



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL CASE NO.63 OF 2015

MEERA UMOJA KENYA LTD.....PLAINTIFF

-VERSUS-

DAVID GIKARA.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. This is a ruling on application dated **23rd July 2019**. It seeks leave to substitute a witness and witness statement.
2. Grounds on the face of the application are that the original witness who was slated to testify in support of plaintiff's case is not in good health and is unable to testify as anticipated.
3. Further, that the original witness has ceased to act as Managing Director and his position is now held by the proposed substitute witness.
4. That it is in the interest of justice to substitute the witness for just and fair determination of this suit; that unless the witness is substituted, the plaintiff stands to be gravely prejudiced since the current witness is unable to testify due to health reasons; that no prejudice will be occasioned on any party to the proceedings herein by substitution of the witness as prayed.
5. In response, the defendant filed replying affidavit sworn by the 1st defendant on 25th November 2019. She averred that on 21st May 2019 they attended court ready to proceed but counsel for the plaintiff sought adjournment on ground that her witness was indisposed after suffering stroke and she stated further that she was not sure the witness was capable of attending court then and in future; and sought court's leave to substitute the witness.
6. He averred that following objection from his Advocate the court directed the plaintiff to file formal application. He stated that the plaintiff has failed to demonstrate that the proposed witness is its current Managing Director of the plaintiff as no certificate of incorporation nor minute of the board or letter from the company appointing him have been annexed.
7. He further deponed that the plaintiff has never served him with any witness statement and copy of the alleged statement has not been attached.
8. He averred that the plaintiff has not attached medical report to prove that the witness is sick nor ceased to hold office as Managing Director. Respondent urged court to dismiss the application.
9. In oral submissions counsel for the applicant restated prayers sought, grounds on the face of the application and averments in the supporting affidavit. She submitted that the witness who is now indisposed has been replaced by his son who was present when issues herein arose and is therefore capable of testifying. She argued that adjournments before the hearing started were occasioned by defendants who have not complied with **Order 11 of the Civil Procedure Code**. She argued that the defendant will not be prejudiced as the case has not proceeded and lastly that the statement is the same but only want the proposed witness to come and testify.
10. **Mrs. Mbeche** for 1st defendant submitted that they were not served with the statement in the first place and secondly there is no proof that the proposed witness is managing Director. She restated averments in the replying affidavit. She further submitted that they have fully complied with **Order 11** contrary to the applicant's assertion. She prayed for dismissal of the suit.
11. **Ms. Cheruiyot** acting for the 2nd defendant the Attorney General stated that the second defendant is not opposed to the application.

12. In a rejoinder, counsel for the plaintiff submitted that on 21st May of 2020 the 1st defendant said they had not complied with **Order 11** and sought time to comply. On issue of witness statement she submitted that the applicant filed the suit together with documents and that the defendant never said they did not receive documents.

ANALYSIS AND DETERMINATION

13. I have considered arguments by counsels herein. Reasons advanced by counsel for the defendants in opposition to the application is that, the applicant has not proved that the proposed substitute is Managing Director of the company, that he has been authorized by the plaintiff's company to testify in these proceedings and, that the original witness is indisposed.

14. I however note that hearing of this suit has not commenced. In the hearing, the 1st defendant will have opportunity to cross examine the proposed witness to establish whether indeed he is the current Managing Director and whether he has authorization to represent the company. In my view, issues that have been raised would be answered in the hearing.

15. Further, the plaintiff's advocate has also indicated that the statement of proposed witness is similar to statement filed by the original witness and the proposed witness is conversant with the issues before court. If that be the case, it means the nature of evidence to be adduced will not change.

16. In addition to the above, the 1st respondent/defendant has not demonstrated prejudice that may be occasioned to him if the proposed witness is allowed to testify in place of the original witness.

17. This is a matter filed in the year 2015, about 5 years old now and allowing the application will expedite the matter as it will pave way for the for hearing to proceed instead of holding on to a witness who may have difficulties in attending court due to ill health. Expediting the matter would serve to benefit all parties herein.

18. From the foregoing, I see merit in the application.

19. FINAL ORDER

- 1. Application dated 23rd July 2019 is allowed.**
- 2. Plaintiff is allowed to substitute a witness as prayed.**
- 3. Witness statement to be filed and served within 14 days from today's date.**
- 4. No orders as to costs.**

Ruling dated, signed and delivered at Nakuru this 5th day of March, 2020

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jenifer - Court Assistant

Ms. Langat holding brief for Ms. Nasimiyu Counsel for plaintiff

Mr. Keboga holding brief for Mrs. Mbeche Counsel for defendants