



COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. 388 OF 2010

PAULINE MUTEI MAKUMU 1ST PLAINTIFF

KILUNGU JUSTUS MULI 2ND PLAINTIFF

- VERSUS -

URSULA KRESZENNTIA 1ST DEFENDANT

MONIKA HERKENRATH 2ND DEFENDANT

PETER JURGEN HERKENRATH 3RD DEFENDANT

JAFFARALI KASSAM ABDULLA4TH DEFENDANT

OSCAR JUMA 5TH DEFENDANT

RULING

[1] During the hearing of this case, when the second defendant Mr Justus Kilungu Muli was being cross-examined by Mr. Gikandi Learned Counsel for the 3rd and 4th defendant, in the middle of cross-examination Mr. Gikandi applied for an order addressed to Barclays Bank Ltd Nkrumah road to avail to court details of Account no [particulars withheld] in the name of Petusha Guest House and Restaurant for the period between 1st February 2010 to 30th March 2010. Mr.Munyithia learned counsel for the plaintiff opposed that application vehemently. He argued that they filed their clients statements on 14th June 2013 and served it upon the counsels for all the defendants. He stated that he was not served with any notice to produce the statement. The other issue raised by Mr. Munyithia was that Mr. Gikandi appeared for 3rd and 4th defendants and the issue of how money was spent was never raised. He argued that there is no provision in law that gives the 3rd and 4th defendant right to apply for the plaintiffs documents at the time of cross-examination.

[2] After this objection Mr Gikandi in an apparent abandonment of his application applied for summons to issue to the manager Barclays Bank Nkrumah road on behalf of the 3rd and 4th defendant to come to court and produce statements of Account No. [particulars withheld] in the name of Petusha Guest House for the period between 1st February 2010 to 31st March 2010.

[3] Mr Munyithia for the plaintiff opposed the application and said the 3rd and 4th defendants have nothing to do with his clients accounts. He said that there was mischief in that the 1st and 2nd defendants

were not being called. He called it an initiative of panel beating pleadings. he argued that such an order shall be oppressive on his client while assisting to put life in the 3rd and 4th defendants case.

[4] Mr. Kabebe learned counsel argued that the defendants are sued together. He stated that the circumstances under which the Kshs. 12 million was paid was relevant. That the production of that document will vindicate the witness and show that he has not perjured himself.

(5) The Civil Procedure Rules under Order II provides for a very comprehensive procedure called the pre-trial directions and conferences where all the documents to be relied on will be indicated, shown and exchanged. Infact Order II rule 7 (1) and 7 (I) (d) provides:

7(i) At least 30 days before the hearing date of the suit a trial conference shall be convened by the court for the following purposes

a) . . .

b] . . .

c] . . .

d] Ordering the admission of statements without the calling of the makers and witness where appropriate and the production of any copy of statement where the original is unavailable.

The Evidence Act Cap 80 Section 69 provides as follows;

Secondary evidence of the contents of the documents referred to Sec 68 (i) (a) shall not be given unless the party proposing such evidence has previously given to the party in whose possession or power the documents is or his advocate, such notice to produce it as required by law or such notice as the court considers reasonable in the circumstances of the case.

(underlining mine)

[6] The documents Mr. Gikandi now requires while on his feet cross examining were documents he should have obtained under provisions of Order II. He has not issued a notice to produce under Sec. 69 of the Evidence Act. His requiring of the same in the middle of a hearing cannot be accepted or condoned by the court. The application is not allowed and is dismissed. The suit shall proceed for hearing of cross-examination of PW2.

Dated and delivered in open court at Mombasa this 6th day of November 2014.

S. MUKUNYA

JUDGE

6.11.2014