



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 471 OF 2010

JOCHEN MICHAEL RINCK.....PLAINTIFF

-VERSUS-

MILKA WANGUI KABUE.....1ST DEFENDANT

JOSEPH NDONGA LANYO..... 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....^{3RD} DEFENDANT

RULING

1. The plaintiff has orally moved this Court seeking two orders ;

i) (a) that the Court do issue summons to the plaintiff under Order 16 rule 1 of the Civil procedure Rules to come and testify

OR

(b) The Court do allow the plaintiff to prosecute his suit by way of affidavit evidence.

ii) An order directing the document examiner to examine the the signature on the Power of Attorney instrument donated to the 1st defendant by the plaintiff.

2. The request for issuances of summons, it is submitted by the plaintiff's advocate to be necessitated by the deportation order in force against the plaintiff. The plaintiff was already deported as at the time of filing of this suit as set out in paragraph 11 of the plaint. The plaintiff relied on order 16 rule 1 in making this application.

3. The application by the plaintiff is vehemently opposed by the 2nd defendant. The 1st defendant was not present to make her position known while the Attorney General for the 3rd defendant left the issue between the parties. The 2nd defendant based her objection on the provisions of order 12 rule 3. According to the 2nd defendant, granting the orders sought implies the plaintiff is being pursued to prosecute his case.

4. On the request for examination of the document by the document examiner, the 2nd defendant submitted that the same should not be granted as it amounts to the Court assisting the plaintiff yet the Court is required to remain impartial. It is the 2nd defendant's view that the plaintiff having been deported does not have any rights in Kenya. She relied on the case of **Re Jochen Michael Rinck (2009) eKLR** to support this averment.

5. Lastly the 2nd defendant submits that allowing the suit to proceed by way of affidavit evidence would amount to the Court perpetuating an illegality. That circumstances where affidavit evidence should be allowed is laid down i.e in cases of sickness, high costs of securing attendance of witnesses or any justifiable reason but deportation is not one of them. She urged the Court not to grant the orders.

6. Order 16 rule 1 provides thus ;

“At any time before the trial conference under order 11, the parties may obtain on application to the Court or to such officer as it appoints in this behalf summonses to persons whose attendance is required either to give evidence or produce documents.

The plaintiff states that the Court has discretion to issue such summonses under this rule and under section 1 A, 1 B, 3 and 3 A of the Civil Procedure Act.

7. My interpretation of Order 16 cited by the plaintiff is that it allows parties (plaintiff or defendant) to apply to Court to summon attendance of a witness to testify on their behalf or produce a document. It does not envisage a situation that the plaintiff himself is to be summoned. Order 12 cited by the 2nd defendant refers to what takes place when the plaintiff does not attend Court on the date set for hearing. The suit has not been set down for hearing. The case law of Re Jochen does support the 2nd defendant's submissions to a certain extent in that this applicant had sought unsuccessfully to reverse the deportation order. This court cannot tell whether an appeal was preferred against this order.

8. The plaintiff pleaded that he was deported in 2007. The plaintiff's advocate submitted that the plaintiff challenged that deportation. No evidence was laid before this Court to enable the Court understand the reason for the deportation and/or the status of the pending case challenging that deportation. This application was made orally so there is no evidence of request to enter made to the relevant authorities and that request declined. This Court can only exercise its discretion when such information is availed to it in order to assist the plaintiff to attend Court. In my view the plaintiff can only avail all these information by way of a formal application before a proper forum and not through an oral application in a civil suit where the concerned government departments are not parties.

9. On the issue of examination of the signature on the power of attorney instrument, the plaintiff's counsel knows the procedure to be followed when there is a complaint of forgery. This Court is not an investigating arm to issue any orders that question any signature. The results of such examination would favour only one party – either the plaintiff or the defendant. Our civil system is adversarial and the Court cannot be pulled into the arena by one party. It must be seen and act to remain impartial.

10. The plaintiff is well represented by counsel. The application for an order from this Court to direct the document examiner to investigate the signature has not been grounded on any provisions of the law. The plaintiff is thus asking the Court to assist him in collecting evidence which action is unfair to the defendants. I therefore find this prayer as vexatious and without merit; the same is declined.

11. In conclusion, the applicant has liberty to appoint someone to testify on his behalf or facilitate the lifting of the deportation order or better still formally move the relevant court for an order to come and prosecute this case. The prayers orally sought are declined.

Ruling dated and delivered at Mombasa this 11th day of May 2016

A. OMOLLO

JUDGE