



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 496 OF 2010

SYLVESTER MUSYOKI KISONZO.....1ST PLAINTIFF

BERIAH WANGARE WARUE.....2ND PLAINTIFF

**(Suing as Administrator and Personal representative
of theEstate of NINA NGINA KISONZO)**

- V E R S U S -

DR. DONALD OYATSI.....1ST DEFENDANT

AGA KHAN UNIVERSITY HOSPITAL.....2ND DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 30.5.2017 taken out by Aga Khan University Hospital, the 2nd defendant herein. In the aforesaid motion, the applicant seeks for leave to call Dr. Mativo to testify in support of its defence in place of Judith Oduge Otieno who has left the employment of the 2nd defendant. The motion is supported by the affidavit of Valentine Situma Achungo. When served, the Dr. Donald Oyatsi, the 1st defendant, filed a replying affidavit to resist the motion. The plaintiffs on their part filed grounds of opposition to oppose the application.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further considered the rival oral submissions of learned counsels. It is the submission of Mr. Mohamed, learned advocate for the 2nd defendant that since Judith Oduge Otieno left the employment of the 2nd defendant, the only available witness for it, is Dr. Mativo. It is stated that Dr. Mativo was not in the initial list of witnesses identified by the 2nd defendant to testify because by then there were other witnesses who had better evidence and knowledge on the case than Dr. Mativo.

3. It is the averment of the plaintiff that Dr. Judith Oduge Otieno is unwilling and or unavailable to testify on behalf of the 2nd defendant. It is said that the 2nd defendant settled on Dr. Mativo because he was involved in the treatment of the deceased hence his evidence is very relevant to this case. It was further pointed out that Dr. Mativo will not raise new issues hence no prejudice will be visited on any party.

4. Miss Mwihaki, learned advocate for the 1st defendant vehemently opposed the application. She

argued that if the application is allowed it will be highly prejudicial to her client, in that her client has already testified. It was pointed out that Dr. Mativo's witness statement was prepared and filed in court after the plaintiff and the 1st defendant had closed their cases. The learned advocate further submitted that the evidence sought to be introduced through Dr. Mativo will change the character of the case before this court. The 1st defendant also submitted that the 2nd defendant has not candidly disclosed when it discovered that its crucial witness had left its employment. Miss Mwihaki further argued that the 1st defendant would not be averse if the witness sought to testify came to court to merely adopt the witness statement prepared and executed by Judith Oduge Otieno pursuant to Order 11 Rule 3(2) c of the Civil Procedure Rules. It was also pointed out that the 2nd defendant has failed to seek for the available remedies under Order 16 of the Civil Procedure Rules.

5. On his part, professor Kiama, learned advocate for the plaintiff also opposed the motion arguing that the same was filed as an afterthought. The learned advocate stated that if the motion is allowed it will make the hearing of this case endless in that it may require the recalling of all the witnesses who have so far testified to testify afresh. It was also argued that the 2nd defendant has not shown the steps it undertook to have the missing witnesses traced and summoned to testify.

6. In response to the submissions of Miss Mwihaki, Mr. Mohamed informed this court that he did not summon with the assistance of the court the witnesses listed in the 2nd defendant's list of witnesses because he feared they would turn out to be hostile witnesses. Mr. Mohamed argued that the 2nd defendant had no mischief when preparing the witness statement of Dr. Mativo.

7. Having considered the material placed before this court together with the rival arguments, I have come to the following conclusions in the matter.

First, it is not in dispute that on 4th April 2012, the 2nd defendant filed a list of 4 potential witnesses dated 29th March 2012, together with the witness statement of Mrs. Judith Oduge Otieno. In the list the following names were put forward as the 2nd defendant's potential witnesses:

1. Dr. John Tole
2. Dr. James Jowi
3. Mrs Jane Wanyama
4. Mrs Judith Oduge – Otieno

8. The witness statement of Mrs. Judith Oduge-Otieno is dated 29th March 2012. It has been stated by the 2nd defendant's advocate that Judith Oduge Otieno left the employment of the 2nd defendant therefore she cannot be secured to testify. When challenged to explain when the 2nd defendant learnt of the unavailability of the aforesaid witness, the 2nd defendant did not give a satisfactory answer. The 2nd defendant failed to show evidence of the steps it took to secure the attendance of their witness. It would appear from the submissions of the 2nd defendant's advocate that Judith Oduge Otieno is unwilling to attend court to testify therefore it is not true that she cannot be traced. In the circumstances, I agree with the submissions of Prof. Kiama that the 2nd defendant made the application to have Dr. Mativo summoned to testify as an afterthought. Mr. Mohamed, learned advocate for the 2nd defendant has expressly stated that he has chosen not to seek the assistance of the court to summon Judith Oduge to testify pursuant to the provisions of Order 16 of the Civil Procedure Rules because he is apprehensive that she may turn out to be hostile to the 2nd defendant's case. I am convinced that having failed to take advantage of Order 16 of the Civil Procedure Rules that the 2nd defendant is not entitled to benefit from the discretion of this court through the current motion. There is no justification at all why Dr. Mativo should testify in place of Judith Oduge Otieno.

9. Secondly, it is apparent from the court file that the 2nd defendant filed the witness statement of Dr. Mativo dated 5th June 2017 on 7th June 2017. By the time of preparing and filing the aforesaid statement both the plaintiff and the 1st defendant had summoned witnesses in support of their cases and had even closed of their cases. Mr. Mohamed, learned advocate for the 2nd defendant was present throughout the hearing and even participated in cross-examining the witnesses. The plaintiffs closed their case on 15th December 2016 while the 1st defendant closed his case on 16th March 2017. It is clear to me that the witness who testified in support of the plaintiffs' case and on behalf of the 1st defendant had no prior knowledge of the witness statement of Dr. Mativo. That statement was prepared and filed long after the aforesaid witnesses had testified. Mr. Mohamed pointed out that the witness statement of Dr. Mativo does not raise anything new therefore no prejudice will be visited upon the plaintiffs and the 1st defendant's case. With respect, I do not agree with Mr. Mohamed's submission. Before the plaintiffs and the 1st defendant closed their cases, the 2nd defendant had only filed a single witness statement of Judith Oduge Otieno, 2nd defendant's erstwhile legal officer. The witness statement filed by Dr. Mativo raises entirely new issues. Some of the issues raised arose during the hearing of the suit therefore, it cannot be said that it is not prejudicial. In my humble view the witness statement of Dr. Mativo is an attempt to controvert evidence already tendered and interrogated through cross-examination. With respect, I agree with the submissions of Miss Mwihaki and Prof. Kiama that the witness statement of Dr. Mativo is highly prejudicial to the case of the plaintiff and to the defence of the 1st defendant hence it should not be allowed to pass.

10. Thirdly, that under Order 11 rule 3(2) C of the Civil Procedure Rules the court has the discretion to order admission of statements without calling of the makers as witnesses where appropriate. In this case the 2nd defendant has not applied for the order to have the witness statement of Judith Oduge Otieno produced pursuant to the aforesaid provision. Even if the 2nd defendant had done so I do not think it would have succeeded because it has not laid the basis to justify the prayer. There is no cogent evidence that the aforesaid witness is unavailable to testify.

11. Fourthly, that it is clear to me that if the order sought is granted, the court will in essence have undermined the purpose and objective of Order 11 of the Civil Procedure Rules. A considerable delay may be occasioned in concluding the dispute.

12. In the end, I find no merit in the motion. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 27th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant