



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 51 of 2003

**ESTHER NJERI NGAVANGAGA.....PLAINTIFF
VERSUS**

CATHERINE WANGARE WAINAINA.....DEFENDANT

RULING

By chamber Summons Application dated 26th March 2007 the Defendant prays for the following orders:

- 1. That this application be heard in the first instance.**
- 2. That the honourable Court be pleased to grant the Defendant a hearing.**
- 3. That the Defendant be granted a chance to offer her defence.**
- 4. That costs be in the cause.**

There is an affidavit in support of the Application sworn by Catherine Wangare Wainaina dated 26th March 2007.

The main grounds in support of the application are that the Honorable Court fixed the hearing for the defence on the 19th February 2007. That the Defendant did not attend the hearing because of the death of her mother.

That the court ordered the parties to proceed with submissions thus denying the Defendant a chance to offer her defence. She states that this is a family dispute and the court need to get all the facts.

The Application is opposed by way of a replying affidavit sworn by Esther Njeri Ngavangaga dated 26th March 2007. She states that the Defendant's mother died in January 2007 and was buried on the 6th February 2007. That this could not be possibly a reason for the Defendant not to attend court on the 19th February 2007. She states that on that day she saw the Defendant at Timboroa. That the Defendant does not desire to have the matter finalized. That the application should have been by way of Notice of Motion, is therefore defective and should be struck out.

The parties presented their oral arguments on the 2nd May 2007.

Mr. Momanyi, Counsel for the Plaintiff Respondent submitted that the procedure used in the application is wrong. That the application should have been by Notice of Motion. That for the court to exercise discretion the applicant must show that her intention is not to delay the suit. That the Defendant's mother

was buried on the 6th February, 2007. She should have sent someone to the Court. That the Plaintiff is an old lady and has been dutifully attending court.

Mrs. Wainaina acting in person submitted that she was in Timboroa. Her mother died on the 24.1.2007. She buried her on the 6.2.2007 in Muranga. She states that her grandmother died. That she could not send someone.

I have considered the application, affidavits and submission by counsel.

There is no dispute that the Defendant lost her mother. It is also not in dispute that the Defendant's mother was buried on the 6.2.2007 two weeks before the hearing for the defence case.

Counsel for the Plaintiff submitted that the application is defective because it is in the wrong form. The applicant is not represented by counsel, she is in person. The defect is on form and not substance. In the circumstances I will not strike the application as the defect can be cured.

I am satisfied by the explanation given by the Defendant. I would allow the application. However the Defendant is advised to take her case seriously and observe the court's directives. I hereby set aside the court order dated 19th February 2007. In the light of this delay in this matter I direct that the Deputy Registrar to give the earliest possible date for the defense hearing.

The costs of this application shall be in the cause.

Dated AND SIGNED at Nairobi ON this 23RD day of AUGUST 2012.

M.K Ibrahim
Judge

DATED AND Delivered at Eldoret on this 26TH Day of SEPTEMBER 2012.

ABIGAIL MSHILA
judge.

In the presence of: Momanyi for Plaintiff/respondent
Applicant: Absent