

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 222 of 1997

AZAD KARA.....PLAINTIFF

VERSUS

MWANGI MUTERO.....DEFENDANT

RULING

This suit was partly heard by the retired Justice Ouna. Mr. Gikandi counsel for the defendant, has orally applied that Justice Ouna having taken the evidence of only one witness the case should be heard *de novo*. He also argued that the evidence given before Justice Ouna is important and that witness should testify afresh before me so that I am able to form an opinion on her demeanour.

Miss Osino for the plaintiff has strongly opposed that application arguing that the witness went to Saudi Arabia soon after testifying and that the plaintiff does not have her contact address. To demand that she comes back to Kenya will not only be expensive for the plaintiff but will also delay the hearing. In a quick rejoinder to that Mr. Gikandi said the defendant is ready to pay for her travel to Kenya and back to Saudi Arabia.

The defendant has denied having signed the agreement the witness said she saw him sign. Given the defendant's defence that the cheques he gave to the plaintiff were for a consideration which totally failed, it appears to me that the plaintiff's case is hinged squarely on that agreement. The witness having not been listed as one of those who witnessed the execution of the agreement, it will be her word against that of the defendant. The court hearing the evidence of both of them should therefore have the advantage of observing their demeanour. In the circumstances I direct that this suit be heard *de novo* on condition that the defendant pays the travel from Saudi Arabia and back as well as hotel accommodation charges for the plaintiff's witness who had testified before Justice Ouna. Counsel for the parties to arrange the modalities of paying those expenses before the hearing date.

DATED and delivered this 29th day of September 2005.

D. K. MARAGA

JUDGE