



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 309 OF 2020

(Before Hon. Justice Dr. Jacob Gakeri)

YVES PRESSLER.....CLAIMANT

VERSUS

DALUGA INVESTMENTS LIMITED T/A

EASY GYM KENYA.....1ST RESPONDENT

JAMES HOLDEN.....2ND RESPONDENT

RULING

1. Before this Court for determination is the Claimant's notice to produce dated 25th October 2021. The witness expressed to be brought under Section 69 of the Evidence Act, Section 22 of the Civil Procedure Act 2010 and all enabling provisions of law.
2. The notice states that TAKE NOTICE that you are hereby required to produce and show to the honourable Court at the hearing of this claim all documents, letter, copies of letters and other writings and documents in your custody, possession or power containing any entry, memorandum or minutes relating to the matters in question in this suit and particularly: *a certified copy of James Holden's passport showing entry and exit stamps for the last six months.*
3. The Claimant, through an affidavit sworn by his counsel Joseph Waakaba state that the request is grounded on the doubts by the Claimant whether the 2nd Respondent had indeed appeared before a Commissioner of Oaths in New York on 23rd September 2021 when executing the affidavits while a medical report issued on 26th September 2021 in Dubai states the 2nd Respondent required healthcare services including surgery.
4. The Claimant state that initially the aforementioned affidavits had indicated it had been sworn in Nairobi but the name Nairobi cancelled and the affidavit states to had been sworn in New York and the deponent has not countersigned the changes. The Claimant prays that the chamber summons and the replying affidavits sworn on 30th September 2021 be struck off the court's records.
5. The Claimant state that the request for a certified copy of the passport is to confirm whether the 2nd Respondent had travelled to New York.
6. It is submitted that this is a serious character and credibility issue and that there is reason to believe the 2nd Respondent alleged to be in Nairobi on 11th February 2021 but was not in the country.
7. Counsel for the Respondent opposed the application to produce contending that it was designed to pre-empt and discredit his witness even before he took the witness stand. He submitted that the witness is deemed credible until proven otherwise the Court of law. It is Counsel's case that the two applications relied upon by the Applicant were not before the Court for determination. It was submitted that a passport is a personal and private document and ought not be used to pre-empt the credibility of a witness. Counsel sought the dismissal of the notice.

Determination

8. Having considered the application and the rival submissions, the issue for determination is whether the 2nd Respondent should be compelled to comply with the notice of production.

9. Section 69 of the Evidence Act provides;

Secondary evidence of the contents of the documents referred to in section 68(1)(a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases-

- (i) when the document to be proved is itself a notice;**
- (ii) when from the nature of the case, the adverse party must know that he will be required to produce it;**
- (iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;**
- (iv) when the adverse party or his agent has the original in court;**
- (v) when the adverse party or his agent has admitted the loss of the document;**
- (vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;

10. Paragraph 1 of the **Volume 13 of the Halsbury Laws of England** states that-

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

11. Similar sentiments were expressed by Havelock, J (as he then was) in **Concord Insurance Co. Ltd v NIC Bank Ltd (2013) eKLR**.

12. In the words of Kimondo J. in **Oracle Productions Limited v Decapture Limited & 3 others [2014] eKLR**

“Pre-trial discovery is so central to litigation that the entire Order

11 of the Civil Procedure Rules 2010 has been substantially devoted to it, including sanctions for non-compliance. ... The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial.”

13. It is not in contest that the suit herein is at the hearing stage. the veracity of the Claimant’s allegations and the rebuttals by the Respondent will be tested by the evidence adduced in Court and the Court will give appropriate directions during the hearing.

14. While pretrial discovery is central to effective and speedy litigation, a notice to produce during hearing could expedite or impede litigation and should in the Court’s view be allowed in very exceptional circumstances such as when the document could not be accessed during pretrial discovery. It is otherwise disruptive.

15. In the instant case, since the deponent of the affidavit in question will testify as a witness. The Applicant herein will have the opportunity to obtain the information required on oath and through documentary evidence as contemplated by the notice to produce.

16. The Court is satisfied that it was inopportune to allow the notice to produce at this juncture and the notice is accordingly dismissed.

17. The Applicant herein shall have the liberty to make an oral application for the production of the passport when the witness testifies in Court.

18. There shall be no orders as to costs.

19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE