



Nyongesa v County Government of Trans Nzoia (Environment & Land Case E021 of 2023) [2025] KEELC 2881 (KLR) (12 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E021 OF 2023
CK NZILI, J
MARCH 12, 2025**

BETWEEN

ELIZABETH NASIMIYU NYONGESA PLAINTIFF

AND

COUNTY GOVERNMENT OF TRANS NZOIA DEFENDANT

RULING

A. Application

1. The court is asked by an application dated 20/2/2025 to take the testimony of the plaintiff/applicant, who is ailing de bene esse, and to inspect the suit land. The reasons are contained on the face of the application and in a supporting affidavit of Elizabeth Nasimiyu Nyongesa, sworn on 19/2/2025.
2. The applicant deposes that the matter came up on 19/2/2025 when only two of her witnesses testified, and the court was unable to take her evidence until a ruling in an application brought by the respondent, due on 19/3/2025. The applicant avers that she is currently unwell and unable to physically attend court, for she is bedridden and depends on a constant supply of oxygen. She attached a medical report as annexure EN'1'.
3. Equally, the applicant deposes that on 19/2/2025, she addressed and brought to the attention of the court her condition with a desire to testify immediately, but directions were issued that had she made a request earlier in the day, she could have been allowed to testify. The applicant avers that she has now moved the court in good faith and in the interest of justice and fairness. The applicant deposes that considering her medical conditions and the circumstances of the case, her desire is to be heard and to give evidence immediately, lest she suffers irreparable loss and damage. The applicant deposes that there will be no prejudice to the respondent if her application is allowed for the end of justice to be met.
4. The application is opposed by the respondent through a replying affidavit sworn on by Truphose Amere dated 25/2/2025 for being incompetent, lacking merits, fatally defective, an abuse of the court



process, a delaying tactic and or an afterthought. Further, the respondent deposes that the application was brought in bad faith, is an escapism, and as an ambush in which the plaintiff intends to evade cross-examination by the Land Registrar. The respondent deposes that the medical letter attached refers to an operation that was to happen five years ago, yet she is still talking well, only that she wants to cloud the court with emotions.

5. The respondent deposes that there is a pending ruling for an application seeking to join the Land Registrar Kitale to the suit, which should be determined first; otherwise, the applicant is fit to stand trial if she can still sign the supporting affidavit, and given the letter attached does not specify how many more days the plaintiff is remaining with in this world to live.
6. Further, the respondent deposes that the applicant is acting on mere assumption and or speculation that she may not be alive at the hearing, which if the application is allowed, will impact its right to a fair hearing. The respondent deposes that in the event the fear by the applicant was to happen, there are avenues under the *Law of Succession Act* to deal with the issue.
7. In view of the foregoing safeguards by the law, the respondent deposes that the court should not entertain matters of life and death, which are natural and should be left to the Almighty God to decide and not man. The respondent deposes that it fails to find the connection between the prayers sought and for this court to inspect the subject land, yet there is no dispute that it is under the occupation of the applicant. The respondent deposes that from the medical letter, it is clear that the applicant needs to take time and heal to be able to stand, so as to withstand cross-examination.

B. Submissions

8. The applicant relies on written submissions dated 25/2/2025. It is submitted that the applicant is currently critically ill and of imperfect health; unable to attend court physically, yet desirous to testify virtually going by the medical report attached, showing that she has lung cancer and is of advanced age, 75 years and due for admission to hospital on 5/5/2025. Reliance is placed on Mukhwana -vs- Sawenja & Another (ELC No. 60 of 2019 [2022] KEELC 2346 [KLR] (12th July 2022) (Ruling) and M'Mucheke M'Muriani -vs- Phinehas Micheni Mucheke & Another (2016) eKLR.
9. The defendant relies on written submissions dated 25/2/2025. It is submitted that the applicant does not intend to leave the jurisdiction of this court and brings her application on the basis of ill health. Regarding this ground, the respondent submits that the medical letter shows that the applicant has been recuperating for the last 5 years, with no evidence that her health is deteriorating or whether she has been admitted to any hospital. Further, the respondent submitted that the medical letter is an afterthought, calculated to sway the court's emotions, given that the health status of the plaintiff has never been brought to the attention of the court.
10. The respondent submitted that the two expert witnesses were called to testify based on a compromise by the parties upon directions being given for an adjournment, and the suit to await the ruling of the application to join the intended defendant in the suit, which directions have not been set aside, varied or appealed against. Reliance was placed on Kuria -vs- Registered Trustees of Catholic Diocese of Nyeri & Others (Civil Appeal E001 of 2022 92024] KEHC 4060 [KLR] (20th April 2024) (Judgment) and KCB -vs- Specialized Engineering Co. Ltd [1982] eKLR. The respondent submitted that the applicant had exhibited sideshows to distract the court from exercising its mandate.
11. On the second prayer, the respondent submitted that it is aimed at derailing the investigation of the title and supporting documents by the Land Registrar, which they suspect is a well-orchestrated scheme hell bound on curtailing or derailing the said investigation of her title. The respondent submits that the dramatization and demeanor of the applicant and her counsel on record on 20/2/2025 should not



go unchecked; there is a need for the court to assert its dignity and chastise the two, for both must be honest to the court at all material times more so, the learned counsel for the applicant who is an officer of the court.

12. In addition, the respondent submitted that there is a great danger if the applicant were to testify before the pending ruling is delivered for the intended party to have a chance to cross-examine the applicant, who is a key witness. The respondent submitted that the court should be left to exercise its mandate without undue influence or an arm-twisting of its powers, for justice must not only be done but must also be seen to be done. The respondent submitted that for the scale of justice to balance, both parties should be given a fair chance, and the applicant must withstand trial at the dock.

C. A Brief History of the Matter

13. The applicant came to this court under a certificate of urgency. On 19/4/2023, temporary orders of injunction were issued restraining the defendants from interfering with quiet possession by the applicant over LR No. 2116/276, pending the hearing of the application. Come to the interpartes hearing on 26/4/2023; the court was told that the suit premises were demolished despite the court orders. The interim orders were extended until 15/6/2023. In the absence of a replying affidavit, the application dated 17/4/2023 was allowed in terms of prayer numbers 3 and 5, until the hearing and determination of the suit.
14. Regarding the application dated 25/4/2023 and a preliminary objection, the same were listed for hearing on 26/6/2023, later on 12/7/2023 and on 17/7/2023. There was no appearance on 17/7/2023, another date for 24/7/2023 was issued, and parties were directed to put in written submissions. Further, on 28/9/2023, the preliminary objection was listed for hearing on 18/10/2023. By a ruling dated 23/1/2024, the court found the County Secretary guilty of contempt of court and ordered her to appear for mitigation and sentencing. It also rejected the preliminary objection dated 14/6/2023. The County Secretary was to appear in person on 8/4/2024. By a ruling dated 3/10/2024, the contemnor was fined Kshs.100,000/=.
15. On 28/11/2024, the defendant was ordered to file a defence, and come 9/12/2024, the court directed parties to comply with Order 11 of the Civil Procedure Rules. A mention date was given for 16/1/2025 to confirm compliance. A hearing date was issued on 16/1/2025 for 19/2/2025, when the respondent applied for an adjournment in view of an application to join a third party. Both counsels, after the directions were issued to adjourn the matter subject to payment of costs, applied to vary the court order and asked the court to take the evidence of the two expert witnesses since they could not agree on the costs payable. Two witnesses proceeded to testify as PW1 and PW2. The court, in that consent, was not told that the plaintiff was also critically ill such that her evidence needed to be taken on a priority basis. It was only after the court was about to rise at about 1:30 p.m. that it noticed a party who had been virtually logged in since morning.
16. Soon after explaining the reason for the adjournment to her, the plaintiff pleaded with the court to be heard. The court told the plaintiff that was not possible in view of the earlier orders and the consent of the advocates. Equally, the court had not been notified since morning, of the medical report which had been sent to the Deputy Registrar by the plaintiff.
17. Furthermore, in the many instances I have indicated the matter came for mentions or hearing, since the inception of the case, there is nowhere that the applicant's counsel had disclosed his medical condition before the hearing date.



18. Indeed, the letter dated 12/2/2025, which was sent to the Deputy Registrar forwarding the medical report, had only sought for the plaintiff to be allowed to testify virtually and not for her evidence to be taken on a priority basis in view of an alleged critical illness.

D. Legal Framework on De Bene Esse

19. Order 18 Rule 9(1) of the Civil Procedure Rules grants the court the power to take evidence de bene esse. An applicant has to show sufficient cause to be allowed to offer their evidence on a priority basis. There are two circumstances in law when such an application can be made. One is where the witness is about to leave the jurisdiction of the court. The second one is where sufficient cause is shown to the satisfaction of the court. See *Martha Thairora Gikundi -vs- Elizabeth Kananu & Another* [2014] eKLR.
20. The applicant says that she is critically ill, and her evidence should be taken on a priority basis. She relies on a medical report dated 31/1/2025 by Dr. Jesse Opakas. The respondent faults the medical report, for it refers to a condition that the applicant has had since 2019. Further, the respondent submits that the applicant has not met the threshold under Order 18 Rule 9(1) of the Civil Procedure Rules, guided by the case law of *Kuria -vs- Registered Trustees of Catholic Diocese of Nyeri & Others (Supra)* and *KCB -vs- Specialized Engineering* [1982] KLR, since the consent to proceed with the two experts' reports did not include the plaintiff and has not been varied, set aside or vacated.
21. On the other hand, the applicant urges the court to find the test met going by the caselaw of *Mukhwana -vs- Sawenja & Another, (supra)*. The respondent submits that the fear by the plaintiff is far-fetched, and if allowed to testify before the ruling, there will be prejudice to them, particularly the incoming party, if the application is allowed.

E. Disposition

22. It is quite unfortunate that the parties herein have gone beyond the issues raised in the application and purported to address extraneous matters. Parties must stick to the real issues in controversy and not cast aspersions on each other. Whereas it is not mandatory in law for a plaintiff to attend court to testify in support of their case, as held in *Hagos Birikirti Tewoldenrehan & another -vs- Evans Ihura & another* [2020] eKLR, a plaintiff is bound to produce evidence in support of the issues he is supposed to prove. The evidence may also be produced by any other competent witness or he can prove his case by any other legal means or arguments as held in *Julianne Ulrike Stamm -vs- Tiwi Beach Hotel Limited* [1998] eKLR. So, the contention by the respondent that the plaintiff must attend court whether sick or not is not the correct position of law. The plaintiff remains a competent but not compellable witness. Equally, the plaintiff is at liberty to request for her evidence to be taken de bene esse.
23. Again, casting aspersions on whether the medical report says how much life she had left in this world and averring on oath that only God can determine if she deserves to be allowed to testify and not man, was stooping too low on the part of the County Secretary when the law under Order 18 of the Civil Procedure Rules grants this court powers to determine based on sufficient cause, whether to admit the evidence de bene esse or not. The discretion remains to the court and not the parties whether the circumstances of the matter allow for the taking of the evidence on a priority basis. The discretion is to be exercised judiciously and not on whim. Not all circumstances qualify for the discretion to be exercised as held in *Martha Thairora Gikundi -vs- Elizabeth Kananu & Another* [2014] eKLR.
24. In *Evanson Mwangi Kihumba -vs- Evelyne Wamuyu Ngumo & Others* [2017] eKLR, the court observed that simply because a party had described himself as of sound mind did not mean he was not susceptible to adverse medical conditions. The court observed that although there are alternatives, the best evidence rule requires oral evidence in judicial proceedings which should be direct evidence,



within the meaning of Section 63 of the Evidence Act and that there were no good reasons for the court to opt for hearsay evidence, later on when direct evidence is available.

25. In this suit, the court is aware that the cause is between the plaintiff and the defendant. None of the parties can prejudice the mind of the court on how the pending ruling will go, to purport to talk on behalf of a non-party to the suit on how it was likely to be prejudiced if the applicant were to testify on a priority basis.
26. The respondent has not demonstrated what prejudice it will suffer if the applicant is allowed to give her evidence. Further, there is no rival medical report to show that the applicant is not sickly or critically ill. More importantly, the applicant's medical report is not specific and does not recommend the taking of the evidence on a priority basis, given specific and critical surrounding circumstances. The medical report does not describe the health status of the applicant, such that the evidence should be taken immediately and cannot wait for the delivery of the ruling on 19/3/2025.
27. Therefore, I find that there are no exceptional circumstances to warrant immediate taking of the evidence before delivery of the ruling.
28. Coming to the inspection of the suit land, the basis for the application has not been laid. The parties had time to comply with Order 11 of the Civil Procedure Rules. No request for a site visit was made. Parties must place material before the court in support of their case. The court has no basis except in exceptional circumstances, to go on a fact-finding mission, as held in *Parkire Stephen Munkasio & 14 others -vs- Kedong Ranch Limited & 8 others* [2015] eKLR. It is not stated how the site visit or inspection will assist the court in understanding the dispute better. Prudent use of judicial time is critical in the dispensation of justice. The inordinate delay in making the application has not been explained.
29. I agree with the respondent that the application was an afterthought. It is dismissed with no order as to cost.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 12TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - Laban

Mr. Masika for the plaintiff present

Mr. Orige for the defendant present

HON. C.K. NZILI

JUDGE, ELC KITALE.

