Leiyagu v Gichohi & another (Civil Case 50 of 2010)
[2025] KEHC 13700 (KLR) (Civ) (2 October 2025) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 50 OF 2010

JN MULWA, J

OCTOBER 2, 2025

BETWEEN

RICHARD N. LEIYAGU ..... PLAINTIFF

AND

HELEN W GICHOHI ..... 1ST DEFENDANT

AFRICAN WILDLIFE FOUNDATION ..... 2ND DEFENDANT

RULING

1. This Ruling is pursuant to an objection made orally on the admissibility and production in evidence of documents by the 1st Defendant during the hearing of her defense case on 7/4/2025. The objection was opposed by learned counsel for the 1st Defendant.

The Objection

2. Counsel for the Plaintiff objected to production of documents at page 309, supplementary affidavit on page 125,126, 156 to 161, 205 to 209 and 271 to 274 arguing that the affidavits were not sworn by the witness and further production of documents at pages 10 to 49, 82, 106 to 147 ,210 to 216, 275-299, as well as arguing that they do not comply with the provisions of Section 34 of the *Evidence Act*.

3. Additionally the plaintiff objected to production of documents in the 1st Defendants bundle of documents at page 316 to 319 argued that the witness was not the maker and that she did not participate in the meeting.

4. In response the 1st Defendant by counsel argued that the objections had no legal basis, that no objections were raised during pre-trial conference under Order 11 of the Civil Procedure Rules, and that admissibility of evidence is upon relevance of documents to the matter in issue.

5. While relying on the provisions Article 159 (2) (d) of the *Constitution* of Kenya,2010 the 1st Defendant argued that it could not go back to days of reliance on technicalities to lock a party out of substantial merits of its case, and sought aid from Section 34 of the *Evidence Act*.

6. The Respondent went on to submit that documents in previous proceedings are admissible as evidence and that the Plaintiff in this case was a party in those other proceedings and therefore in both proceedings both were parties thereto, hence urged that the said documents qualify as relevant documents and evidence in the subsequent proceedings to which each would have an opportunity to cross examine the defendant on those documents.

7. On the issue of certification, the 1st Defendant submitted that both parties had access to the documents and therefore there was no need for certification, the same having been produced in court in the previous proceedings.

8. As to documents in bundle no.1 paragraph 302-336, the Ist Defendant submitted that the said documents were part of a report of parliament which report was produced as exhibit no. 5 in the Nyeri Case and therefore relevant and proper for admission in the instant case.

9. As for documents appearing at pages 337-339 and 340 - 342, the 1st Defendant argued that these were web pages of an organization hence public documents, wherein the Plaintiff identified himself as a Human Rights activist and serving in the Armed Forces, and the substance of the letter of complaint and therefore it had demonstrated that the documents are relevant.

10. In summation, it was the Plaintiff's argument that the impugned documents did not meet the requirements stated at Section 80 of the *Evidence Act* and so should be expunged from the court record.

Determination.

11. The only issue for determination by the Court is whether the objection to the admissibility of the documents is merited.

12. Section 80 of the *Evidence Act* provides that;

    (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

    (2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

13. The Plaintiff while advancing its argument did not provide evidence that the documents were in possession of a third party warranting certification. The court having perused the pleadings on record and upon consideration of thor relevance to the suit is convinced that both parties had access to the said documents from the inception of the suit and during the hearing of the prior suit wherein both parties were parties. It is for this reason that the argument on certification fails.

14. For the supplementary list of documents at pages 125,126 ,156 to 161, 205-209 and page 271 to 274 the learned Counsel argued that all the affidavits were not sworn by the witness. The test about whether

a person is or is not a maker of a document is whether the alleged maker can be legally held responsible for the existence of and contents therein. Thus, one needs to settle the question whether if an issue, for instance, criminal in nature, arose, the alleged maker can answer by being held to account about the criminal element sought thereto.

15. In the instant case, the affidavits are relevant to the instant case in as much the same were not sworn by the 1st Defendant. As for the other documents at pages 10 to 49, 82 , 106 to 147,162 to 167, 210 to 216 , 275 to 299 the Plaintiff argued that the documents do not comply with previous proceedings as they were not subjected to cross examination and not subject of these proceedings.

16. In the case of DT Dobie & Company Ltd vs Muchina [1982] eKLR, the court stated as follows: -

> " The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the application, which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right." (emphasis mine).

17. Compliance with Order 11 of the Civil Procedure Rules, 2010 has been a practice in Kenya since their formulation. Its provisions are clear regarding the steps each party in a suit, claim or petition is required to take prior to the fixing a case for hearing. In the instant case, the Plaintiff did not raise objections during pre-trial conference under Order 11 of the Civil Procedure Rules as stipulated in Sections 1A and 3 respectively, to draw to the attention of the others its intention to raise objections to production of documents at issue. It is not open for a party to waylay another with an objection to certain documents when the other has taken the witness stand.

18. Order 11 of the Civil Procedure Rules has significance that goes to the root of justice. Pretrial directions in strict sense contains the packaged rules that enable the right to a fair hearing as ably captured in the decision of David Kimani Gitau v Francis Wainaina [2016] eKLR, wherein Prof Joel Ngugi J, (as he then was) propounded this position as follows:

> " pre-trial procedures, like all rules of procedures, are the handmaidens of justice and not its mistress. Hence, they are not formulaic or talismanic steps, which must be rigidly followed regardless of their utility to the trial process. Indeed, Order 11 of the Civil Procedure Code exists to ensure that the trial process is more efficient. Hence, a Court may, where circumstances and context permit or dictate skip, abbreviate or bespoke the pre-trial processes and procedures. The nature of this particular case indicates that this case might be a good candidate for that."

19. This a clear case of a party "waylaying" or ambushing the adverse party in court with an objection to production of documents. Discovery as provided at the *Civil Procedure Act* Section 22 is key on production and inspection of documents by parties in a suit. The plaintiff kept mum all the way, failed to invoke the above legal provision and raise questions of admissibility of the 1st Defendants Documents, only to do so after the Plaintiffs case was heard. Orders for discovery and inspection of documents would have been readily availed to the plaintiff if it had requested for the same at the pretrial stage of the proceedings.

20. Undoubtedly, the purpose for discovery is the reduction of trial length, promoting fairness and preventing surprise at the hearing. Days are long gone when trials were by ambush, hiding documentary evidence from sight of the opposite party.

21. Section 22 *Civil Procedure Act* provides the procedure for achieving the above in relation to discovery, delivery, and admission of documents. The plaintiff in the court's view failed to undertake due diligence in the matter and wasted the opportunity to invoke the law in respect of the issues it raises at the middle of the hearing, when its case had been heard.

22. For the foregoing upon careful consideration of the parties oral arguments, the court is persuaded that the objection raised by the Plaintiff to the production of the documents as listed, and their probative value shall remain a matter within the domain of final Judgment.

23. The objection therefore fails. The suit shall proceed from where it reached.

    Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF OCTOBER, 2025.

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JANET MULWA.

JUDGE