



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 451 of 1998

EZEKIEL KARANJA MUGO & 63 OTHERS PLAINTIFF

VERSUS

DAUDI MBUGUA KIIRU & 5 OTHERS DEFENDANT

RULING

A total of sixty four (64) plaintiffs filed a suit against six (6) defendants in 1998. The case was heard and finalized by Justice Ondeyo and judgment was supposed to be delivered on 26th April 2006. However, judgment was postponed severally and in the cause of time, the trial judge was transferred to another station and subsequently, the Judge retired from the bench. In the course of time, two of the defendants also passed away.

During the hearing, of this application, Counsel for the applicants applied and by consent the application by way of chamber summons which is expressed to be brought under **Order XXIII Rule 4** and **8 (2)** and **Order XVI Rule 10** of the **Civil Procedure Rules** was amended to read **Order XVII Rule 10**.

The defendants have sought for orders that the deceased defendants namely; **Johana Muchono Kariuki** and John **Ruhoo Michwe** be substituted with **Joshua Waweru Mwangi**. They have also sought for orders that the case against **Johana Muchono Kariuki** be revived. And lastly, that the court does proceed with this matter from where it was left by the trial judge, and judgment is written and delivered by another Judge.

The application is premised on the grounds stated on the body thereto and the matters deposed to in the supporting affidavit by **Joshua Waweru Mwangi**. The gist of the application is that the two deceased defendants passed away before judgment was delivered and therefore substitution is necessary. It is also not possible to procure the attendance of some of the witnesses and it will be in the interest of justice that, judgment be delivered by another Judge instead of rehearing the matter which may be time consuming.

Counsel for the defendants/applicants submitted that under **Order 17 Rule 10**

“Where a Judge is prevented by death, transfer or other cause from concluding the trial, in successor may deal with any evidence taken as if such evidence has been taken down by him.”

It is on the above basis that, Counsel submitted that the successor of that Judge should proceed with the matter. Secondly counsel for the applicants submitted that, this being an old case in which evidence was concluded and the proceedings have been typed it will not be in the interest of justice to hear the matter **denovo**. Moreover, two of the defendants who gave evidence have since passed away, the proceedings have been typed and there is no justifiable reason why the plaintiff would object to the matter proceeding from where it was left.

On the part of the respondents, Counsel for the respondents **Mr. Waiganjo** objected to prayer number **3**, that is the matter to proceed from where the previous judge left the matter. Counsel for the respondents was of the view that the matter should be heard afresh for the court to arrive at a fair judgment upon examination of certain demeanor that was displayed by certain witnesses. Counsel relied on the replying affidavit of **Erick Kuria** sworn on *2nd February 2007*. Counsel submitted that he participated on the hearing throughout and there were certain demeanors exhibited by certain witnesses that he would like this court to observe during the re hearing.

Secondly, the applicable provision of the law is **Order 20** which deals with judgments as opposed to **Order 17** which deals with proceedings.

Under **Order 20**;

“A Judge may pronounce a judgment written and signed by another Judge and there is no provision for writing a judgment where a judgment has been concluded by another Judge.”

Thus it was **Mr. Waiganjo’s** view that the present application is misconceived and bad in law.

I have considered the entire rival arguments; the only issue that is contested is whether this matter should be heard *denovo* or where this court should proceed from where **Justice Ondeyo** left the matter and proceed to write a judgment based on the evidence on record.

The only contention by Counsel for the plaintiff, and the reason why he would not like the matter to proceed from where it was left, is because he would like the court to observe certain demeanors by the witnesses. As far as this matter is concerned, no judgment was written by **Justice Ondeyo**. What is before this court is the proceedings that were recorded by Justice Ondeyo and honorable judge left the Judiciary before a judgment was written? The issue is whether this court should now proceed from that point.

In this regard, am of the view that the applicable provision of the law is **Order 17 Rule 10** as there was no judgment on record. Thus, the provisions of **Order 20** do not apply. I am also of the view that considering the age of this matter, the fact that the proceedings have been typed, both parties have been furnished with copies of the proceedings and none of the parties disagree with the correctness of the said proceedings, it is prudent that this matter should proceed from where the previous judge left it.

Mr. Waiganjo opposes this application but he does not contend that the proceedings do not reflect the correct proceedings of what happened in court, his only problem, is that he would like the court to observe demeanor of the witnesses.

I am not satisfied that this is a valid reason for re-hearing the matter if there was a remarkable demeanor that was exhibited by witnesses during the hearing, the same ought to have been noted in the proceedings. I therefore disregard this argument as lacking in merit. The prayer of substitution of the defendants was not opposed and accordingly I allow the application as prayed and cost shall be in the cause.

Ruling read and delivered on this 20th day of April 2007.

MARTHA KOOME

JUDGE