



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gacheru v Mburu & 2 others (Land Case 72 of 2021)  
[2022] KEELC 14633 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
LAND CASE 72 OF 2021**

**AE DENA, J**

**NOVEMBER 4, 2022**

**BETWEEN**

**JAMES MWANGI GACHERU ..... PLAINTIFF**

**AND**

**CHARLES NJOGU MBURU ..... 1<sup>ST</sup> DEFENDANT**

**MUSAN ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application the subject of this ruling is dated 14/9/2022 seeking to have the evidence of one Engineer Erastus Ngunya taken *debene esse*. The application is premised upon the provisions of order 18 rule 9 (1) of the [Civil Procedure Rules](#) which provides that 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 application of any party or the witness at any time after the institution of the suit take the evidence of such witness immediately.
2. The application is supported by an affidavit sworn on 14/9/2022 by James Mwangi Gacheru the plaintiff. He avers that for the interest of justice it has become necessary for the court to immediately take the evidence of his witness Engineer Erastus. That the said witness is of advanced age about 90 years and in very poor health and which continues to decline by the day. According to him the evidence is crucial in buttressing his case and that no prejudice will be occasioned if the evidence is taken as prayed.
3. The application is opposed by the replying affidavit of the 1<sup>st</sup> defendant Charles Njogu Mburu sworn on 27/9/22. He avers that the applicant has approached the court with unclean hands. It is contended that the said witness has been described as a person of sound mind and working for gain at the time of instituting the suit. That old age has never been a life-threatening issue to seek preferential treatment. The applicant is not leaving the jurisdiction of the court. It is further stated no evidence has been placed



before court to demonstrate ill health or the advanced age but mere statements. The application is further opposed by the replying affidavit sworn by John Erick Musyoka-Annan a director of the 2<sup>nd</sup> defendant who has reiterated the lack of sufficient evidence or cause to warrant the orders sought.

4. The applicants filed submissions dated October 11, 2022 and several authorities which I have considered.
5. The issues raised in the application are straight forward. The applicant is apprehensive his witness may be unable to testify at the hearing of the suit due to ill health and old age. It is however noteworthy that no single piece of evidence to demonstrate the age of the witness and his medical condition has been presented before this court in support of the averments as to old age and ill health. Counsel for the applicant referred this court to the decision in *Jackton Siundu Mukhwana vs Protus Sawenja & another* (2022) eKLR by my learned brother Nyagaka J. I noted that the court in that case had the benefit of the witnesses' ID card as well as medical evidence. In the instant case these have not been availed. I decline on this basis to allow the application.
6. Be that as it may upon perusal of the court record in respect of this matter I noted a letter dated 23/5/2022 wherein counsel for the plaintiff requested the Deputy Registrar of this court to facilitate for the taking of Eng Erastus Ngunya's testimony through a video link on 26/5/2022. The letter states that the witness is aged, sickly and could not travel to Kwale. This has also been raised by the 2<sup>nd</sup> defendant who states that there is no evidence that the said witness had aged dramatically since then.
7. In view of the option for a virtual hearing that has been proposed by the plaintiffs the court chooses this mode as a preferable option. In view of the age of this dispute and to ensure access to justice it is hereby directed that this suit shall be heard on priority basis on a day to day basis.
8. Since the application has not succeeded the plaintiff shall bear the costs of this application.

It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Wamuti Ndegwa the Plaintiff /Applicants

Mr. Magiya for the 1<sup>st</sup> Defendant/Respondent

Mr. Kiti 2<sup>nd</sup> Defendant/Respondent

Mr. Denis Mwakina- Court Assistant.

