



REPUBLIC OF KENYA



KENYA LAW
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**Mukhwana v Sawenja & another (Environment & Land Case
60 of 2019) [2022] KEELC 2346 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 60 OF 2019**

FO NYAGAKA, J

JULY 12, 2022

BETWEEN

JACKTON SIUNDU MUKHWANA PLAINTIFF

AND

PROTUS SAWENJA 1ST DEFENDANT

JOHN WAKOLI SAWENJA 2ND DEFENDANT

RULING

1. The Application dated March 23, 2022 and filed on March 24, 2022 is that of the 1st Defendant. It was brought under Sections 3, 3A and 23 of the [Civil Procedure Act](#) and Order 18 Rule 9 and Order 51 Rule 1 of the [Civil Procedure Rules](#) and “all enabling provisions of law.” It seeks the following reliefs:
 - (1) ...spent.
 - (2) That the Honorable Court allows taking of oral evidence of one Henry Wenga’nga’ Opicho immediately on such manner as the court may direct.
 - (3) Costs be in the cause.
2. The Application is supported by the grounds on the face of it and by Affidavit of the 1st Defendant. The gist of the Application is that the Plaintiff was in the process of giving his evidence when the suit was stayed pursuant to orders issued in Petition No. 71 of 2019. The Defendant’s case is yet to commence. The said Henry Wenga’nga’ Opicho, one of the 1st Defendant’s witnesses, is the sole surviving director of Birunda Farm Limited. He is, however, senile and becoming older with time. In support of Henry Wenga’nga’ Opicho’s evidence of age and ill health, the Applicant annexed and marked PS1 and 2(a), (b), and (c) a number of copies of documents namely, the said individual’s ID card, lab test, x-ray report and prescription note respectively. In light of the circumstances, and since his evidence is critical, the 1st Defendant asserted that it was in the interest of justice and fairness that his evidence be taken down, the



orders in Petition No. 71 of 2019 in subsistence notwithstanding. His evidence would assist the Court to effectively and fairly determine the suit. It was further stated that no prejudice would be occasioned on the Plaintiff if the orders sought are granted.

3. The Plaintiff opposed the Application by way of a Replying Affidavit on April 4, 2022. It was filed on April 20, 2022. It was the Plaintiff's view that the 1st Defendant sought preferential treatment since the stay orders have not been disturbed. He questioned why the 1st Defendant only sought for those orders in the present suit yet the said witness would testify in other cases touching on Birunda Farm. The Plaintiff pitted against the Applicant that all witnesses of the Plaintiff were equally crucial including the County Land Registrar and the Officer Kiminini Land Control Board, who were yet to testify. Since all witnesses in his support had not testified, it was deposed that the taking of the testimony of the 1st Defendant's witness would occasion prejudice on his case.
4. He challenged that he is worse of elderly and ailing accusing the 1st Defendant's witness of aggrandizing his senility. He deposed that the intended elderly witness, Henry Wenganga Opicho, was "extremely strong at the village and walks on his own and only feigns sickness and frailty..." He then stated the even he himself was sickly and with a deteriorating health. He annexed a copy of his ID card, medical records and treatment notes marked JSM1A, JSM1B and JSM1C respectively to evidence that he too was not in good health. He then stated that the evidence of the said Henry Wenganga Opich would be prejudicial to him if taken at this stage before he gave his as a Plaintiff.
5. He the recalled that an interim injunction was issued on 18/05/2020 (JSM2) and subsequently injunction relief granted in his favor on 04/09/2020. He annexed the Ruling and Order as JSM3A and JSM3B respectively. These Orders, the Plaintiff maintained, were disobeyed by the 1st Defendant who, he accused, is in contempt of court proceeding. For this proposition he annexed and marked photographs JSM5, JSM6, JSM7A, JSM7B, JSM7C and JSM7D. He accused the 1st Defendant of making recordings during court sessions and using them to cast aspersions on the Plaintiff. He urged this court to dismiss the Application.

Submissions

6. The Court directed that the Application be canvassed orally. Although the 1st Defendant was called to the witness stand, he did not submit on the present Application. The Plaintiff also failed to submit on this Application. I will now determine the same on the strength of the Application, the grounds and Affidavit in support as well as the one in Reply.

Analysis And Disposition

7. The Application is anchored on Sections 3, 3A and 23 of the *Civil Procedure Act* and Order 18 Rule 9 as well as Order 51 Rule 1 of the Civil Procedure Rules. However, all the other provisions except Order 18 Rule 9 of the Civil Procedure Rules are basically not relevant, leave alone the blanket meaningless phrase stated as "all enabling provisions of law." The germane provision is that under Order 18 Rule 9. The said rule provides for the taking of evidence de bene esse. This is evidence taken in anticipation of, particularly, the future exception. It is evidence received by the Court outside of the usual processes of the laid down steps of who testifies before the other and at what stage of the proceedings. Thus, its taking dislodges the fixed usual processes of taking evidence and sticks out to single out itself as needing of being treated as an exception to the norm. Of evidence de bene esse Court have had a few things to say.



8. In *Martha Thairora Gikundi v Elizabeth Kananu & another* [2014] eKLR the learned judge stated as follows:

“As for taking the evidence of the plaintiff and defendant urgently to pre-empt its being lost in the event that they cease to live before the suit is heard and determined, I have the following to say:

1. De bene esse evidence is conditional, provisional and in anticipation of a future need. In certain cases, courts will embrace that evidence be taken outside the orthodox route to prevent its being lost through the demise of a party or prolonged absence of a party.
2. In Kenya, De bene esse evidence is embraced by Order 18, Rule 9 (1) which states: “where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after institution of the suit, take the evidence of such witness in the manner herein before provided.”

9. In *M'Mucheke M'Muriani v Phinehas Micheni Mucheke & Another* [2016] eKLR, the Court stated that “...the aim of the application is to hear de bene esse the evidence of the Plaintiff who is 87 years old and sickly. The Court finds that the application is meritorious.”

10. In essence, the Court has to weigh the circumstances of each case. Not all cases qualify for the taking of evidence de bene esse. The party (ies) have to place sufficient material before the Court to warrant the grant of such an order. The purpose of the Court is to administer justice to all parties irrespective of “race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth” and the such like reasons as, as the law may provide, in addition to those stipulated under Article 27(4) of the 2010 *Constitution* regarding grounds of discrimination. But where it is shown that the exigencies of the case demand that a party is given preferential treatment, as long as it does not prejudice the interests and cases of the other parties, the Court should exercise its discretion and grant the Application. The danger of losing the evidence held by a party’s witness due to illness, death or other condition of impairment that is likely to result and deny the Court the opportunity to access the evidence is good and sufficient reason to base the grant of the order sought.

11. Where an Application of this nature is made, an Applicant has satisfied one of either the following requirements:

- (a) Where a witness is about to leave the jurisdiction of this court; or
- (b) Other sufficient cause is shown to the satisfaction of the court.

12. According to the 1st Defendant, the Application is not brought because the said Mr. Henry Wenganga Opicho is about to leave the jurisdiction of the Court: he is within it as long as God grants him life. The argument the Applicant poses in support of the Application before the Court is that the said witness, namely, Henry Wenga’nga’ Opicho is of advanced age with deteriorating health. Indirectly, the Applicant is stating that he is apprehensive that the said Mr. Henry Wenganga Opicho may, God forbid, die soon or be in a mental condition that he will not be in a position to testify, hence depriving the Court of his vital evidence.



13. I have looked at the relevant witness's Identification Card copy, marked as PS1. It discloses that the intended witness is eighty five (85) years of age. I have also considered the medical evidence presented hereto and marked PS 2b. It is dated March 30, 2021, about one year before the Application was made. It was issued by Perazim Diagnostic Centre in Eldoret. It shows that the said Mr. Henry Wenganga Opicho suffers from a medical condition to the prostate (details withheld). In my view, and I take judicial notice of the fact that men at such and advanced age do suffer from life threatening maladies relating to their reproductive parts, such a condition of health could be as much in relation to the intended proposed witness. Thus, the argument by the Respondent that the said Mr. Henry Wenganga Opicho is strong and walks around feigning illness, is to say the least demeaning and jesting about the life and health of the individual. It is the wearer of the shoe who knows where it pinches. The Respondent should not be heard to wail less on behalf of the individual who is suffering.
14. In opposing the Application, the Plaintiff stated that the 1st Defendant was not deserving of the orders sought as he was in contempt of court orders. He further stated that he was similarly senile and since he had not closed his case, the taking of the evidence of the 1st Defendant would occasion him a miscarriage of justice. He annexed a copy of an Identity Card which was not clear as to his age. He also annexed to the Replying Affidavit a copy of a medical treatment chit issued by the Bungoma County Referral Hospital on April 5, 2022. Clearly the treatment chit was tailored and produced by the Respondent to use to whip sympathy from the Court and also try and convince it that he too is equally unwell. Whereas there was attached to the affidavit another copy of another medical record from Nalondo Model Health Centre to evidence his frail health, the Court notes that it was not called upon to deal with what it would term as "illness competition" so as to finally make a finding as to who of the two wins or more sick than the other. The question before the Court was and remains as to whether, based on the evidence before me, there was sufficient cause to my satisfaction to warrant evidence de bene esse being taken herein.
15. Thus, I disagree with the depositions laid out by the Plaintiff. Firstly, it is not gainsaid that the 1st Defendant's witness is senile. The Plaintiff did not equally oppose the 1st Defendants annexures on ill health save that he stated that he, the said Henry Wenganga Opicho had magnified his condition. Secondly, where a party can demonstrate ill health and advanced age, as demystified herein, that is sufficient cause that a court can consider where an application for taking evidence de bene esse is before it. Thirdly, the Plaintiff similarly stated that he was of advanced age and had not filed such an Application. Both he and the intended witnesses are of fairly similar age. However, I note that he already testified on September 22, 2021 and October 18, 2021 when his re-examination ended and he was to call other witnesses. His evidence cannot countermand the senility of the 1st Defendant's witness consequently. Fourthly, the Plaintiff only makes claims of contempt by the 1st Defendant. He has not laid credence to this. A cursory perusal of the pleadings reveal no contempt orders in force against the 1st Defendant. Lastly, the Plaintiff has not demonstrated what prejudice he shall suffer if the testimony of the said witness will be taken before he closes his case. He will have every opportune moment to cross-examine the witness as the rules of procedure dictate. In my view, the Plaintiff is a man who is happy that on his part he has given evidence before the Court and will not mind any other evidence that would bring to light the issues in controversy herein not being available so that his testimony remains to be the sole statement of truth about the issues herein. He is happy riding on the cloud of an order issued in the Petition No. 71 of 2019 so as to ensure that no other evidence that can give a different picture his testimony other than his is given. Thus, he does not care how long it will take for the door to be opened for that other evidence to come in.
16. The upshot, I am satisfied that it has aptly been demonstrated that sufficient cause has been exemplified. Consequently, the Application is allowed. This matter mentioned on July 14, 2022 when a hearing



date shall be taken on a priority basis for the taking of the evidence de bene esse of the said Henry Wenga'nga' Opicho.

17. Costs shall be in the cause.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 12TH DAY OF JULY, 2022.**

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

