



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.43 OF 2009**

**ANTONY ASHLEY BURCH.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**SAMPAT T/A KILIFI ENTERPRISES.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. In the Application dated 5<sup>th</sup> March 2015, the Plaintiff is seeking for the following reliefs:
  - (a) **The Plaintiff's evidence in this matter be produced by way of affidavit.**
  - (b) **The affidavits of Antony Ashley Burch (the Plaintiff) and Colin Roger Burch copies of which are annexed hereto marked "A" and "B" respectively be read at the hearing of this case and the matters set out therein be proved at the hearing by the said affidavits.**
  - (c) **The cost of the Application be provided for.**
2. The Application is premised on the grounds that the Plaintiff and Colin Rodger Burch cannot be procured without unreasonable delay and expenses which expenses may outweigh the relief sought in the Plaintiff.
3. It is the Plaintiff's deposition that he works at Friars Moor Veterinary clinic on a contract basis and any absence from work would mean he losses 2,300 USD Per week.
4. It is the Plaintiff's deposition that if he travels to Kenya, he will need a return air ticket costing at least 1,200 USD and accommodation together with meals of 100 USD per day.
5. Colin Roger Burch deponed that he lives and works in Australia and that he works for two separate companies and runs a small holding with cattle, sheep and an orchard.
6. According to Colin, traveling to Kenya would not only lead to loss of income but also severe disruption, inconvenience and cost to his employers and himself.
7. It is the deposition of Colin that it will cost him USD 3,000 in a return air ticket and transfers if he was to travel to Malindi, amongst other costs.
8. Both the Plaintiff and his witness filed affidavits stipulating their evidence. They also attached documents in support of the Plaintiff's case.
9. The Defendant has opposed the Application.

10. The Plaintiff's advocate submitted that Section 35(1) of the Evidence Act recognises that where the expenses to be incurred to procure the attendance of a witness are deemed to be unreasonable, then a written statement made by the witness can be admitted in evidence without calling the witness.
11. According to counsel, the burden of prove is upon the Defendant to prove that he incurred expenses of Kshs.4,244,515 and the fact that he entered into an agreement with the Plaintiff's parents and Colin Roger Burch as asserted in the Defence and counterclaim.
12. Counsel relied on numerous authorities which I have considered.
13. The Defendant's counsel submitted that the nature of the order sought would deny the Respondent his inherent right to cross-examine the witnesses; that the Plaintiff's claim is very substantial and that the anticipated expenses are not high.

### **Analysis and findings:**

14. In the Plaintiff, the Plaintiff has averred that he was the landlord of L.R. No.1705/22 whereas the Defendant was a tenant paying rent of Kshs.15,000 per month. According to the Plaintiff, the Defendant did not pay rent between January, 2004 until February, 2009 amounting Ksh.930,000.
15. The Plaintiff then issued to the Defendant a notice to vacate the premises on 12<sup>th</sup> January, 2009.
16. The Plaintiff's claim is for Kshs.930,000 being rent arrears and mense profits from 1<sup>st</sup> March 2009 until vacant possession is given. The Plaintiff is also seeking for the costs of the suit.
17. In the Defence, the Defendant has denied that it owes the Plaintiff rent to the tune of 930,000 as alleged.
18. It is the Defendant's case that it paid rent in the sum of Kshs.15,000 per month until March 2009 when it was mutually agreed that all sums incurred by the Defendant on all the developments and renovations carried out on the property in the sum of Kshs.4,244,515 would either be refunded or converted into rent payments.
19. The Defendant is claiming for payment of 3,479,515 in the counterclaim.
20. The Plaintiff and his brother do not want to attend court and testify because doing so would occasion unreasonable delay and expense which expense may outweigh the relief sought in the Plaintiff.
21. According to the Plaintiff's Affidavit, he will incur expenses to the tune of 1,200 USD to travel to Malindi, 100 USD Per day for his accommodation, USD 170 per day to hire someone to work on his holding and loss of income of about 2,300 USD per week for failing to attend work. The Total figure amounts to approximately USD 3,640 if the Plaintiff is to come to the country to testify. That translates to approximately Kshs.364,000.
22. The Plaintiff's whole claim, inclusive of mense profits at a conservative sum of Kshs.15,000 per month from January, 2009 until December 2015 if the matter was to be heard around that period would be approximately Kshs.3,060,000.
23. In addition, the Plaintiff would have his house back if the order for vacant possession is granted. The Plaintiff will also have to defend the sum of Kshs.3,479,515 which the Defendant may be awarded by the court unless he testifies and be cross examined on it.
24. I therefore do not think that the expenses that shall be incurred by the Plaintiff and his witness shall outweigh the relief sought.
25. In any event, I do not see why a Plaintiff would file a suit, and then claim that he cannot testify just because he would incur unreasonable expenses in prosecuting it. He should not have filed the suit in the first place if that was the case.
26. In my view, Section 35 of the Evidence Act does not come to the aid of a party who files a suit and then refuses to testify because of the expenses that he might incur if he testifies.
27. That section is only applicable where a party who files a suit or is sued testifies but an objection is raised on the admissibility of a document in his possession, requiring the maker of the document to attend court and produce it. The proviso to the Section states as follows:

**“Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is in capable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears**

**to the court unreasonable.”**

28. A closer reading of the proviso shows that it only applies in respect to “witnesses” and not parties to a suit. If a Plaintiff died or cannot be found, or is incapable of giving evidence, the law specifically provides what would follow. Such a suit either abates or is dismissed. A suit cannot proceed by way of affidavit evidence where it has been commenced by way of a Plaintiff in those incidences. However, documentary evidence as to facts in issue may be admitted even in the absence of the maker (witness) pursuant to the provisions of Section 35 of the Evidence Act.

29. Consequently, I do not agree with the Plaintiff's advocate submissions that the Plaintiff can “testify” in this matter by way of affidavit evidence just because of the expenses that shall be incurred by him.

30. For those reasons, I dismiss the Plaintiff's Application dated 5<sup>th</sup> March 2015 with costs.

**Dated and delivered in Malindi this 18<sup>th</sup> day of September 2015.**

**O. A. Angote**

**Judge**