



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 98 OF 2018

MARY NGONYO KIUME.....PLAINTIFF

VERSUS

CHARLES MUISYO DAVID.....1ST DEFENDANT

WINFRED WANJIKU MAINA.....2ND DEFENDANT

MACHAKOS COUNTY LAND REGISTRAR.....3RD DEFENDANT

AND

EXAMS HOUSING CO-OPERATIVE SOCIETY LTD.....PROPOSED INTERESTED PARTY

RULING

1. This matter proceeded for hearing on 5th March, 2020 when the Plaintiff, PW1, testified. After his testimony, the Defendants' advocate informed the court that the Plaintiff's witness, PW2, was in court throughout the period when the Plaintiff was testifying.

2. The Defendants' counsel raised an objection to the effect that sound practice demands that a witness should not sit in court while another witness, or a party to the suit, is testifying. Counsel argued that such a witness will not be credible because his evidence will be geared towards filling up the gaps left by the initial witness.

3. On his part, the Plaintiff's advocate submitted that he had told PW2 to sit outside the court room while PW1 was testifying; that he was surprised that PW2 never went outside the court room as directed and that PW2 had recorded a statement whose contents the Defence knows. This Ruling is therefore in respect to the objection raised by the Defence on whether PW2 can testify in this matter.

4. Indeed, as correctly argued by the Defence, the practice of this court requires a witness to sit outside the court room while a party or another witness is testifying. This practice is meant to assist the court and the parties to assess the credibility of the evidence that is given by each witness, independent of the evidence of the other witness. It is only when this practice is upheld and observed that the principle of corroborative evidence, which is key in a trial, would be helpful to the court in arriving at a fair decision.

5. But can such a witness be locked out completely from testifying. This issue was considered by the court in the case of *Waithaka & Another vs. Republic (1972) E.A 184* in which the court held that the evidence of such a witness should be taken and the fact of his or her presence in court would then go to the weight to be attached to such evidence.

6. The *Waithaka (supra)* decision was adopted by Sitati J. in *John Oroo Oyioka & Another vs. Independent Electoral Boundaries Commission & 2 Others (2013) eKLR* as follows:

“I entirely agree with the view held by the court in the Waithaka case and hold that the presence of Atandi Machuka in court during the hearing of the evidence of the Petitioner in EP No. 2 of 2013 shall only affect the weight to be placed on that evidence by this court.

7. Just like in the *Waithaka* and *John Oroo (supra)* cases, I am of the same view that a witness cannot be locked out from testing just because he was in court when the Plaintiff was testifying. However, the weight to be placed on his testimony will be less than the weight that would have been placed on the evidence that he would have given had he not sat in court while the Plaintiff, or any other witness was testifying.

8. For those reasons, I shall allow PW2 to testify in this matter. The costs of the objection shall be in the cause.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE