



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 221 OF 2014

IRERI NDWIGA.....PLAINTIFF

VERSUS

BEDAN IRERI M'MITL.....DEFENDANT

RULING

1. By a notice of motion dated 15th February 2019 brought under the provisions of **sections 153 and 165 of the Evidence Act (Cap 80), Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and all enabling provisions of the law** the Defendant sought the following orders;

a. That the evidence of Karanja Mathanjuki DW 2 in Criminal Case No. 1514 of 2015 be adopted as his testimony by the honourable court.

b. That the costs of this application be provided for.

2. The said application was based upon the grounds set out on the face of the motion. It was supported by the Defendant's supporting affidavit sworn on 15th February 2019. The gist of the application was that the evidence of DW 2 at the trial hereof was at variance with his sworn evidence in *Criminal Case No. 1515 of 2015, R Vs Bedan Ireri M'Miti* whereby he had testified as a defence witness. The Defendant therefore wanted the court to discard his oral evidence at the trial thereof and replace it with his evidence in the said criminal case.

3. The Plaintiff filed a replying affidavit sworn on 22nd March 2019 in opposition to the said application. It was contended that the Defendant was accorded full opportunity to produce all necessary documents in support of his defence at the trial of the action. It was contended that the application was an afterthought merely intended to circumvent a fair trial at the tail end of the trial process since the suit was already slated for judgement on 11th April 2019.

4. The Plaintiff also opposed the said application on the basis that since the hearing had been concluded, substituting the evidence of DW 2 as sought by the Defendant would be prejudicial to him since he would have no opportunity to test the veracity of the new evidence through cross-examination. The court was, therefore, urged to maintain a level playing field by dismissing the said application.

5. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The record of proceedings shows that both parties herein were accorded an opportunity to bring forward all the necessary documentary and oral evidence at the hearing. The record further shows that the hearing was concluded on 15th November 2018 and the matter was fixed for judgement on 11th April 2019.

6. The Defendant is now seeking to change the rules of the game by seeking to substitute the evidence which DW 2 tendered at the trial of the suit with the evidence he tendered earlier on in a criminal case which is said to be pending before the Chief Magistrate's court at Embu. The court is not persuaded that there is any legal justification for doing so at this stage of the proceedings when the suit is pending judgment.

7. The mere fact that DW 2 did not give the expected evidence at the hearing hereof cannot be a justification for re-visiting and re-opening the hearing for the purpose of securing favourable evidence for the Defendant. The court is of the view that such a course of action would be prejudicial to the Plaintiff who would have no opportunity of testing the new evidence through cross-examination. The court would also be unable to get the benefit of observing the demeanor of DW 2 with respect to the evidence taken in the criminal case.

8. The court has perused **sections 153 and 163 of the Evidence Act** upon which the Defendant's application was based. Those sections are only applicable in the course of an active hearing. **Section 153** allows a witness to be cross-examined on his previous statements whereas **section 163** provides for the impeachment of the credit of a witness. The nature of the instant application is, however, totally different. It is

simply seeking the substitution of the evidence of DW 2 on record with what the Defendant considers to be more favourable evidence tendered in the criminal case.

9. Finally, the court is of the view that apart from merely showing that a witness had made a previous contradictory statement or that a witness is not credible, any statement given by a witness in a prior criminal case is not admissible in evidence in subsequent civil proceedings. It is especially inadmissible for the purpose of proving the truth of its contents.

10. The upshot of the foregoing is that the court finds no merit in the Defendant's notice of motion dated 15th February 2019 and the same is accordingly dismissed with costs to the Plaintiff.

11. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28TH day of MARCH, 2019

In the presence of Ms Nzekele holding brief for Ms Ndorongo for the Plaintiff, Defendant present in person and in the absence of the Defendant's Advocate.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19