



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC NO. 241 OF 2017**

**PAULINE RIGIRI MUTHIORA.....PLAINTIFF**

**VERSUS**

**ZACHARY MURIKI JOSEPH.....DEFENDANT**

**RULING**

1. On 3.11.2020 DW 1, the defendant was in the course of giving his testimony when his advocate made an application for the statement of a witness by the name Mbororoki recorded on 9.10.2017 to be produced as evidence. Mr. Thangicia counsel for defendant informed the court that the said witness fell sick and died. He contended that the law of evidence provides that if a witness is unavailable due to circumstances like death and where such a person had made a statement in relation to a matter before court, then the court may consider adopting the statement. He further stated that no prejudice will be occasioned upon the plaintiff.

2. In response Mr. Kiogora for plaintiff stated that the defence side knew that their witness was old and they ought to have applied for the witness to testify de benese. That the defence could also have applied for substitution of the witness, that they were not notified of the impending application and that no evidence of death like a death certificate has been availed.

3. It was further argued that DW 1 will not be adequately cross examined on the said statement, that the court will not be able to observe the demeanor of the witness who recorded the said statement and that this kind of situation is not envisaged under the evidence act.

4. I have considered all the arguments raised herein. The statement which the defence desires to produce can only be admitted vide the statutory created exceptions which are to be found under **Section 33 of the Evidence Act**.

5. The said section provides that:

*“Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases.....”.*

6. In the case of **Ngoingwa Company Limited vs Dorcas Wanjiku Ikiru (2018) eKLR**, a similar issue arose and the court considered that the statement sought to be produced was within the subject (b) *“when the statement was made by such person in the ordinary course of business”*.

7. It follows that a basis must be laid to apply for the production of statement of a deceased person and in particular, an applicant ought to mention the specific exception set out under paragraph a- h in **Section 33 of the Evidence Act** in order to succeed in the application of this nature. The defence has failed to mention the specific exemption which would warrant the issuance of the orders sought.

8. I find that the application made by the defence is not merited and the court declines to adopt the statement of Mboroki as evidence herein.

**DATED, SIGNED AND DELIVERED AT MERU THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties in open court on 3.11.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**