



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA T MERU
CIVIL CASE NO. 307 OF 2013

MARTHA THAIRORA GIKUNDI.....PLAINTIFF

VERSUS

ELIZABETH KANANU.....1ST DEFENDANT

HELLEN NTHIORI M'TIRI.....2ND DEFENDANT

RULING

This application is dated 31st January, 2014 and prays for orders:

1. ***THAT this application be certified as extremely urgent.***
2. ***THAT this Honourable Court do take the 1st Defendant's evidence De Bene Esse***
3. ***THAT this Honourable Court do make any orders in the interest of justice.***
4. ***THAT Costs of this application be provided for.***

The application is supported by the supporting affidavit of the 2nd defendant who avers that she has the authority to appear, sign, plead, file and/or otherwise howsoever deal for and on behalf of the 1st defendant, Elizabeth Kananu.

The applicant's case is that the first defendant is 83 years old, is hypertensive and suffers from depression. A medical report confirming her health status has been availed. The report indicates that the health condition of the 1st defendant is fragile and delicate as in addition to hypertension and diabetes, she has two other serious conditions namely, thyroid disease and osteo-arthritis.

As the plaintiff's claim, according to the defendant, revolves around the evidence of the 1st defendant, the defendants pray that her evidence be heard urgently so that at the end of the day the Court will have everyone's evidence. The application argues that the hearing of the 1st defendant will not prejudice the plaintiff's case in any way.

The plaintiff has opposed the application saying that the threshold required by Order 18 Rule 9 (1) of the Civil Procedure Rules has not been attained so that the 1st defendant can be allowed to give her evidence de bene esse. The plaintiff points out that the 2nd defendant is not leaving the jurisdiction of the Court. It is also submitted that she has not shown sufficient cause to the Court regarding why her evidence should be taken seriously. The plaintiff further opines that nothing could have been easier than for the doctor to recommend in his report that due to her ailments, her testimony needs to be taken on priority basis. The plaintiff suggest that the application is a ploy to delay the expeditious hearing and determination of the case.

The taking of evidence de bene esse is governed by Order 18 of the Civil Procedure Rules. Such

evidence is allowed to be heard on a priority basis in two circumstances. The first is where a witness is about to leave the jurisdiction of the Court. The second is where sufficient cause is shown to the satisfaction of the Court.

After considering the health condition of the 2nd defendant, and in the interests of justice so that the Court will at the end of the day have heard all available evidence before determining the suit, I find that sufficient cause has been shown to the satisfaction of this Court that her evidence should be taken immediately.

Costs shall be in the cause.

It is so ordered.

Delivered in Open Court at Meru this 23rd day of June, 2014 in the presence of:

Lilian/Daniel

Ngunjiri for Defendant/Applicant

Plaintiff not represented

P. M. NJOROGE

JUDGE