



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. EO13 OF 2021

JOHN MUYA MURIITHI.....APPELLANT/RESPONDENT

-VERSUS-

LUCY MUTHONI NJOROGE.....1ST RESPONDENT/APPLICANT

GABRIEL WACHIRA MURIITHI.....2ND RESPONDENT/APPLICANT

RULING

1. By the Notice of Motion dated 2nd July 2021, Lucy Muthoni Njoroge and Gabriel Wachira Muriithi (the Respondents) pray for orders:
 1. Spent.
 2. *That this Honourable Court be pleased to order a stay of proceedings herein for purposes of returning the lower court file from Othaya Senior Resident Magistrates Court MELC No. 4 of 2020 (which forms part of the record in this Court for purposes of this appeal) to that Court to facilitate taking the evidence of one Gabriel Wachira Muriithi who is the 2nd Respondent/Applicant herein.*
 3. *That this Honourable Court be pleased to make any other orders to ensure that justice is done.*
 4. *That the costs of this application be in the cause.*
2. The application which is supported by an affidavit sworn by the 1st Respondent – Lucy Muthoni Njoroge is premised on the grounds that:
 - (i) *The 2nd Respondent is elderly and extremely ill and there is a great chance that dementia may set in;*
 - (ii) *The 2nd Respondent is desirous of having his evidence recorded by the trial court before his circumstances and health render him completely incapable of giving evidence;*
 - (iii) *The trial court file has been brought to form part of the record before this Honourable Court for purposes of hearing this Appeal;*
 - (iv) *It is impossible to take the evidence of the 2nd Respondent without the record being returned to the trial Court;*
 - (v) *The Appellant will not suffer any prejudice as they will get a chance to cross-examine the evidence of the 2nd Respondent in the trial Court; and*
 - (vi) *The orders sought will not affect the outcome of the Appeal.*
3. While the Appellant filed submissions herein on 16th December, 2021 in opposition to the Respondent's application, I was unable to trace either a Replying Affidavit or Grounds of Opposition filed by the Appellant in response to the application.
4. Be that as it may, I have perused and considered the application and rival submissions placed before me by the Learned Advocates for

the parties.

5. The application before me is expressed to be brought under **Sections 1A & 1B (of the Civil Procedure Act)** and **Article 159 (2)(d) of the Constitution**. By the said application, the Respondents urge the Court to stay this Appeal and to return the lower court file to Othaya Magistrates Court for purposes of taking the evidence of the 2nd Respondent who is said to be of extremely advanced age and ill-health.

6. The Respondents assert that due to the 2nd Respondent's advanced age and illness, it has become a concern as his health and mental strength have continued to deteriorate and that he shall be unable to give evidence to assist in the determination of the issues before the court if the matter delays any longer.

7. While the Respondents may have not stated so, it was apparent that what they seek herein is the taking of the evidence of the 2nd Respondent *de bene esse*. Such taking of evidence is contemplated under the Evidence Act as well as in the provisions of **Order 18 Rule 9(1) of the Civil Procedure Rules** which provides thus:

“Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in the manner herein before provided.”

8. In support of their application, the Respondents have annexed a Medical Report dated 24th June, 2021 which gives the age of the 2nd Respondent as 73 years old. The Report from the Nyahururu County Referral Hospital further alludes to the possibility that the 2nd Respondent may be undergoing progressive brain atrophy leading to dementia.

9. That being the case, I was persuaded that the Respondents have shown sufficient cause why the evidence of the 2nd Respondent ought to be taken urgently. I was also persuaded that the taking of such evidence would not be prejudicial in any way to the Appellant herein.

10. Accordingly, I shall grant a temporary stay of the Appeal herein which relates to the refusal of the trial Court to set aside and/or vary certain orders issued in favour of the Respondents and order that the Lower Court file be returned forthwith to Othaya Senior Resident Magistrates Court for the 2nd Respondent's evidence to be taken.

11. This matter shall be mentioned on 10th May, 2022 for further directions.

12. The costs of the application shall be in the Appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY OF MARCH, 2022.

In the presence of:

Mr. Muchiri wa Gathoni for the Applicant

Mr. Kahiga holding brief for Muguku for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE