



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 361 OF 2016

BETWEEN

ROSHANARA EBRAHIM.....PETITIONER

VERSUS

ASHLEYS KENYA LIMITED1ST RESPONDENT

TERRY MUNGAI.....2ND RESPONDENT

FRANK ZAHITEN3RD RESPONDENT

EVELYNE NJAMBI.....4TH RESPONDENT

RULING

The issue

1. This is a ruling on an application to expunge the supplementary affidavit of the 3rd respondent filed on 10th November 2016 without leave of court. Counsel for the petitioner objects that no leave of court was obtained before the filing and that the petitioner did not have opportunity to respond to the affidavit and to make submissions thereon in her submissions filed before the Court.

2. Counsel for the 3rd respondent contended that the 3rd respondent's impugned Supplementary Affidavit was made necessary by the petitioner's Supplementary affidavit of 28th October 2016 which raised a new issue that the photographs in the replying affidavits of the 1st and 2nd Respondent were disputed as to the time when they were taken and that the Supplementary Affidavit of the 3rd Respondent merely elaborated on the photos and alleged use of narcotics by the petitioner.

3. Counsel for the 2nd, 3rd and 4th Respondents did not object to the admission of the affidavit and urged that it was in the public interest that all evidence bearing on the case be presented and the petitioner may be allowed time to respond to the affidavit.

Determination

4. There is no doubt that the Court has power to grant leave to file affidavit on any matter in dispute before it. See Order 19 Rule (1) of the Civil Procedure Rules and Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

5. Although leave should ideally be sought and obtained before the filing of the affidavit, there is no bar for the Court to grant such leave even after the filing of such affidavit. The Court should only be concerned that parties are granted a fair hearing within the meaning of Article 50 of the Constitution.

6. In this case, it is clear that an issue arises as at when the photographs were taken, the Petitioner stating at paragraph 12 of the Supplementary Affidavit of 28th October 2016 that

“That the photos forwarded to the 1st and 2nd Respondents by the 3rd Respondent were photos taken way back in mid-2015, with some dating back to three years before I was crowned Miss World Kenya, 2016.”

Evidence corroborating, contradicting or elaborating such deposition is relevant to the determination of the matter, and the Court may properly receive it.

7. Moreover, the element of alleged criminality of the petitioner’s conduct in the alleged use of narcotics is a serious enough matter to warrant the receipt of the affidavit. A court of law may not ignore allegations of criminality or illegality made against a party to proceedings before it. It behoves the Court to investigate the issue by evidence presented to it and make a determination as appropriate.

8. The petitioner’s right to fair hearing is capable of protection, and she is not unduly prejudiced by receipt of the 3rd Respondent’s supplementary affidavit because in this case there is time for a response thereto before the hearing of the Petition. In addition, submissions thereon may be made at the hearing orally and in writing in advance thereof. This case is distinguishable from the situation where the proceedings are at advance stage of hearing with no opportunity to uphold the other party’s right to fair hearing as in ***Raila Odinga v IEBC & Ors.***, Supreme Court Election Petition No. 6 of 2013 and ***Zakariah Okoth Obado v. Edward Akong’o Opiyo & 2 Ors.***, Supreme Court Election Petition No. 4 of 2014, where it has been held that “at this advance stage in the proceedings, it is not in the interest of justice to allow for new affidavit evidence to be filed.”

9. The Petitioner’s objection as to the cogency of the evidence in relation to the interpretation of the photographs and contents of the affidavit is a matter for determination at the trial when the Court considers whether the facts in issue have been proved or disproved, as necessary. See section 3 (2) (3) and (4) of the Evidence Act.

Order

10. For reasons set out above, the Court admits and grants leave for the filing of the Supplementary Affidavit sworn on 9th November 2016 and directs that the petitioner do file a response thereto, if necessary, before the hearing of the Petition on the 16th November 2016 as scheduled.

11. Submissions thereon may be the subject of the supplementary written and oral argument to be made at the hearing.

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2016.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S MMA Advocates for the Petitioners.

M/S Omwancha Mukiri & Onyango Advocates for the 1st, 2nd and 4th Respondents.

M/S Apollo & Co. Advocates for the 3rd Respondent.