



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 25 OF 2018

AFRICAN COTTON INDUSTRIES LIMITED.....PLAINTIFF

VS

RURAL DEVELOPMENT SERVICES LIMITED.....DEFENDANT

RULING

1. By Notice of motion filed on the 23/7/18 the Plaintiff sought orders as follows;

- a. That the Defendant /Respondent's director, shareholder and witness, Dr. John Kibunga Kimani, be compelled to avail himself for medical examination by a medical expert nominated by the Applicant within a period of fourteen (14) days of being notified by the Applicant of the name of the expert and venue of examination or within such extended period as the Court may subsequently order;
- b. That in the event that Dr. John Kibunga Kimani fails to so avail himself as ordered in 1 above, the medical report of Dr. Philip Mwangemi dated 14th March 2018 and filed by the Respondent on 19th March, 2018 be struck out and/or the Defendant /Respondent be barred from relying on its contents at any point of these proceedings; and
- c. That the costs of this application be awarded to the Applicant.

2. The application is based on the grounds thus;

- a. one of the issues for determination jointly filed by the parties herein is whether the Respondent's Director John Kibunga Kimani had the capacity to sign the agreement for sale;
- b. the Respondent filed a medical report by a Dr Mwangemi dated the 14/3/18 where he alleges that he treated Dr Kimani between the month of March and July 2013 and that in his considered opinion Dr Kimani endures a residual brain damage which manifests itself in his ability to concentrate on tasks.
- c. Dr Mwangemi alleges interalia that since March 2013 Dr Kimani has not performed his professional duties, which involve planning and implementation of development projects for his clientele.
- d. That the Plaintiff has a right to challenge the medical opinion of the said Dr Mwangemi by providing its own expert as a witness. That the Applicant's advocate wrote on 20/4/18, and 7/6/18 asking the Respondent's to avail the said Dr Kimani for medical examination by their own neurologist but the response is that they did not think it necessary to subject the said Dr Kimani to a medical examination.
- e. That it is in the interest of justice and fairness that the Court grants the orders sought.

3. In the supporting affidavit dated the 20/7/18 and sworn by Mr. Mohammed Amani Karega, counsel for the Applicant, he deponed from his knowledge of the perusal of documents exchanged from the parties and reiterated the grounds supporting the application enumerated at para 2 above. Further, he added that the Court has power to so grant the orders in the interest of justice and fairness.

4. The Respondent in a swift rejoinder filed the grounds of opposition dated the 20/9/18 in which they raised the following grounds;

- a. This Honourable Court has no jurisdiction to grant the orders (and particularly order No. 1) sought herein.
- b. The Plaintiff is seeking grant of an order of a compelling medical examination of a person which would infringe on the right to privacy, human dignity, and freedom from cruel inhuman and degrading treatment of the person contrary to the provisions of Article

25, 28, 31 of the Constitution without any lawful justification.

c. The Plaintiff is seeking orders of the Court to obtain evidence and to rely on the same in a manner that violates the right and fundamental freedom of the Defendant's director Dr. John Kibunga Kimani contrary to provision of Article 50(1) & (4) of the Constitution.

d. In any event the Plaintiff has not laid out a proper basis in law to warrant this Honourable Court to exercise its discretion and grant of the orders sought.

e. The application is frivolous, amounts to abuse of the due process of Court and is mischievously lodged to delay the expeditious disposal of this old case.

5. The parties elected to prosecute the application by way of written submissions. Both have duly filed their written submissions, which I have read and considered.

6. On the jurisdiction of the Court to grant the orders sought, the Plaintiff submitted that the duty of the Court is to ensure that justice is done and section 3A enjoins the Court to make such orders that are necessary for the ends of justice to be met. In discharging that duty, the Court has discretion to issue procedural orders to ensure effective disposal of the suit in a just manner. The Applicant relied on Order 11 rule 3(2) (e) which allows the Court to order for examination of any witness by an examiner or by issue of commission outside Court for the admission of any such examination as evidence in Court.

7. Quoting the case of **Duvvuri Rami Reddi Vs Duvvudi Papi Reddi & Ors Air (1963) AP 160** as highlighted in the case of **MMM Vs AMK (2016) EKLR**, the applicant stated that where a question of unsoundness of mind arises not only under Order 32, Rule 15 of the Civil Procedure Code but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question and for that purpose seek medical opinion. That the Court may also compel the attendance of the alleged person before it and to submit himself for medical examination.

8. Contending that the status of expert witness is to serve as an opinion and should be brought to Court after an analysis and examination of the situation in the case. That the danger of one party to the suit bringing an expert witness is that the facts may tilt in favour of the party that brought the expert witness. The applicant further argues that expert witness can only be challenged by another expert witness and it is for that reason that the Court should order Dr Kimani to submit himself for medical examination by an expert appointed by the Plaintiff.

9. The Applicant further submitted that if the said Dr Kimani is not subjected to medical examination in order to establish his allegation of mental incapacity, the applicant's right to fair hearing under Art 50 of the Constitution stands prejudiced. That it is clear that the Respondent intends to rely on the medical report dated the 14/2/18 by Dr Mwangemi and it is fair and just that the Applicant be afforded the opportunity to challenge the evidence, which can only be done by an expert witness. To buttress his point on fair hearing, the applicant has relied on the following cases; **Patriotic Guards Limited Vs James Kipchirchir Sambu (2018) EKLR**; **JMK Vs MWM & Anor (2015) EKLR**; **Mbaki & Others Vs Macharia & Anor (2005) 2 EA 206**.

10. The applicant submitted that the medical reexamination of Dr Kimani is not meant to humiliate or breach his privacy. That in any event his medical reports have been produced on record to prove his allegation of mental incapacitation and he should not object to a second medical examination by another expert appointed by the Applicant. That this way the applicant is bound to test the veracity of the allegations by Dr Kimani. His mental state is a subject of challenge and reassessment of the same cannot constitute any violation under the Constitution.

11. The Respondent in opposing the application stated that the applicant is seeking orders of the Court to compel Dr Kimani to appear before a medical expert to be nominated by the applicant. He pointed out that the Respondent seeks to call Dr Mwangemi as an expert witness and has duly filed a medical report on the same dated the 14/2/18. According to the report by Dr Mwangemi, he examined Dr Kimani on 8/3/13 and prepared a report thereto. He has also prepared a report based on the review of documents relating to Dr Kimani prepared by other medical doctors. The Respondent has argued that since Dr Kimani is not a witness in the case he should not be subjected to medical examination as sought by the Applicant. Further it argued that the Court has no jurisdiction to grant the orders sought by the applicant that is to say compel a person who is not a witness to appear for medical examination so as to enable the Applicant rely on the same to prove his case.

12. The Respondent further stated that expert reports are not binding on the Court. They are opinion evidence that are considered along other evidence for the Court to form its own opinion on the matter. Relying on the case of **Amosam Builders Developers Ltd Vs Gachie & Others (2010) EA**, the applicant argued that the Court is still at liberty to reject or accept the evidence of the expert witness depending on the facts and circumstances of the case.

13. The Respondent opined that it is open to the Plaintiff to have the medical reports filed in Court reviewed by another medical expert of their choice, which report they can rely on the opinion in Court. That the applicant has not cited any provisions of the law in the Notice of Motion which expressly gives the Court the jurisdiction to grant such an order against a person who is not a witness in the case.

14. It further argued that in criminal cases where certain offences require medical examinations Court must exercise their discretion judiciously so as not to infringe the rights to privacy, human dignity and freedom from cruel inhuman and degrading treatment of the person contrary to Art 25, 28 and 31 of the Constitution. It relied and quoted extensively on the case of **COI & Anor Vs Chief Magistrates Ukunda Law Courts & 4 others (2018) EKLR** and stated that the Court of Appeal declared such compelled medical examination as unconstitutional and a violation of the petitioner's rights under Art 25, 27, 28 and 29 of the Constitution.

15. The Applicant submitted that there is no compelling reason to warrant the orders sought for medical examination as the application has been made by an Advocate and not a medical expert. The applicant has not stated that there is an expert's view calling for the re-examination

of the said Dr Kimani. That the medical examination sought is for speculative reasons aimed at building the evidence of the Plaintiff and not for a just determination of the dispute before the Court. That in any event under Art 50(4) of the Constitution any evidence obtained in a manner that violates rights or fundamental freedoms in the bill of rights would render the trial unfair and a detriment to the administration of justice.

16. On striking out the medical report by the Respondent, the Respondent argued that the applicant is open to calling their own witness to test the veracity of the testimony of Dr Mwangemi instead of asking the Court to block the evidence and the witness from adducing the said evidence. That the power of the Court to strike out pleadings and by extension documentary evidence must be exercised sparingly and only after the Court considering the quality and the circumstances relating to the offending document. That there are no compelling reasons to support the striking out of Dr Mwangemi's report and by extension barring him from testifying for the Defendant . The Respondent submitted that the application is one of the delaying tactics of the Plaintiff to delay the hearing of the case.

Analysis and determination

17. Having considered the application, the replying affidavit and the rival submissions as well as the totality of the pleadings on record the issues that fall for determination are as follows;

- a. Whether this Court has power to grant the application
- b. Whether Dr Kimani should be examined by a doctor of the Plaintiff's choice.
- c. If Dr Kimani fails to submit to examination whether the Report of Dr Mwangemi dated 14/3/18 should be struck out.
- d. Who meets the cost of the application?

Whether this Court has power to grant the application

18. This is an application geared to shape and direct the course of the prosecution and defense of the case. I say so because the Plaintiff has relied on information given by the Defendant and sought an order of the Court to have Dr John Kibunga Kimani (called Dr Kimani) re-examined medically by a doctor of the Plaintiff's choice. The reason for such prayer is given to be that the Defendant seeks to have Dr Philip Mwangemi to give expert evidence based on, inter alia, his personal examination and treatment of the Defendant 's Managing Director namely Dr Kimani.

19. The order sought by the Plaintiff is of a procedural nature so as to ensure that the Plaintiff has the same advantage of examination (treatment may not be facilitated) of Dr Kimani and make an opinion thereon as Dr Philip Mwangemi has done for the Defendant.

20. Order 11 rule 3 (e) of the Civil Procedure Rules provides as follows;

“ordering the giving of evidence on the basis of affidavit evidence; ordering for the examination of any witness by the issue of Commission outside Court and for the admission of any such examination as evidence in Court.”

21. Further the Civil Procedure Act donates inherent powers under Section 3A of the Court as follows;

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

22. The Court is bound by law in exercise of its jurisdiction to ensure fair and just trial to give such direction as the ends of justice may demand. Such Directions are based on residual and /or inherent jurisdiction of the Court as the arbiter in a dispute between parties. Such power is exercised judicially so as to ensure that the parties before the Court are equal and the case proceeds on equal footing.

23. In these circumstances, the Court finds that it has power to make the orders sought by the Plaintiff.

Whether Dr Kimani should be examined by a doctor of the Plaintiff's choice.

24. The grounds of objection under this heading by the Defendant is that though Dr Kimani is the managing director and majority shareholder of the Defendant , his being subjected to medical reexamination would infringe on his rights under Art 25, 28, 31 of the Constitution without any lawful justification.

25. The said Art of the Constitution provides as follows;

Art 25 (a);

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

Art 28;

“Every person has inherent dignity and the right to have that dignity respected and protected”

Art 31(a);

“Every person has the right to privacy, which includes the right not to have—

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed”.

26. On the contrary, the Plaintiff asserts that facilitating reexamination of the Defendants managing director would prompt fulfillment of the right to a fair hearing as expressed in Art 50 of the Constitution of Kenya.

27. It is noteworthy that the reason why the Plaintiff has filed this application is because Dr Kimani who is the managing director of the Defendant subjected himself at the behest of the Defendant voluntarily for medical examination by Dr Mwangemi and that the said doctor seeks to combine his findings on examination and treatment and medical reports of other doctors into an expert opinion led by a report dated the 14 /3/14 filed in this case. In the report Dr Mwangemi alleges that the said Dr Kimani suffered mental disability so much so that as at the time of negotiating and /or entering into the contract with the Plaintiff he was not able to fully understand his actions. In the circumstances, the Defendant denies that it is bound by the contract signed on 2/7/13 between it and the Plaintiff.

28. It may reasonably be said that the Defendant having sought to rely on the medical condition of its managing director, such director more particularly being the majority shareholder, cannot reasonably be divorced entirely from the Defendant so much so that the said Dr Kimani’s acquiesce to medical examination at the behest of the Defendant would not be reasonably exempted from similar procedure more so when it is not calling for medical treatment by the Plaintiff.

29. That notwithstanding, Dr. Kimani is not listed as a witness of the Defendant. The report by Dr. Mwangemi appears to be expert opinion. He has not given the evidence. Both parties are represented by able counsel. The Court is careful on how to consider such report and evidence. Much as the Court does not find a breach of any human or other rights on Dr Kimani if he is subjected to reassessment of his medical condition, it finds prejudice in the fair trial if Dr. Mwangemi’s report is locked out of the case at the interlocutory stage.

30. Further the order sought by the Plaintiff under this heading is purely to ensure equality of arms before the Court between the parties. It is clearly so because the Defendant seeks to rely on expert opinion relative to Dr Kimani’s medical condition on examination and treatment by Dr Mwangemi, upon which Dr Mwangemi alleges that Dr Kimani had disability at the time of negotiating and or entering into contract with the Plaintiff. The Plaintiff does not accept such state of affairs as true. Given that the matter relates to medical science, examination and treatment of Dr Kimani, it is in the Courts finding fair and just that the evidence on Dr. Dr Kimani be placed on record and he not being a witness, the report be considered alongside other evidence that may be adduced at the trial. The Court finds that a doctor of the Plaintiff’s choice should not at this stage subject Dr Kimani to medical examination.

Whether the Report of Dr Mwangemi dated 14/3/18 should be struck out

31. It is pleaded and submitted on behalf of the Plaintiff that if Dr Kimani fails to submit to re-examination of the Plaintiff choice, the medical report of Dr. Philip Mwangemi dated 14th March, 2018 and filed by the Respondent on 19th March, 2018 be struck out and/or the Defendant/Respondent be barred from relying on its contents at any point of these proceedings.

32. On the contrary, the Defendant submits that the power of the Court to strike out pleadings must be exercised judicially and sparingly. The Defendant indeed does not deny the Court has such powers. It only pleads for exercise of caution.

33. The Court finds that it would be disproportionate to grant the order as prayed in the application at para 2 in its entirety. The reason is because the defence of the Defendant rests on the issue of the medical condition of Dr Kimani. Expunging the documents and evidence may lead to the total annihilation of the Defendant’s case thus condemning a party unheard at an interlocutory stage.

34. As a general rule, evidence by experts being opinion evidence is not binding on the Court. The Court has to consider it along with other evidence and form its own opinion on the matter in issue. The Court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it. (see **C.D. Desouza v B.R. Sharma (1953) 26 KLR 41 at P. 42**). Indeed, if the Defendant would like to rely on Dr. Mwangemi’s report, it is upon it to place necessary real evidence before the Court.

35. Final orders

- a. The application is unmerited. It is dismissed.
- b. The costs shall be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF MARCH, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Situma for the Plaintiff

Malenya HB for Wanga for the Defendant

Irene and Njeri, Court Assistants