



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL SUIT NO. 1 OF 2015

J N N.....PLAINTIFF/RESPONDENT

VERSUS

D N M.....DEFENDANT/APPLICANT

RULING

1. By an application dated 18.5.18 (the Application), D N M the **Defendant/Applicant** seeks to be excused from testifying before this Court in the suit herein filed by J N N, the **Plaintiff/Respondent**. The **Defendant/Applicant** claims that he is unable to attend Court to give oral evidence on account of his serious illness. He resides in Nairobi and is under strict medical care. He exhibited a medical report to support his claim. He avers that the application is made in utmost good faith and no prejudice will be suffered by the **Plaintiff/Respondent** should the orders sought be granted. The **Plaintiff/Respondent** seeks to be allowed to rely on the documents filed in Court.

2. The Application is opposed. The **Plaintiff/Respondent** avers that if the orders sought are granted, the **Defendant/Applicant** will not be cross examined and his testimony will remain unchallenged. This will go against the principle of acquiring justice and equity. The orders sought are unreasonable and will be prejudicial to her. According to the **Plaintiff/Respondent**, the medical report does not say that the **Defendant/Applicant** is completely incapacitated and only excuses him from physical stress and has nothing to do with his mental health. He can testify while seated. The seeking of the orders after directions as to the hearing were given is a tactic to delay/defeat justice and a waste of the Court's time. The Application is incompetent, bad in law and an afterthought and ought to be dismissed with costs.

3. The undisputed facts are that the parties hereto are married and have children. The **Plaintiff/Respondent** lives in [Particulars Withheld], Kwale County while the **Defendant/Applicant** lives in Nairobi County. The dispute herein relates to certain properties in respect of which the **Plaintiff/Respondent** seeks a declaratory order that the same are matrimonial properties and further seeks a 50% share therein. She also seeks 50% share in the profits of a business named in the suit. The **Defendant/Applicant** has opposed the suit. His position is that the suit properties were purchased by him without any contribution from the **Plaintiff/Respondent**.

4. The **Defendant/Applicant** as early as 2014 averred in his affidavit sworn on 28.11.14 that he suffered a major stroke in 2010 and had been bed ridden for 3½ years. In his report dated 17.4.18 Dr. Daniel R. Mukiri Githegi stated the following:

Mr. M collapsed due to an intra-cerebral bleed in 2010.

He currently has symptoms of numbness, weakness of the right arm and leg, with consequent instability and poor balance. As noted before, he has easy fatigueability, and can only walk with a stick for very short distances, and stand for a few moments.

In the interest of his health, I request that he is excused from the physical stress that attending court would entail.

5. The law recognizes that there will be occasions when a person who swears an affidavit or records a statement is unable to attend Court to testify. The Court has power under order 11 of the Civil Procedure Rules to admit statements without calling the makers as witnesses. Rule 3(2) provides:

(2) In addition to any other general power the court may at the case conference—

(a) ...

(b) ...

(c) order admission of statements without calling of the makers as witnesses where appropriate and the production of any copy of

a statement where the original is unavailable;

(d) order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case;

6. The power of the Court in this regard is discretionary and may only be exercised in appropriate circumstances where there are sufficient reasons. The facts of this case are such as require *viva voce* evidence. It is necessary that the disputed allegations made by the **Defendant/Applicant** be tested by cross examination by the **Plaintiff/Respondent**. Failure to grant **Plaintiff/Respondent** this opportunity will in my view be prejudicial to her.

7. I note from the medical report that the **Defendant/Applicant** is not in good health and may not be able to travel to Mombasa from Nairobi where he resides for the hearing of this case. I do note however that the condition is physical and has not affected his mental health. Though the doctor cautions against physical stress that attending Court would entail, he does not say anything about testifying. In the circumstances, the Court is not satisfied that the **Defendant/Applicant** is unable on account of his health, to testify in Court. The Court need only make necessary arrangements in order to keep physical stress on him at a minimum. In this regard, the Court shall sit at Milimani Law Courts, Nairobi or any other appropriate place in Nairobi for purposes of taking the **Defendant/Applicant's** evidence. The Application is dismissed but with no order as to Costs.

DATED, SIGNED and DELIVERED in MOMBASA this 2nd day of November 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Defendant/Applicant**

.....**for the Plaintiff/Respondent**

.....**Court Assistant**