



Sakaja v Sakaja (Land Case E005 of 2024) [2025] KEELC 388 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
LAND CASE E005 OF 2024
MN MWANYALE, J
FEBRUARY 6, 2025**

BETWEEN

NASIEKO ENE SAKAJA APPLICANT

AND

PRISCILLAH KOILA SAKAJA RESPONDENT

RULING

1. Before court for determination is the Application by the Defendant dated 19.09.2024 seeking to have the Plaintiff's evidence taken *De Bene Esse* as the Plaintiff is now aged 102 years old and with deteriorating health, and the Plaintiff to be granted leave to comply with order 11 after her evidence is taken.
2. The grounds in support of the application are interalia,
 - i. That the Plaintiff is at advanced age and
 - ii. her health is deteriorating and suit revolves around the sole evidence of the Plaintiff.
 - iii. The Plaintiff has not complied with Order 11 while the Defendant has already complied. It is vital to take the Plaintiff's evidence so that everyone's evidence is on record.
3. The application is further supported by the supporting affidavit of the Applicant who deposed and reiterates the grounds in support of the application and has annexed annexure PKS 1 a copy of the National Identity card of the Plaintiff.
4. In opposition to the application the Plaintiff/Respondent has filed a Response by way of a a Replying Affidavit, in which she deposes that on the 16th September 2024, before this application was filed, she had donated a specific power of Attorney, which is yet to be registered; hence there is no need to compel her to testify noting that the done will be at hand to testify in the matter. She annexed a copy of the power of Attorney authorizing her son to testify n court on her behalf.



5. The Applicant in brief written submissions, argues the court to allow the application as the power of Attorney was filed as an afterthought, she placed reliance on order 18 of the Civil Procedure Rules on the circumstances where evidence *de bene esse* can be taken, as well as her decisions in the cases of Martha Thairora Gikundi, v Elizabeth Kananu and Another (2014) eKLR, as well as Mmucheeke Murianki v Phinehas Micheni Mucbeke and Another 2016 (eKLR). On the strength of the above the Applicant urges the court to allow the application.
6. In Response, the Respondent submits that the Respondent is taking great exception to the instant application as the same seems to pre-empt her demise.
7. The Plaintiff/Respondent submits that the application before court is not her application, the evidence she wishes to produce has been taken care of by way of the power of Attorney, hence no prejudice would be occasioned. The Respondent cites the decision in the case of Center for Rights Education and Awantets and Another v John Harun Mwau and 6 Others (2012) eKLR on the definition of *de bene esse* and submits that the instance application be dismissed.
8. Upon analysis of the application the court frames the sole issue for determination as to whether the application is merited.

Analysis and Determination

9. Indeed, Order 18 Rule 9 envisages a situation where a witness may be heard on priority basis in two instances,
 - i. Where a witness is about to leave the jurisdiction of the court or
 - ii. Other sufficient cause.
10. In our present application, the witness is elderly and her health is deteriorating which may be a sufficient cause noting that the witness is not leaving to jurisdiction of the Court. The said witness has however exhibited a power of Attorney donating powers to her son to testify on her behalf.
11. In that regard the court finds that upon filing of the power of Attorney, the very nature of the testimony by the witness as contained in her witness statement filed in court shall be adduced by the donee and hence the court shall be able to get all the evidence by the parties.
12. Consequently, the court finds that the option the Plaintiff has taken to donate a power of Attorney to a witness to testify on her behalf to be sufficient and the same shall negate the attendance of the Plaintiff to testify in court either *de bene esse* or otherwise.
13. Allowing this application will be to allow the Defendant to determine the manner in which the Plaintiff intends to prosecute her suit.
14. Accordingly, the court finds the application not to be merited in view of the depositions as to the willingness of the Plaintiff to donate a power of Attorney to her son to testify.
15. The application thus fails and dismissed with costs in the cause.
16. In order to address the Defendants concern of non-compliance with order 11 by the Plaintiff, the Plaintiff is granted 28 days from today to: -
 - a. File all the relevant witnesses' statements they intend to rely on.
 - b. File the power of Attorney donating the power of Mr. Leshan to testify on behalf of Nasieku Ene Sakaja, and any other documents they intend to rely on.



- c. Failure e to which the matter shall proceed based on the statements and documents currently on record.
- d. Mention on 10.03.2025 for compliance and upon confirmation of compliance pre-trial conference.

DATED AND DELIVERED AT KILGORIS THIS 6TH DAY FEBRUARY OF 2025

HON. M.N. MWANYALE

JUDGE

In the presence of:

Mr. Shira for the Plaintiff/Respondent

Ms. Wekesa for the Defendant/Applicant

C/A Emmanuel/Slyvia

