



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

OS NO. 9 OF 2015 (FORMERLY CIVIL SUIT NO. 66 OF 2014)

L O (Alias A O).....PLAINTIFF

VERSUS

O J (Alias S J M)DEFENDANT

RULING

1. Before this Court is a Notice of Motion dated 25.8.15 seeking the following orders:

- a. That the Plaintiff’s witness statement be admitted as evidence-in-chief without the calling for the Plaintiff to give evidence in person;
- b. That in the alternative, this Honourable Court be pleased to grant leave for the Plaintiff’s evidence to be given on the basis of affidavit evidence;
- c. That the costs of this Application be provided for.

2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of the L O, the Plaintiff/Applicant sworn on 29.7.15. The Defendant/Respondent filed a Replying Affidavit sworn on 2.11.15 opposing the Application.

The Plaintiff/Applicant’s Case

3. The Plaintiff/Applicant avers in her Supporting Affidavit that she is currently resident in [particulars withheld], U.S.A; that she is the guardian and primary caregiver of the Defendant/Respondent’s 10 year old son M O J who requires constant care and attention and entirely depends on her; that the said M O J suffered emotional and psychological trauma when he was living with the Defendant/Respondent in Mombasa and has been diagnosed with Post Traumatic Stress Disorder; that she does not have any close family in the USA to leave M O J with to enable her travel to Kenya to testify in the suit herein; that she has been advised against leaving the said M O J behind or travelling with him as this could seriously compromise his emotional wellbeing and social development. To buttress her application, she annexed reports from M O J’s doctor and school.

4. In the written submissions filed on 27.11.15 on her behalf, the Plaintiff/Applicant reiterated the contents of her affidavit. She further submitted that Order 11 Rule 7 of the Civil Procedure Rules empowers this Court to grant the orders sought. The Plaintiff/Applicant further argues that the right to cross-examine is not mandatory and that there are certain situations where it is not always possible to cross examine a witness. The Plaintiff/Applicant relied in this regard on the decision of Julia Rosario

D'Souza & Another v Leo Investment Limited [2013] eKLR. It is the Plaintiff/Applicant's further submission that the Plaintiff's case relies primarily on documentary evidence which is indisputable and will suffice in place of oral evidence; that the Court has inherent power to make directions on how the suit shall proceed in the present circumstances and in the interests of justice; that the Defendant/Applicant will not be prejudiced by the granting of the orders requested. The Plaintiff/Applicant therefore urged the Court to allow the Application.

The Defendant/Respondent's Case

5. In his Replying Affidavit opposing the Application the Defendant/Respondent states that his case will be prejudiced if the Plaintiff/Applicant is allowed to testify by way of affidavit evidence as his advocates will not be able to cross examine her; that it is in the interest of justice that the veracity of the Plaintiff/Applicant's evidence is tested by cross examination; that the Plaintiff/Applicant has not given sufficient reasons why she should be allowed to testify by way of affidavit. He urged the Court dismiss the Application.

6. In his written submissions filed on his behalf on 8.12.15 by his advocates, the Defendant/Respondent urged the Court to dismiss the Application and reiterated the reasons in his Replying Affidavit. The Defendant/Respondent further argues that it is upon the Plaintiff/Applicant to fix the matter for hearing on a date that is convenient to her; that it is a cardinal rule of natural justice that every party must be accorded a fair opportunity to present their case and their evidence; that the Defendant/Respondent will be prejudiced if the veracity and strength of the Plaintiff/Applicant evidence is not tested by cross-examination. To buttress this argument he cited the case of Theodore Otieno Kambogo vs Norwegian People's Aid [2008] eKLR. It is the Defendant/Respondent's further submission that the documentary evidence has raised questions as to its relevance. He therefore prays that the Court considers his sentiments before allowing the Application.

Determination

7. I have carefully considered the Application, the Affidavits, the Submissions and the cited authorities. The issues for determination are the following:

- i. Whether the Plaintiff/Applicant has made out a case to enable the Court admit her witness statement and affidavit evidence without having her physically in Court to give oral evidence and to be cross-examined.
- ii. Whether the orders sought if granted would prejudice the Defendant/Respondent.

8. The Court is satisfied that the Defendant's son M O J has been diagnosed with Post Traumatic Stress Disorder and that the Plaintiff/Applicant is his primary care giver. The reports from his doctor and school confirm this and further state that his condition is such that it would not be advisable for him to travel to Kenya nor be left by the Plaintiff/Applicant as she travels to Kenya. Indeed the Defendant/Respondent acknowledges this in his submissions. In the case of Julia Rosario D'Souza & Another v Leo Investment Limited [2013] eKLR, Mutungi, J. in allowing a similar application observed-

“In the circumstances of this case it is the court's view that the 2nd plaintiff has demonstrated that it is impractical for her to travel to testify in this matter at least at the present moment and it is not possible to determine whether she will be well enough any time in the near future to be able to travel. She wishes the matter to proceed on the basis of her witness statement without her having to physically attend court as she is not in a position to travel and withstand sitting through a court session.”

9. The Court in the case of Theodore Otieno Kambogo vs Norwegian People's Aid [2008] eKLR cited by the Defendant/Respondent actually granted the application for admission of affidavit evidence without calling the deponent. The Court said in part-

“I agree with Mr. Kimani Kiragu that what amounts to sufficient reasons is a question of

fact. However upon examination of the facts presented by the parties herein, it is difficult if not impossible to bring the plaintiff's witness without incurring costs. I do not think that the plaintiff is in a position to shoulder the air ticket from London to Nairobi due to impecunious nature. In my view poverty and lack of means cannot be a reason to deny the plaintiff the opportunity to present and/or support his case with the affidavit evidence of Pamela”.

10. In the instant case, though it is not the Plaintiff/Applicant herself who is unwell but a child for whom she is the principal caregiver, it is impractical for her to travel to testify in the case. She has been advised against travelling for the sake of the minor who suffers from a condition that makes it impractical for her to travel and there is no indication as to when it will be expedient for her to travel and leave the minor. In the circumstances, I am persuaded that the Plaintiff/Applicant has provided sufficient reasons for her not to have to travel to Kenya to testify in this suit.

11. Will the Defendant/Respondent suffer prejudice if the orders sought are granted? The Defendant/Respondent claims that he will suffer prejudice as his advocates will not be able to cross examine the Plaintiff/Applicant to test the veracity of her evidence. In the Julia Rosario D'Souza case (*supra*) the Court stated-

“The Defendant’s assertion that she will be denied the opportunity to cross examine the 2nd plaintiff is well founded as a party has a right to cross examine the opposing party and that party’s witnesses. The court appreciates this right of a party but also acknowledges that there will be situations when it will not always be possible to procure the attendance of a witness for cross examination. It does not mean a statement of evidence admitted without calling the maker is not good evidence; it is evidence okay save that the weight to be given to such evidence is less than if the witness had been cross examined and further that the evidence of a party who has not been cross examined has to be evaluated together with the other available evidence to determine its veracity (sic).”

And in the Theodore Otieno Kambogo case (*supra*)

“The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that affidavit evidence. I am not in any way saying that affidavit evidence is not good but what I am saying is that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same. It is therefore my position that there is sufficient and reasonable proposition to allow the admission of the affidavit the plaintiff intends to rely on in support of his case”.

12. I have perused the record herein. I am persuaded that the suit is based primarily on documentary evidence. Order 11 rule 7 of the Civil Procedure Rules provides *inter alia*

- i. ***“At least thirty days before the hearing date of the suit a Trial Conference shall be convened by the court for the following purposes—***
- d. ***ordering the admission of statements without the calling of the makers as witnesses where appropriate and the production of any copy of a statement where the original is unavailable;***
- e. ***ordering the giving of evidence on the basis of affidavit evidence;***
- (h) ***making appropriate orders concerning the receiving in evidence of any exhibit.”***

13. This Court is empowered by law to allow the admission of statements without the calling of the makers as witnesses where appropriate and the production of any copy of a statement where the original is unavailable. It is also empowered to order the giving of evidence on the basis of affidavit evidence and to make appropriate orders concerning receiving evidence of any exhibit.

14. Consequently, I find that the application herein has merit and is allowed. I therefore make the following orders:

- a. Leave is hereby granted for the Plaintiff's evidence to be given on the basis of affidavit evidence;
- b. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of FEBRUARY, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**