



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 39 OF 2017

MARJORY NJERI NJOROGHE.....PLAINTIFF/RESPONDENT

VS

JOSEPH MUCHIRI NJUGUNA.....DEFENDANT/APPLICANT

RULING

1. The ruling arises from the application of the Defendant/Applicant dated 16/10/2020 and filed on the 21/10/2020 seeking the following orders;

a. That the Hon Court be pleased to adjudicate that the Defendant's witness Mburu Mwaura is suffering from senile dementia and is therefore unable to testify before the Court for purposes of the trial.

b. That this honourable Court be pleased to substitute the Defendant's witness Mburu Mwaura with Julius Mwaura Mburu his son, to testify in terms of the attached witness statement.

2. The application is based on the premises that Mburu Mwaura the intended witness aged over 80 years is unable to testify on account of old age and dementia and that in the interest of justice the witness be substituted with Julius Mwaura Mburu as a defence witness. Learned Counsel for the Applicant has sworn an affidavit in which she deposed that she had presented the witness at the start of the defence case on account of his age and frailty but was objected by Mr. Mungai, Learned Counsel for the Plaintiff forcing her to step down the witness. That on the 9/10/2020 and 12/10/2020 she interviewed Mr. Mwaura and noticed that his memory was failing and his son reported to her that his memory had been on a downward trend in the past year. That the medical report by Dr Kiama described him as suffering from senile dementia.

3. She opined that Mr. Mwaura will not be a useful witness to the Court or the defence and that his son be allowed to testify in his stead. That the son's witness statement is the same as that of Mr Mwaura save for evidence based on the personal knowledge of Mr. Mwaura.

4. Maintaining that the Respondent stands to suffer no prejudice, she urged the Court to allow substitution of Mr. Mwaura with his son Julius Mwaura Mburu as per the annexed draft witness statement.

5. In a quick rejoinder the Respondent opposed the application. In refuting the claim of dementia, the Respondent stated that she listened into a conversation between the advocate and her witness along the Court corridor and she noted that the witness was rational in the manner he carried out the conversation. She sought for a second medical opinion and accused the son of the witness and the Defendant's counsel of shielding the witness from giving evidence because it will prejudice the Defendants case.

6. Further she contended that Mburu Mwaura is not the Defendant and therefore his evidence is not necessarily of utmost importance. That the witness statement of the intended substitute is scanty and does not address the issues in the statement of Mburu Mwaura. That the said statement is not signed contrary to Order 2 Rule 2(1) of the Civil Procedure Rules.

7. She accused the Advocate of withdrawing the witness because he had admitted in his witness statement dated the 16/2/18 that the said Advocate, Julia Munyua had made an error in his affidavit of 10/3/15. She further added that she believes the said advocate has interfered with the defence witness statements given that the contents of the defence witnesses are largely a copy and paste of each other.

8. She urged the Court to allow the son of Mburu Mwaura to adopt his father's witness statement and that the said Mburu Mwaura be subjected to a second medical checkup at the Defendant's expense. Further the Court was urged to adopt the witness statement of Mburu Mwaura as it is unnecessary to substitute the witness and secondly since it was made when he was of sound mind.

9. The Respondent too filed grounds of opposition which interalia faulted the Advocate of the Applicant for swearing the affidavit when it does not constitute grounds of law. That the Defendant has not attached a power of attorney or a consent form confirming that the witness has consented to being replaced by his son.

10. The Applicant deponed that she instructed his Advocate to swear the affidavit on account that she had personally interviewed the witness on the 16/10/2020 and assessed his competency as a witness. That his recent interaction with Mburu Mwaura revealed that his memory is waning and will not be a competent witness in this suit. That during the hearing certain evidence that is prejudicial to him came forth and it is important that the said Mburu Mwaura or his son is called to offer a rebuttal. He urged the Court to allow Julius to adopt his father's statement or his own draft statement. Further that Mburu Mwaura can be presented for the Court to satisfy itself that he is an incompetent witness.

11. The Applicant submitted that a Court of law can allow statements to be introduced where good reasons are given as to why the statements were not filed earlier and also the nature of the evidence being brought in by the new witness. See the case of **Jane Kipkeni Too Vs Hellen Tum**. In that regard the Applicant urged the Court to allow for the witness substitution as the new witness will give similar evidence as his father. That no new evidence will be adduced capable of changing the character of the suit. In essence the evidence is to affirm that Mburu Mwaura's plot is 726, which parcel is at the Centre of the dispute and no other better person to adduce this nature of evidence that his son now that Mburu is incompetent to do so.

12. That no prejudice will be occasioned to the Plaintiff as she will have the opportunity to cross examine the witness in the fullness of time. See the case of **Raila Odinga 7 5 Others Vs IEBC & 3 others 2013 EKLK**. That the Respondent has not shown any prejudice she is likely to suffer.

13. The Applicant submitted that the intended witness statement complies with Order 2 Rule 2(1) of the Civil Procedure Rules. That the statement was a draft which when leave of the Court is granted will be signed and filed on record. That the allegation of interfering with witness statements is untrue. That there is no express provision of the law which prohibits advocates to swear an affidavit on client's behalf particularly where the facts are not contentious and for the interlocutory applications where no oral testimony and cross examination of the witness is required. That the facts sworn in the affidavit of Counsel are facts within her knowledge and are facts of procedural aspects and not the substance of the suit. See the case of **Factory Guards Limited Vs Factory Guards Limited (2014) EKLK**.

14. The Respondent on the other hand submitted that in 2015 Mburu Mwaura swore an affidavit that Kariuki Gicheru settled on the parcel No 727 next to him and that Gicheru attempted to evict Mwaura vide CMCC No 743 of 1995 and yet available evidence is that the Plaintiff was on the parcel way before 1995. That it is important that the witness statement be subjected to examination. That the defense is shielding the witness from rigorous examination. That the Court should hold a judicial inquiry as permitted by Order 32 Rule 15 of the Civil Procedure Rules so that the Court can make a determination as to the soundness of mind or mental infirmity or otherwise of the witness.

15. As to whether the Court should substitute the Defendant's witness statement with Julius Mwaura by adopting the full statement, the Respondent faulted the statement of the said Julius for being unexecuted. She urged the Court to order the adoption of the witness statement of Mburu Mwaura by his son instead of filing a new and fresh witness statement.

16. The key issues for determination are; Whether the Court should hold that Mburu Mwaura is incapable of testifying in this suit on account of senile dementia; whether the said Mburu Mwaura should be substituted with Julius Mwaura Mburu; who meets the costs of the application.

17. It is the Applicant's case that Mburu Mwaura is unable to competently testify and should be substituted. The Respondent refutes that the witness is able to testify and urged the Court to call for an inquiry to test his soundness of mind.

18. Generally, competency of persons who can testify in Court is provided for under Section 125 of the Evidence Act that; -

(1) All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

19. Order 32 Rule 15 provides as follows;

"The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

20. In this case the witness is said to be suffering from senile dementia and a doctor's report has been annexed. The counsel for the Applicant has explained that through her interaction with the witness during interview she noticed that the witness' memory was low. She is of the opinion that he will not be able to bear the rigour of cross examination. The doctor has described his condition as slurred speech, memory loss and reduced speech and further that he is being managed for senile dementia.

21. Order 32 Rule 15 provides that where the person has not been adjudged to be of unsound mind the Court should carry out an inquiry to find out as to whether the Plaintiff by reasons of any mental infirmity is incapable of protecting his interests in the suit. My understanding is that Order 32 Rule 15 refers to a party to the suit. In this case the application is with respect to the substitution of a witness.

22. *Demetia* is described as an illness of older adults and said to be an umbrella term for a group of cognitive disorders typically characterized by memory impairment, as well as marked difficulty in the domains of language, motor activity, object recognition, and disturbance of executive function – the ability to plan, organize, and abstract. See the **Meriam-Webster dictionary** (www.meriam-webster.com) which defines the condition as one that affects the mind of aging people and causes them to be confused and or to forget

things.

23. When confronted with the same case, the Court in the case of **M M M –VS- A M K [2016] eKLR**. held that these principles are designed to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so.

These are: -

- a. A person must be assumed to have capacity unless it is established that he/she lacks capacity.
- b. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
- c. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
- d. An act done, or decision made, under the above rule for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests.
- e. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

24. The Court held that even if parties had submitted medical evidence confirming their opposing positions or identical positions that such position does not satisfy the requirements of Order 32 Rule 15.

25. In answer to issue no 1 it is the view of the Court that the application is premature and as such the Court is unable to hold the Mburu Mwaura is suffering from senile dementia as no inquiry has been done.

26. In answer to issue No 2, it is the understanding of the Court that the Applicant has elected to withdraw the witness, Mburu Mwaura for reasons already disclosed. It is the right of party to call witnesses that in their opinion will best bring forward their case. In this case the party has determined that Mburu Mwaura will not serve him in form of evidence to be adduced.

27. That said the Court is unable to see any prejudice that the Respondent (none was adduced) will suffer because she shall, when the witness is presented in Court, have the opportunity to cross examine the witness, having had the chance to read the witness statement in advance.

28. For the above reasons I decline to grant prayer No 2. However, to serve the interest of justice this Court shall grant the Applicant the liberty to present Julius Mwaura Mburu as a witness if he so desires.

29. The application partially succeeds and I make the following orders;

- a. The Respondent shall have the liberty to call Julius Mwaura Mburu as a witness.
- b. If he elects to do so, he should file and serve the witness statement within 15 days from the date hereof
- c. The Respondent shall have corresponding leave to recall the Plaintiff/file a witness statement in rebuttal if need be.
- d. The costs shall be borne by the Appellant in favour of the Respondent.

30. **It is so ordered.**

DATED, SIGNED & DELIVERED ONLINE THIS 26th DAY OF MAY, 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms Onsembe for the Plaintiff/Respondent

Ms Munyua for the Defendant/Applicant

Court Assistants: Kuiyaki/Alex