



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 240 OF 2016

VICTORIA MWIHAKI MUCHIRA.....1ST PLAINTIFF

CHARLES MUGO MUCHIRA.....2ND PLAINTIFF

CATHERINE NJERI MUCHIRA.....3RD PLAINTIFF

VERSUS

WANJIKU MWENJA MWANGI.....1ST DEFENDANT

TERESINA MWINGI.....2ND DEFENDANT

AND

CLIFFORD MWANGI MUCHIRA.....1ST INTERESTED PARTY

NANCY WANJIKU MWANGI.....2ND INTERESTED PARTY

RULING

1. In this burial dispute, Victoria Mwihaki Muchira (PW1) who is the first plaintiff herein has sought to produce the witness statements recorded by her co-plaintiffs. PW1 also wishes to produce the “authority to plead and act” signed by her co-plaintiffs authorizing her to act, plead and draw documents on their behalf in this case. The 2nd plaintiff, Charles Mugo Muchira and the 3rd plaintiff Catherine Njeri Muchira, are the children of PW1 and the deceased herein. The 1st plaintiff’s claim is that she is the widow of the deceased and is the one entitled to bury his body.

2. It is PW1’s evidence that her children the 2nd and 3rd Plaintiffs are based in United Kingdom. That the 2nd plaintiff left Kenya for studies in the United Kingdom in the year 2012. That the 2nd plaintiff cannot be away from his studies for long and is therefore unable to come to court to give evidence. The 3rd plaintiff is said to have left Kenya in the year 1998 and now works in the United Kingdom. That the 3rd plaintiff has a 14 year old child who cannot be out of school for long and cannot be left home alone. It is also stated that there are financial constraints and job security issues.

3. The 1st and 2nd defendants and the 1st interested party have objected to the production of the said documents. The 1st defendant is a sister in law to the deceased while the 2nd defendant claims to be the widow of the deceased. The 1st interested party is a son to the plaintiff and the deceased. The grounds of the objection raised are that the said documents are copies and not the originals. That the documents have been executed by a solicitor and not by a Notary Public. That there is need for cross-examination of the makers of the said documents to test the veracity of their evidence and to verify the signatures therein.

4. The 1st plaintiff's counsel in response to the objections raised referred the court to Order 11 rule (2) and (3) Civil Procedure Rules, Section 166 of the Evidence Act Cap 80 Laws of Kenya, Article 159 of the Constitution and Section 1A & 1B of the Civil Procedure Act. He submitted that this is a burial dispute which is being fast tracked and that the defendants and the interested parties will not suffer any prejudice and that the issues raised in the objection are just mere technicalities.

5. I have considered the evidential foundation laid by the PW1 regarding the documents in question. I have also considered the submissions by the counsels for the respective parties.

6. Witness statements were filed herein pursuant to the provisions of Order 3 rule 2 Civil Procedure Act. Order 3 rule 2 (c) provides that the statements be signed by the witness. There is no requirement that the statements be signed before any person or officer. The crux of the matter herein is whether the statements can be produced without the calling of the makers thereof.

7. Order 11 rule 2 & 3 which the plaintiffs' counsel referred the court to provides for pre-trial directions and conferences. Order 11 rule 3 (2)(c) Civil Procedure Rules provides for the admission of the statements without calling the witnesses where appropriate. In the case at hand, the production of the statements is objected to. The objecting parties have expressed their intention to cross examine the witnesses. Thus even if the intended witnesses were to give affidavit evidence, the objections would still be raised. My view is that it would be prejudicial to deny the objecting parties the right to cross-examine and test the veracity of the evidence in question.

8. The court has also been referred to Section 166 of the Evidence Act Cap 80 Laws of Kenya. This section provides for the calling of evidence to test or rebut the evidence of persons who are not able to come to court and their statements have been admitted under Section 33 and Section 34 of the Evidence Act.

9. Section 33 of the Evidence Act provides as follows:

“statements written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an account of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases.....”

The said cases relate to evidence in respect of the cause of death, made in the course of business, against the interest of the maker, opinion on public right or custom, existence of a relationship, family affairs, customs and statements by several persons expressing feelings. It is noted that even in cases relating to relationships, family affairs and expression of feelings, the statement must have been made before the matters in dispute arose. It is noted that Section 34 of the Evidence Act deals with evidence in previous proceedings.

10. Whether a party's evidence can be admitted without the party appearing in court to adduce evidence goes into the merits of the case. It is not a mere technicality. The party who is denied the chance to cross-examine and test the veracity of the evidence would be prejudiced. In the circumstances of this case the court would stand the risk of admitting hearsay evidence if the witness statements in question are admitted

(See for example **Salim Awadhi Salim & 10 v Commissioner of Police & 3 others**)

11. Although I empathize with the position that the 2nd and 3rd Plaintiffs find themselves in, I agree with the Defendants' counsel that a party who has come to court must be prepared to meet the requirements relating to the production of evidence. Consequently, I find merit in the objection and the same is sustained.

Dated, signed and delivered at Nairobi this 2nd day of Nov.,2016

B. THURANIRA JADEN

JUDGE