



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELC CASE NO. 544 OF 2009**

**CHRISTOPHER KIOI**

**NANCY WAMBUI WAWERU(Suing on behalf of the Estate of**

**MWANGI KIOI (Deceased)).....PLAINTIFFS**

**VERSUS**

**WINNIE MUKOLWE**

**JULIA KIRIRA**

**HOPE MUTUAL (sued as the administrators of the Estate of DAVID NYAMBU JONATHAN**

**KITURI (Deceased)).....DEFENDANTS**

**AND**

**LUCY WANJIKU T/A BELLAVINN INVESTMENTS.....INTERESTED  
PARTY**

**RULING**

On 16/07/2013, the plaintiff's case commenced. The plaintiff called one witness Christopher Kio. After PW1 was cross-examined, Mr. Gatonye counsel for the plaintiff applied for leave to be allowed to call a 4<sup>th</sup> witness. Mr. Gatonye alleged that this witness has vital documents which are useful to the court. That his evidence is necessary for completeness of evidence and that the court has primary duty to do justice to parties and avoid technicalities. He further submitted that no prejudiced will be caused to any party as the evidence is brought in good faith and defendants will have time to respond through further statements.

The said application was opposed by Mr. Mwangi for the defendant and Kinyanjui for the interested party.

Mr. Mwangi submitted that the case has began and discoveries are now finalized. He also stated that introduction of new evidence will complicate the case and the court should not allow the case to keep on mutating.

Mr. Kinyanjui also submitted that the plaintiff should not be allowed to prosecute the case by

instalments. He urged the court to reject the application. Mr. Gatonye reiterated that the application is not meant to cover up the loopholes and there was no pre-trial conference done for this case and no directions have been flouted so far.

I have considered the rival arguments. I have considered the pleadings. On 28/2/2011 parties took directions before Judge Mbogholi Msagha. The parties agreed to call oral evidence and parties were to comply with order 11 and have the matter mentioned on 4/5/2011. However there is no indication as to whether the parties complied with order 11 or not. The matter was thereafter set for hearing.

What is clear is that the plaintiff has supplied witness statements to the defendant and interested party. That therefore meant that plaintiff would call three witnesses.

Plaintiff's advocate has applied for leave to be allowed to put in witness statement for a fourth witness. He argued that his evidence is very vital to this case. The same is opposed by the defence.

Before the suits are set down for hearing, parties are supposed to comply with order 11. The essence of order 11 is to assist the court in furthering expeditious disposal of cases. The parties are also supposed to exchange witness statements so that each party can prepare adequately for the case. Mr. Gatonye has applied for leave to bring his fourth witness even though the trial has begun. The plaintiff has yet to call two more witnesses. The matter is set for hearing on 7/11/2013.

Sections 1A & 1B of the Civil Procedure Act deal with the overriding objective of the Act. One of such overriding objective is just determination of the matter. Section 3A also empowers the court to make such orders that would ensure that the end of justice is met. Though ordinarily witness statements should be exchanged before the matter is set down for hearing, I will concur with Mr. Gatonye that courts do not ordinarily operate in a perfect system. The court has a wide discretion to deal with each circumstances of the case to ensure that justice is done.

Article 159 (2) of the Constitution also enjoins the court to administer justice without due regard to technicalities. Having considered all the circumstances herein, I find that granting leave to the plaintiff to bring a fourth witness will not be prejudicial to the defendant and interested party herein. They will have an opportunity to respond to the said statement and there is adequate time between now and 7<sup>th</sup> /11/2013 for defendant to prepare for the case.

Consequently the court allows the plaintiff to bring a 4<sup>th</sup> witness. However, the plaintiff should not prosecute the matter in instalments. Justice will be served if all the parties will have an opportunity to have the evidence against their cause well in advance so that they can prepare adequately. This should be the last witness the plaintiff is to introduce in the mid-stream of the trial.

The court consequently grants the plaintiff leave to bring in a 4<sup>th</sup> witness. The plaintiff to serve the defendant and interested party's counsel with the witness statement of the 4<sup>th</sup> witness within the next 30 days from the date of this ruling so that the other parties can have adequate time to interrogate it and seek instructions from their respective clients. Failure to adhere to the time frame will automatically bar the plaintiff from introducing the said witness.

It is so ordered.

**Dated, Signed and delivered this 23rd day of August, 2013.**

**L.N. GACHERU**

**Kamotho holding brief for Waweru Gatonye for Plaintiff**

**Miss. Akonga holding brief for Kinyanjui for Interested party**

**No appearance for Mr. Mwangi for the Defendant**