uncalled evidence as follows:-

> ***"95 As to the "circumstances" Mahoney JA in Fabre v Arenales (1992) 27 NSWLR 437 at 449-450 said:-***
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> > ***"The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. But there are circumstances in which it has been recognised that such an inference is not available or, if available, is of little significance. The party may not be in a position to call the witness. He may not be sufficiently aware of what the witness would say to warrant the inference that, in the relevant sense, he feared to call him. The reason why the witness is not called may have no relevant relationship to the fact in issue: it may be related to, for example, the fact that the party simply does not know what the witness will say. A party is not, under pain of a detrimental inference, required to call a witness "blind".***
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> > ***These matters are of relevance in the present case. A Jones v Dunkel inference may not arise if, for example, a witness has a reason for not telling the truth or refusing to assist and the party who may call him is aware of this. If the Government Insurance Office had been the party and Mr Arenales merely a witness, it is at least arguable that no inference would be drawn from the fact that he was not called for the defendant. If called he would have been asked in effect to admit a crime of some seriousness. If he did, he might be liable to reimburse the Government Insurance Office for or in respect of the amount recovered by the plaintiff. And, perhaps, it might be doubted that he would co-operate, by way of prior consultation, proof of evidence, or the like. It may be that his character or criminal record would affect these matters. These were, in my opinion, matters which the learned judge would have been required to 'address' had the Jones v Dunkel inference been of significance in his consideration of the plaintiff's credibility".***
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> ***[96] It is important to bear in mind that the rule does not permit the Court to draw an inference that the uncalled evidence would have been damaging; nor, of course, does it permit the Court to fill gaps in the evidence or to convert conjecture and suspicion into inference (Cubillo v Commonwealth [2000] 174 ALR 97). The unexplained failure to call a witness may permit the Court to resolve a doubt or ambiguity "adversely" to the party who did not call the witness or tender the evidence.***
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> ***[97] The "uncalled" evidence must not be just any evidence, it must be evidence capable of "putting the true complexion on the facts" (cf. Kitto J at 308 in Jones v Dunkel). In Nuhic v Rail & Road Excavations Pty Limited [1972] 1 NSWLR 204 Mason JA at 211 stated that the evidence must establish that the uncalled witness must have some knowledge of the event or issue in question***. (emphasis added).
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> [***98] In Payne v Parker (above) at 202 Glass JA said:-***
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> > ***"I would think it insufficient to meet the requirements of principle that one party merely claims that the missing witness has knowledge, or that, upon the evidence, he may have knowledge. Unless, upon the evidence, the tribunal of fact is entitled to conclude that he probably would have knowledge, there would seem to be no basis for any adverse deduction from the failure to call him".***

24. The applicant in the instant application only offered one reason for the intended joinder, that is to be allowed to retract his statement and supporting affidavit. It is therefore this court's considered opinion that he failed to satisfy any of the elements enumerated in the two cases above. It is therefore my finding that the applicant is not a necessary party to this matter. He was unable to prove that he has a stake in the matter or to disclose the prejudice that he will suffer if his enjoinment to this case is not allowed. Further, the applicant failed to show that his presence will assist in completing the settlement of all questions involved in this matter or that by being enjoined as an Interested Party his right that would have otherwise been adversely affected, will be protected.

25. It is my finding that the reason given by the applicant to be enjoined in the present suit is not sufficient to persuade a court to grant the said prayer. The applicant can still pursue his application to retract his statement and affidavit without being a party to these proceedings. Further, if the applicant was to be enjoined as a party to this suit, it would subvert the course of justice for the reason that the statement and affidavit he intends to retract form the genesis of this suit.

26. Section 128 of the Evidence Act provides as follows:-

> ***"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 proceedings upon the ground that the answer to such question will incriminate, or may tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to incriminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to 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 proceeding, except a prosecution for giving false evidence by such an answer."***

27. Had it not been for the supporting affidavit that was recorded by the applicant and for his statement, the case herein would not have been filed. The applicant must bear the responsibility for his actions by attending court as required to give evidence as the defendant's witness. He is as such a compellable witness for the defence. I therefore decline to give the orders sought in their totality. The application dated 25th

September, 2017 is hereby dismissed for being unmeritorious. Costs of the application are awarded to the defendant herein.

DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of December, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Njoroge Benjamin for the plaintiffs and holding brief for Mr. Aming'a for the Intended Interested Party/applicant

Mr. Kinyua Kamundi for the defendant

Mr. Oliver Musundi - Court Assistant