



**WW v JMM (Matrimonial Cause 4 of 2023)  
[2025] KEHC 14069 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14069 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MATRIMONIAL CAUSE 4 OF 2023  
RM MWONGO, J  
OCTOBER 9, 2025**

**BETWEEN**

**WW ..... PETITIONER**

**AND**

**JMM ..... RESPONDENT**

**RULING**

**Background**

1. In this matter the hearing is underway and the applicant closed her case. The respondent called his first witness, and simultaneously indicated that he wished to abandon his 3 other witnesses. This would leave the first witness as the Respondent’s only witness. Counsel stated that he did not find them relevant for his case anymore.
2. The applicant has opposed the respondent’s move to withdraw his witnesses stating that the testimony of one of the abandoned witnesses namely, witness No.3, is crucial in determining 2 of the properties in contention. The applicant argued an oral application seeking that the court do compel the attendance of the respondents Witness No. 3.
3. In rebuttal and opposing the application, the respondent states that he cannot be compelled to call Witness No.3 to produce the witness statement that had been filed. That this was his case, and he had the prerogative and right to choose which witnesses to call and which ones to abandon depending on who is relevant to his case. He stated that, in any event, the applicant had already closed her case and she ought to have taken the option to call any witness including the abandoned witness to testify on her behalf before closing her case.



## Issue for determination

4. The question for determination is whether the court can compel the respondent's abandoned witness No.3 to testify and produce the witness statement he had filed; and whether this can be at the behest of the applicant, and with compulsion of the Court.

## Analysis and Determination

5. Order 3 Rule 2 of the Civil Procedure Rules provides.
  - “2. All suits filed under rule 10 including suits against the government, except small claims, shall be accompanied by —
    - (a) the affidavit referred to under Order 4 rule 1 (2);
    - (b) a list of witnesses to be called at the trial;
    - (c) written statements signed by the witnesses excluding expert witnesses; and
    - (d) copies of documents to be relied on at the trial including a demand letter before action:

Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”

6. It is mandatory that trial documents, including the witness statement be served upon the opponent. This enables the opponent to prepare adequately for the trial. Discovery is part of the pre-trial procedures of a court, and it satisfies the rules of natural justice. In *Surgipharm Ltd vs Kenya Invalid & Pharmacy Supplies Ltd & 2 others* (2013) eKLR, the court observed that a witness statement under Orders 37 and 11 of the Civil Procedure Rules was a written statement signed by a person containing the evidence that person would be entitled to give orally, and that its primary objective was to improve the efficiency of trials. The court said that in an adversarial system, discovery rules ensure that parties are prepared on time and there were no surprises since each party should come to trial with all their cards on the table.
7. Filing of witness statements does not automatically convert them into evidence. They become evidence that can be tested during cross-examination only once they are adopted and produced by their makers during the hearing. Until then, they are a guide for the oral evidence that will be adduced at the trial if the witness will be called to testify. This means that the presence of a witness statement on record does not automatically mean that the witness will testify. Indeed, a witness may die prior to testifying.
8. In the case of *Kithela Liria v Jacob Nkunja Kabilu* [2022] KEELC 1849 (KLR), the court held:

“Order 18 of the Civil Procedure Rules provides the plaintiff shall begin, state his case and produce his evidence in open court. Rule 16(c) of the Hon. Chief Justice Practice Directions of July 25th 2014, require witnesses to adopt witness statements in chief, minimally highlight and produce documents and thereafter be subjected to cross examination. 25. In *Surgipharm Ltd –vs- Kenya Invalid & Pharmacy Supplies Ltd & 2 Others* (supra) the court held that a witness statement remains a guide for oral testimony which is subject to cross-examination. In *Bhandari –vs- Guatama* [1964] E.A 606 the court held that a party has a right to cross-examine without any hindrance and no evidence affecting a party is admissible unless an opportunity to test its truthfulness and credibility by cross-examination is allowed.



In *Kenneth Nyaga Mwige –vs- Austin Kiguta and 2 Others* [2015] eKLR , the court held a document becomes part of evidence of the court only after it is tendered or produced in court by either party and the court admits the documents as evidence. That once admitted the document becomes proved or disapproved when the court applies its judicial mind to determine its relevance and veracity of the contents. In the instant case, there is no record to show the documents by both parties were ever produced and or marked as exhibits. Similarly, there is no record if the plaintiff was cross-examined by the respondent and vice versa.” [Emphasis added]

9. Article 50(1) of *the Constitution* accords every person the right to have any dispute resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This right includes the right to choose the most favourable, relevant, and material witnesses for his case as he thinks fit.
10. In this case, the respondent filed witness statements for all the witnesses he thought were relevant for his case as required under the Civil Procedure Rules. However, during hearing of his case, he abandoned some of them, on the basis that they were no longer relevant for his case, or so he claimed.
11. In my view, the respondent has every right to do so and there is nothing in law forbidding him. More so, there is no basis in law, following the events stated hereinbefore, for the court to compel the respondent not to abandon any witness or to compel the respondent to put on the stand any particular witness. If the court were to do so, it would amount to descending into the arena of litigation, a place where the court must never venture.
12. Accordingly, the Court declines to make any order requiring the attendance of the Respondent’s Witness No.3 or the involuntary production of his written statement.
13. The matter shall proceed with the parties’ witnesses of choice.
14. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 9<sup>TH</sup> DAY OF OCTOBER, 2025.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Onyiego for Petition

Kimanzi for Respondents

Francis Munyao - Court Assistant

