



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 540 OF 2007

STANOVIC MILAN.....1ST PLAINTIFF

JACKSON NG'ANG'A WAWERU.....2ND PLAINTIFF

-VERSUS-

HAYAT AKASHO IBRAHIM.....1ST DEFENDANT

BAKTASH AKASHA.....2ND DEFENDANT

NURI AKASHA.....3RD DEFENDANT

BONIFACE NGATIA IREGI.....4TH DEFENDANT

JOHN KHAMINWA.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1) When this suit came up for hearing on 27th May 2019, Mr. Siro, learned litigation counsel, on behalf of the Hon. Attorney General, the 6th defendant herein, applied for an adjournment to enable him record a witness statement from Boniface Ngatia Iregi, the 4th defendant. Mr. Siro informed this court that the aforesaid individual who retired from the police service had called him to express his willingness to be a witness of the 6th defendant.

2) Mr. Machina, learned advocate appeared as holding brief for Mr. Wandugi for Baktash Akasha, the 2nd defendant herein, too applied for an adjournment on the basis that the 2nd defendant has not given him instructions since he is in custody in the U.S.A over another case pending in the U.S.A court.

3) Dr. Khaminwa, learned Senior counsel (SC) appearing for the 1^s and 3rd defendants supported the application for adjournment made by the two learned counsels arguing that the Attorney General should be given ample time to prepare himself for the hearing of this case. The learned senior counsel also pointed out that it is important for the 2nd defendant to be present in court at the hearing of this case.

4) Mr. Ndambiri, learned advocate for Stanovic Milan, the 1st plaintiff, opposed the application for adjournment by the 6th defendant stated that there is no basis at all. The learned advocate pointed out that the 4th defendant should have filed a witness statement long time ago since he is a party to this suit. Mr. Ndambiri further argued that there is no evidence to show that the 2nd was out of jurisdiction of this court.

5) Mr. Wetangula, learned advocate for Jackson Ng'ang'a Waweru, the 2nd plaintiff herein, opposed the application for adjournment and adopted the submissions of Mr. Ndambiri. The learned counsel stated that the defendants have all along had no desire to proceed with the hearing of this case. He pointed out that on

7th May 2015, all the defendants were given a chance to file witness statements but none has complied with those directions.

6) At the time of writing this ruling, the 2nd plaintiff filed a notice dated 28.5.2019 to withdraw the suit as against the 2nd defendant. However, the suit by the 1st plaintiff as against the 2nd defendant still stands. There is no doubt that Baktash Akasha, the 2nd defendant is being held in custody in the U.S.A and therefore he cannot attend court. He has been sued jointly and severally with the other defendants. If this suit proceeds for hearing in his absence, his right to a fair hearing will have been impaired.

7) The question which keeps on lingering in my mind is for how long will this suit be kept pending because of the 2nd defendant's absence. In order to avoid the matter procrastinating further, parties to this suit will be forced to make hard choices from various options. **First**, the suit as against the absent defendant may be withdrawn. **Secondly**, the case as against the 2nd defendant can be split and kept in abeyance to await his arrival from the U.S.A.

Thirdly, the parties concerned can make arrangements to have the 2nd defendant testify by video link.

8) However, as of now, I am satisfied that Mr. Muchina has put up a strong argument which receives the favour of this to adjourn the hearing of this suit for a limited period to enable parties make hard choices as alluded hereinabove.

9) I have also considered the arguments put forward by the Hon. Attorney General and the responses made in opposition.

10) With respect, I agree with the submissions of Dr. Khaminwa S.C that the Hon. Attorney General is a central player in this saga. The Attorney General participated in the prosecution of the plaintiffs in the criminal case which gave rise to this suit. The evidence from the 5th defendant is very critical in a fair determination of this case.

11) For this reason, I will exercise my discretion in favour of the 5th defendant and have the hearing of this suit adjourned.

Dated, Signed and Delivered at Nairobi this 29th day of May, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants