



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 85 OF 2005

SILVANO CORSARO.....PLAINTIFF

VERSUS

1. LUIGI FORMICA

2. SAMSKIRT INVESTMENTS LTD.....DEFENDANTS

RULING

1. I have before me a Notice of Motion application dated 2nd May 2017. The Plaintiff/Applicant prays for Orders as follows:

1. That this Honourable Court be pleased to dispense with the attendance of the Plaintiff's witness, one Leonello Anderlini at the further hearing of the suit.

2. That the Court be pleased to allow the Plaintiff/Applicant's remaining witness one Mr. Leonello Anderlini who currently resides in Italy to give his testimony through video conferencing.

2. The said application is supported by an affidavit sworn by the Plaintiff Silvana Corsano on 2nd May 2017 and premised on the grounds that:-

i. The proposed witness is a 79 year old legal practitioner who resides in Italy presently.

ii. The witness is currently undergoing medical treatment in Italy as he suffers from a severe heart disease. He underwent a coronary angio Plasty surgery in June 2013 but the condition has not improved.

iii. The said medical condition has rendered the witness immobile and he is not therefore able to travel to Kenya to give evidence.

3. The application is opposed. By a Replying Affidavit sworn by Maurice Kilonzo advocate and filed herein on 6th February 2018, the Defendants/Respondents aver that the Plaintiff's application is unmentorious, bad in law as it lacks basis and an abuse of the Court process. The Defendant contend that the Plaintiff has not demonstrated good and sufficient reasons why the witness whom they accuse of always avoiding to attend Court, cannot appear before the Court to testify.

4. The Defendants assert that the said witness has avoided Court since 2013 in an effort to hide his demeanour from the Court and the Defendant its right to cross-examine him and establish the veracity of his evidence. They accordingly urge the Court to strike out the Application with costs.

5. I have considered the Application and the Defendant's response thereto. I have equally taken into consideration the oral submissions made before me by the Learned Advocates for the parties.

6. From the record, it is evident that this matter has been in Court for far too long. The Plaintiff and the 1st Defendant were married for 30 years. The couple is now separated. At some point in the course of their marriage, the 1st Defendant acquired Plot No. 631 Malindi. According to the Plaintiff, she later bought a half portion of the said Plot from the 1st Defendant and both the Plaintiff and the 1st Defendant were thereafter registered as tenants in common over the said property on which there now sits a hotel christened Tamani Jua Hotel.

7. A dispute arose between the parties when the 2nd Defendant was said to have purchased the suit property vide an Indenture dated 24th

September 1997. The said Indenture was held out to have been executed by both the Plaintiff and the 1st Defendant on the said 24th September 1997 before one Leonello Anderlini, the witness whose testimony this application seek to have rendered via video link.

8. The unavailability of the said Leonello Anderlini to testify in these proceedings has stalled this case for more than a decade. This matter was partly heard by Ouko J. (as he then was) on 1st March 2006. It last proceeded in Court on 19th September 2006. On the said dates the Plaintiff and one witness were heard. Thereafter the matter was adjourned for one reason or the other until 13th May 2015 when a near similar application like the one before me was made before the Honourable Angote J to dispense with the attendance of the witness and to have a sworn declaration he had made admitted as evidence without calling him to testify and to be cross-examined by the Defence.

9. In a Ruling rendered on 14th September 2016, the Learned Judge dismissed the application. At paragraph 19 of the said Ruling the Learned Judge opined as follows:-

***“Considering that the evidence of Mr. Leonello is crucial to the Plaintiff’s case, and prejudicial to the defence, it will be unjust, unfair and a breach of the rules of natural justice to allow the evidence of Mr. Leonello without giving the Defendants an opportunity to challenge it by way of cross-examination.*”**

10. Some eight or so months after the said Ruling, the Plaintiff brought this application in which he now seeks to have the evidence of the said witness through video conferencing. The Defence is opposed to this application and accuses the witness of avoiding to attend this Court in an effort to hide his demeanour from the Court and to deny the Defendants a chance for face to face cross-examination.

11. The circumstances under which a party may be allowed to provide video evidence in Kenya remain somewhat unclear. In ***Republic –vs- Kipsgei Cosmas Sigei & Another***, Justice GBM Kariuki considered the admissibility of evidence contained in a video recording. The Learned Judge observed, and I do agree, that the absence of specific legislation on video evidence did not outlaw the admission of such evidence. The Learned Judge further observed that when faced with such circumstances, the Court had a duty to adopt a common sense approach (and).....inherent power to do justice in accordance with the law...The Court as the Learned Judge stated, must respond to and keep the pace with the advancements in science and technology and societal Changes.

12. In ***R-V- Mistic (2002) 2 LRC 1***, the New Zealand Court of Appeal, while considering the question whether a computer programme existing in electronic form or the hard disk on which it was recorded were a “document” for the purpose of the law of evidence, observed that a piece of papyrus, a page of parchment, a copper plate or a tablet of clay on which information was recorded were all documents. The document exists because there is a material record of information. The existence of information, rather than the medium on which it was made, was according to the Court, the definitive feature.

13. Indeed it ought to be noted that it is now generally accepted that a tape recording is admissible in evidence provided the accuracy of the recording can be proved, the voices recorded are properly identified and that the evidence is relevant and otherwise admissible. In ***R vs Masqsud Ali (1966) 1 QB 688***, the English Court of Appeal endorsed this position but observed that such evidence “should always be regarded with some caution” and that each case would depend on its own circumstances.

14. It is clear to me that in the acrimonious circumstances of this case in which the Plaintiff and the 1st Defendant separated after living together as wife and husband for 30 years, the Defendants would relish a one-on-one cross-examination with the Plaintiff’s witnesses. However, as the House of Lords observed in the English case of ***R –vs- Davis (2008) UKHL 36***, “even though such face-to-face confrontation with trial witnesses was important, (it) was not necessarily an indispensable element of the constitutional right of an accused person to face his accusers. It thus may be dispensed with where it is necessary for public policy and where the reliability of the testimony is otherwise assured.”

15. Arising from the foregoing and in the circumstances of this case, I am persuaded that a trial by video conferencing is the only way to propel this case forward. Accordingly, I will allow the Plaintiff’s application dated 2nd May 2017 on condition that the Plaintiff shall bear any costs that may arise from and that are incidental to the installation of the procedures necessary for video conferencing.

16. Accordingly the parties are hereby granted 30 days within which to appear before the Deputy Registrar of this Court to agree on the practical aspects of setting up the video conferencing and to deal with any concerns that may arise as to the procedure they intend to use.

17. This matter shall be mentioned before this Court for further directions on 11th December 2018 for further directions.

18. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 31st day of October, 2018.

J.O. OLOLA

JUDGE