



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KERUGOYA**

**ELC CASE NO. 12 OF 2015**

**MARY MUTHONI NGARI.....PLAINTIFF**

**VERSUS**

**JOSEPH NGARI KAMAU.....1<sup>ST</sup> DEFENDANT**

**JANE WAIRIMU NGARI.....2<sup>ND</sup> DEFENDANT**

**JORUM KAMAU NGARI.....3<sup>RD</sup> DEFENDANT**

**JAMES MWANGI NGARI.....4<sup>TH</sup> DEFENDANT**

**SAMUEL GITHUA NGARI.....5<sup>TH</sup> DEFENDANT**

**PATRICK KURIA NGARI.....6<sup>TH</sup> DEFENDANT**

**ELIUD KAGUMO NGARI.....7<sup>TH</sup> DEFENDANT**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 16<sup>th</sup> April 2015 brought under the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act and Order 18 Rule 9 of the Civil Procedure Rules** seeking the following orders:-

**1. Spent**

**2. That this Honourable Court be pleased to order that a medical report by a recognized hospital/Doctor demonstrating the current state of mind and/or health status of the 1<sup>st</sup> defendant herein JOSEPH NGARI KAMAU be prepared and filed as part of the record of this Court.**

**3. That further to and/or prior to and/or after the filing of the medical report as in 2 above, this Honourable Court be pleased to order that the evidence of the 1<sup>st</sup> defendant JOSEPH NGARI KAMAU regarding title to L.R No. MUTIRA/KIAGA/525 but now sub-divided into 1510 and 1511 be taken and be part of the record right away.**

**4. That the costs of this application be provided for.**

The application is grounded on the affidavit of the plaintiff **MARY MUTHONI NGARI** and on the grounds set out therein which may be summarized as follows:-

That the 1<sup>st</sup> defendant (**JOSEPH NGARI KAMAU**) is ailing and not in full control of his state of mind which the defendants may have taken advantage of in sub-dividing land parcel No. L.R MUTIRA/KIAGA/525 to 1510 and 1511 to the exclusion of the plaintiffs yet in a family meeting on 12<sup>th</sup> December 1996, the 1<sup>st</sup> defendant had clearly indicated how he wanted the land in dispute shared.

The application is opposed and in a replying affidavit sworn by the 3<sup>rd</sup> defendant (**JORUM KAMAU NGARI**) on behalf of all the other defendants, it is deponed, inter alia, that the 1<sup>st</sup> defendant is ailing and cannot recognize people a fact that the plaintiff has admitted, that the 1<sup>st</sup> defendant's mobility is difficult as his legs cannot support his weight and lots of costs will be incurred to move him to hospital and this application is only meant to torture the 1<sup>st</sup> defendant.

Submissions have been filed both by the firm of Wambugu Kariuki Advocates for the plaintiff and Fatuma Wanjiku Advocates for the defendants.

I have considered the application, the rival affidavits and submissions by counsel.

**Order 18 Rule 9 of the Civil Procedure Rules** reads as follows:-

1. ***“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 hereinbefore provided”***
2. ***“Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination shall be given to the parties”***
3. ***“The evidence so taken shall be signed by the Judge and shall be evidence in the suit”***

**Order 18 Rule 9 of the Civil Procedure Rules** therefore deals with the taking of evidence De Bene Esse in two circumstances i.e.:-

1. ***Where the witness is about to leave the jurisdiction of the Court or***
2. ***For other sufficient reason***

The basis of this application is that the 1<sup>st</sup> defendant is ailing and therefore his evidence needs to be taken right away for future use i.e. De bene esse. In my view, the health or mental condition of a party or witness is other sufficient reason that can be justified in invoking the provisions of **Order 18 Rule 9 of the Civil Procedure Rules**. It must be realized that the whole purpose of **Order 18 Rule 9 of the Civil Procedure Rules** is to **collect** and **preserve** evidence that may otherwise become un-available in future and in the circumstances, prejudice a party during the trial.

Ms Fatuma counsel for the defendants has submitted that the 1<sup>st</sup> defendant is not a witness for whom the provisions of **Order 18 Rule 9 of the Civil Procedure Rules** was meant. The 1<sup>st</sup> defendant is a party to these proceedings and there can be no better witness than the party himself. I think Ms Fatuma has taken a very restrictive view of the term “**witness**”. Both a plaintiff and a defendant are witnesses in their respective cases because a witness is essentially any person who is called to take the witness stand and give evidence in any legal proceedings and who else is best suited to do so than the plaintiff or defendant? In **BLACK’S LAW DICTIONARY NINTH EDITION**, it is stated as follows:-

***“The term witness in its strict legal sense, means one who gives evidence in a cause before a***

***Court, and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceedings, and so includes deponents and affiants as well as persons delivering oral testimony before a Court or Jury”***

The illness of the 1<sup>st</sup> defendant is not in dispute and infact the 3<sup>rd</sup> defendant concedes as much in his replying affidavit in which he adds that the 1<sup>st</sup> defendant is now aged over 85 years. The more reason why his evidence needs to be **collected** and **preserved** awaiting the trial. It is also not lost to this Court that the defendants themselves have a counter-claim against the plaintiff. In paragraph 10 of the defendants’ defence and counter-claim, it is pleaded that the 1<sup>st</sup> defendant being the registered owner of the land parcel No. MUTIRA/KIAGA/525 from which parcels No. MUTIRA/KIAGA/1510 and 1511 (which are the subject of this suit) were hived, had the right to transfer it to the other defendants. I should have thought that given that pleading, the defendants herein must also be keen to **collect** and **preserve** any evidence to that effect. How else will they prove that the 1<sup>st</sup> defendant, while of sound mind, took the 3<sup>rd</sup> to 7<sup>th</sup> defendants to the Land Control Board Kirinyaga on 26<sup>th</sup> November 2009 where he transferred the land to the other defendants as a gift? Yet, that is part of the defendants’ own pleading. It is therefore in the interests of both the plaintiff and the defendants in this case that the evidence of the 1<sup>st</sup> defendant be taken de bene esse. That of course will be subject to what I am going to direct in the following part of this ruling.

Having said above that there is need to preserve the 1<sup>st</sup> defendant’s evidence, it is also clear that due to his age and health, he may infact not be able to testify even at this early stage of the trial. That explains why the plaintiff has sought that he be examined by a recognized hospital/Doctor so that the Court can have a report on his current state of mind or health before he is called upon to testify. It is only after the doctor has confirmed that the 1<sup>st</sup> defendant is in a position to testify that he will be required to do so.

In the circumstances, I am satisfied that the plaintiff’s Notice of Motion dated 16<sup>th</sup> April 2016 is well merited and I grant the orders sought therein in the following terms:-

- 1. The 1<sup>st</sup> defendant be examined by a doctor agreed upon by both parties who should file a report in this Court within the next 30 days indicating the current state of mind of the 1<sup>st</sup> defendant and in particular whether he is capable of giving evidence in Court.***
- 2. The plaintiff shall meet the costs of that examination.***
- 3. As it has been deponed that the 1<sup>st</sup> defendant’s mobility is difficult, such examination can be conducted at his home.***
- 4. The Court shall make further orders upon receipt of the doctor’s report.***
- 5. Costs of this application shall be in the cause.***
- 6. This case shall be mentioned on 5<sup>th</sup> May 2016 when I expect the report to have been filed and for further orders.***

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> APRIL, 2016**

Ruling delivered this 8<sup>th</sup> April 2016 in open Court

Mr. Ngangah for Fatuma for Defendants present

Mr. Wambugu Kariuki for Plaintiff absent but Plaintiff present in person.

**B.N. OLAO**

**JUDGE**

**8<sup>TH</sup> APRIL, 2016**