

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC CAUSE NO. 245 OF 2017

FORMERLY NAKURU ELC NO. 318 OF 2011

ENDONYO KETE KUTO GROUP RANCH.....PLAINTIFF

-VERSUS-

MURIKEVEN OLOLMAITANY & 42 OTHERS.....DEFENDANTS

RULING

By a Notice of Motion dated 25th June, 2019 the Applicant sought for orders to substitute its first 3 witnesses to give evidence on their behalf and that the supplementary list of witnesses and their statements be deemed as having been duly filed and served.

The application is based on the grounds that the testimony of the said witnesses will enable the court to effectively and conclusively determine the issue between the parties and further that the intended witnesses they wish to replace have passed on and the only surviving witness has developed memory lapse and can't be a reliable witness. The Applicant further states that the intended witnesses have been authorized by the members of the plaintiff through a resolution of the applicants' General Meeting held on 16/2/2019.

The application was further supported by the affidavit of Mamaiyo Ole Leperes who deponed that he is the chairman of the plaintiff and that as a result of old age he is suffering from temporary memory loss. He further stated that there previously intended witnesses have since passed on. He stated that when he appeared before court on 13/12/2018 he could not remember the facts of the case and hence testify and it will therefore be in the interest of justice to have him and those who passed on be substituted to enable the court determine the issues and not to condemn them unheard.

The application was opposed by the respondent by way of a replying affidavit sworn by Symon Kipkoros Marintai sworn on 15/7/2019 in which he stated that he was in court when Mr Leperes allegedly suffered from memory lapse but contends that he is of sound mind. He further stated that the substitution of the witness is intended to withhold crucial evidence from the court.

I have considered the application before me, the replying affidavit in opposition thereto and the submissions filed. This is an application in which the plaintiff seeks for the substitution of witnesses on grounds that 3 of them have passed on and the only remaining one is suffering from memory lapse. The respondents in their replying affidavit have not controverted the applicants' assertions that the witnesses had passed on and he suffers from memory lapse and in any event the respondents will not suffer any prejudice in the event that the said witnesses are substituted since they will have the opportunity to cross examine the said witnesses and put them to test on the veracity of their testimony.

In view of the above I find that the Notice of Motion dated 24th June, 2019 is merited and I thus allow the application accordingly. I further direct that the witness statement of the intended witnesses be served on the respondents within 14 days.

DATED, SIGNED and DELIVERED ONLINE at NAROK on this 16th day of February, 2021.

Mohammed N. Kullow

Judge

16/2/2021

In the presence of: -

CA:Chuma

Mr Kenani for the defendant

Mr Nanda for the plaintiff/applicant

Mr Waweru for the intended interested parties