



**Nkarichia v Magiri & 7 others (Environment & Land Case E004 of 2021)
[2023] KEELC 20405 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E004 OF 2021
CK NZILI, J
SEPTEMBER 27, 2023**

BETWEEN

FRANCIS KIRIMI NKARICHIA PLAINTIFF

AND

DAVID NKANATA MAGIRI & 7 OTHERS DEFENDANT

RULING

1. By an application dated September 4, 2023, the court is asked to allow the 2nd defendant to testify in this suit through his son Samuel Mwenda Riungu, whom he has appointed through a special power of attorney. The application is supported by the grounds on its face and the affidavit sworn by M'Ibiri M'Mbogori on September 4, 2023. The 2nd defendant avers that he is 78 years old and suffering from cardiomyopathy as per the medical report attached as annexure SMR – 03 to his affidavit.
2. Similarly, he states that he suffered a stroke recently and has developed some speech difficulties. He urges the court to allow his son to testify on his behalf as per a supplementary witness statement attached as an annexure marked SMR – 04. The rest of the defendants do not oppose the application.
3. Mr Obwanda, counsel on record for the plaintiff, opposes the application because it does not comply with order 32 rule 15 of the *Civil Procedure Rules*. It is a shortcut, and no inquiry has been made to establish that the 2nd defendant is of unsound mind.
4. In a rejoinder, Mr Muthomi, counsel for the applicant, submitted that the medical report does not state any mental infirmity on the part of his client and that the law allows him to testify through a third party. He urged the court to apply the oxygen rule for the ends of justice to be met.
5. On May 11, 2023, the 2nd defendant appeared before the court. Given his apparent age and health, the court dispensed with his further appearance and granted leave to his counsel to file a supplementary witness statement upon obtaining either a special power of attorney or an authority for someone else to testify on his behalf. The court gave the 2nd defendant 30 days to undertake the exercise.



6. On July 27, 2023, the court reluctantly granted the 2nd defendant a last chance to take remedial action within 30 days, the absence of which his defense would be deemed as closed. A mention of September 19, 2023 was set for further directions. No action was taken until September 5, 2023 when this application was filed. There was no explanation as to why the supplementary witness statement was not filed within the time since obtaining leave on May 11, 2023.
7. Order 9 rule 2 of the *Civil Procedure Rules* relates to recognized agents as, among other things, one holding a power of attorney or an affidavit sworn by a party authorizing them to make such appearances to act on their behalf.
8. The plaintiff opposes the application because it offends order 32 of the *Civil Procedure Rules*. Order 9 rule 1 of the Rules thereof allows a party to use a recognized agent to testify on his behalf. A person holding a power of attorney fits under order 9 rule 2 (a) of the said rules as a recognized agent. such a party is also a competent witness under sections 126 – 128 of the *Evidence Act*. See *John Kamau Gachina v Sofia Salim Karama* (2016) eKLR.
9. The applicant relies on a special power of attorney dated September 4, 2023. There is no evidence that the same was registered under section 9 of Kenya's *Registration of Documents Act* (cap 285) within two months after its execution. There is no indication that any stamp duty was paid for it. See *Francis Mwangi Mugo v David Kamau Gachago* (2017) eKLR and *Ummer Suleiman Kara v Maa Zabeen Sidik* (2014) eKLR.
10. As much as the agent is recognized, he has to comply with the law and the document he relies upon to exercise the rights and bind the 2nd defendant has to be in conformity with the law.
11. The upshot is that I found the witness statement filed outside the timelines set by the court such that the 2nd defendant's defense became closed by effluxion of time, yet the order has not been reviewed or the time to file the document extended. The application is dismissed with costs.
12. Parties to proceed to file written submissions within 30 days from the date hereof. Judgment on November 29, 2023.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 27TH DAY OF SEPTEMBER 2023

In presence of

C.A Kananu

Obwanda for the plaintiff

Mageria for Nyamu Nyaga for 1st defendant

Miss Mohammed for Mbaikyatta for 4th – 8th defendants

Muthomi for 2nd defendant

HON. CK NZILI

ELC JUDGE

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