REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALRY DIVISION MILIMANI

CIVIL SUIT NO 337 OF 2011

FUELS TRADING COMPANY LIMITED……..…1ST PLAINTIFF

DAVID MWANGI NGITE……..2ND PLAINTIFF

VERSUS

APA INSURANCE COMPANY LIMITED……..……DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT NO 418 OF 2012

DAVID MWANGI NGITE…….1ST PLAINTIFF

GEOFFREY KAMAU NGUMO……2ND PLAINTIFF

VERSUS

APA INSURANCE COMPANY LIMITED……....1ST DEFENDANT

JOHN M MUKIGI T/A

RAPID INVESTIGATIONS SERVICES……...…2ND DEFENDANT

RULING

1. For the determination of the Court was the Plaintiffs' application dated 13th October 2014. The application was brought under the ambit of Order 19 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act as well as Article 159 of the Constitution. The Plaintiffs' sought the following orders inter alia;

1. ***Spent;***
2. ***THAT leave be granted to Geoffrey KamauNgumo, the 2nd Plaintiff in High Court Civil Case No 337 of 2011 as consolidated with High Court Civil Case No 418 of 2012, to adduce viva voce evidence on a priority basis before his intended relocation to the United States of America on or***

before 25th November 2014 or thereafter;

3. ***THAT in the alternative, leave be granted to GeofreyKamauNgumo, the 2nd Plaintiff in High Court Civil Case No 337 of 2011 as consolidated with High Court Civil Case No 418 of 2012 to adduce his evidence through sworn affidavit(s) before his intended relocation to the United States of America on or before 25thNovember 2014 or thereafter;***
4. ***THAT the said Geoffrey KamauNgumo be exempted from personal attendance of this honourable Court sessions should the honourable Court be inclined to grant leave to the above mentioned person to present his evidence through affidavit;***
5. ***THAT this honourable Court be at liberty to dictate and/or direct the terms through which Geoffrey KamauNgumo, the 2nd Plaintiff in High Court Civil Case No 337 of 2011 as consolidated with High Court Civil Case No 418 of 2012 is to present and/or adduce his evidence in Court before his intended relocation to the United States of America on or before 25th November 2014 or thereafter;***
6. ***THAT this honourable Court be pleased to make any order as to costs;***
7. ***Any other relief that this Court deems fit and just to grant.***

2. The application was predicated upon the grounds that the 2nd Plaintiff intended to relocate to the United States of America on or about 25th November 2014, and that it would be preferable that his evidence either be adduced *viva voce* and he be cross-examined or adduced by way of affidavit(s)before his intended relocation. In the affidavit in support of the application, it was deponed to that with the intended relocation, it would be apt for the 2nd Plaintiff's testimony be reduced into writing and the same presented as evidence in the form of an affidavit(s). The affidavit further reiterated the grounds of the application as urged by the Plaintiffs'. The application was opposed.
3. On 8th October 2015, this Court directed that the parties would be heard on the application. On 4th November 2015, the Plaintiff urged before the Court that the 2nd Plaintiff had since relocated to the United States of America, and that his intention to relocate had been intimated to the Defendants through the substantive application dated 14th October 2014. Further, the Plaintiffs contended that it would be expensive for the 2nd Plaintiff to attend Court, and that therefore his witness statement should be admitted as *viva voce* evidence.
4. The Defendants opposed the application, citing that Order 18 Rule 3 of the Civil Procedure Rules prescribed for witnesses to be orally examined. It was further urged that the Plaintiff's attendance was required and should thus not be exempted from testifying and giving his evidence *viva voce*. It was urged that no evidence had been adduced before the Court that the 2nd Plaintiff had indeed relocated to the United States of America, and that the visa annexed to the application only showed that the 2nd Plaintiff had a visa valid for one (1) year. Further, it was reiterated that the 2nd Defendant was not only a witness but a party to the consolidated suit, and that there was therefore no basis for admitting the witness statement.
5. The Plaintiffs' application is based on the provisions of Order 19 Rule 1 of the Civil Procedure Rules. The said provision reads;

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

Further, and in accordance with Order 18 Rule 3 relied upon by the Defendants, it is provided that;

The evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge.

6. Under the rules of the Civil Procedure, and as specifically provided in the above mentioned

provisions, unless for sufficient reason, the Court shall not make any orders for any fact or facts to be proven by affidavit, and it shall impose upon the attendance of such witness to give evidence before the Court. The reasons adduced by the Plaintiffs was that the 2nd Plaintiff had relocated to the United States of America, and that his attendance for the hearing of the matter would be expensive. Do these reasons as stated by the 2nd Plaintiff construe sufficient reason as to why the 2nd Plaintiff may not attend the hearing of the matter, and for him, further, to testify before the Court as both witness and Plaintiff? It has not been shown that the 2nd Plaintiff would be unable to facilitate for his travel to attend Court, and it is for this reason that the Court would be inclined to critically analyse whether other sufficient reason has been given to allow for the prayers made in the application.

7. The probative value of a witness statement should not be understated; they are mere statements without probative value and can only acquire the status of evidence when adopted by the witness after being sworn. In **Consolata Hospital Mathari v Dr. BiankaMatensNyeri HCCA No. 17 of 2004** as applied by Gikonyo, J in **Musikari Kombo v Royal Media Services Ltd [2014] eKLR** it was held that there was no probative value in a witness statement that had been produced by an unsworn witness and as such was a mere statement. It had been held *inter alia*;

"From the record there is no indication that witnesses testified on oath. It is possible they may have testified on oath but the learned magistrate inadvertently failed to record. However, this is a court of record and there is no room for speculation and or conjecture. Going by the record it can be held that perhaps the witnesses testified without being sworn. The effect of the evidence not given on oath is that it amounts to no more than a mere statement of no probative value to the case…The fact that this was not an issue canvassed before the court did not occasion any injustice and prejudice to any of the parties since the law is settled that evidence must be taken on oath unless for children of tender years as well as those who choose to be affirmed. Submissions on this issue by counsel would not have made any difference. In any event the issue in focus goes to the jurisdiction and the court has jurisdiction to address the same suo moto. On this issue alone the appeal ought to succeed."

8. The learned Judge in his determination on the legal status of a witness statement in civil proceedings, went further to state that the witness statement that had been presented before the Court was of no probative value as it was neither sworn nor adopted or shown that the witness had adopted the same after being sworn.
9. This Court reconciles and acquiesce itself with the sentiments expressed by the learned Judge. It would only be proper and just, in the absence of any sufficient reason as to why the witness cannot attend Court, for the Court to dismiss the Plaintiffs' application. To the mind of the Court, the reasons that have been presented by the Plaintiffs do not proffer cogent deductions as to why the 2nd Plaintiff may not attend Court. Further, it has not been shown that the 2nd Plaintiff's attendance is encumbered by any reason, save for costs, and that he actually resides in the United States of America as claimed. His attendance for the hearing of the matter and to present his testimony is therefore paramount to the effective, effectual and expedient determination of this matter.
10. In consideration of the foregoing, the application by the Plaintiffs is without merit and the same is dismissed with costs to the Defendants.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of December, 2015.

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C. KARIUKI

JUDGE