



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**E.L.C. NO 77 OF 2014**  
**FORMERLY KERUGOYA 208 OF 2013**

**CHARITY MACHAKI.....1<sup>st</sup> PLAINTIFF**

**BERNARD NGARI KAUGI.....2<sup>nd</sup> PLAINTIFF**

***VERSUS***

**DICKSON NYAGA KAUGI.....DEFENDANT**

**RULING**

**Introduction**

Mr. Dickson Nyaga Kaugi, through his counsel has filed a notice of motion dated 14<sup>th</sup> January, 2015 under sections 3A and 1A of the Civil Act and all other enabling laws seeking the following orders from the court:

1. That the defendant be allowed to file witness statement of John N.M. Nyaga out of time.
2. That the costs of this application be provided for.

In support of that motion, they have annexed a supporting affidavit dated 14<sup>th</sup> June, 2015.

The motion is opposed by the plaintiffs, who have filed a replying affidavit dated 21<sup>st</sup> June, 2015.

**The Case for the Defendant/Applicant**

Counsel for the defendant/applicant has urged this court to allow the witness statement of John Nyaga to be filed in court out of time. In their grounds in the notice of motion, they have stated that the documents which the intended witness needs to produce are part of the record. What they have not mentioned is that this witness' statement had been expunged from the record by the High Court in Kerugoya (Olao, J) on 17<sup>th</sup> June, 2014. The statement had been filed without leave of the court. The matter rested there until the filing of this motion 14<sup>th</sup> June 2015.

In support of the notice of motion, the defendant/applicant has stated that his counsel mistakenly filed the witness' statement out of time. He now says that the same statement was expunged from the record. According to him, the contents of that statement are extremely critical to his defence. He therefore urges the court that the witness be allowed to testify as his defence witness.

## **The Case for the Plaintiffs/Respondents:**

In their replying affidavit, the plaintiffs/respondents have stated that the witness statement of John Nyaga was expunged from the court record on 17<sup>th</sup> June, 2014 in the presence of both counsel and the parties. They have stated that they have closed their case and that the defendant has also testified in his own behalf. According to them, bringing back of the statement that comes after they have closed their case and after the testimony of the defendant had been taken in court will be prejudicial to their case. They have also stated that there has been inordinate delay in bringing this application. And for those reasons, they urge the court to dismiss the application.

## **The Applicable Law**

The law that governs this application is found in Order 45 of the 2010 Civil Procedure Rules, which permits a court to review an order . In terms of Order 45, a court is allowed to review a judgement or an order where there has been the discovery of new and important matter that was not there during the proceedings or where there is some mistake or an error apparent on the face of the record.

Additionally, the court is allowed to review an order for any other sufficient reason. In all these situations, the application must be made expeditiously. In addition to Order 45, there are provisions in section 19 of the Environment and Land Act, which sets out the procedure and powers of this court.

According to those provisions, this court is required to ***“act expeditiously, without undue regard to technicalities, procedure and shall not be strictly bound by rules of evidence.”*** In terms of Section 19 (2), the court shall not be bound by the procedure laid down in the Civil Procedure Act.

## **Issues for Determination:**

In the light of the affidavit evidence of the parties, their submissions and the applicable law, I find the following to be the issues for determination:

1. Whether or not this court has jurisdiction to review an order made by another High Court Judge.
2. Whether or not the defendant/applicant has brought the application without delay.
3. Whether or not the admission of the witness statement and the maker thereof to give evidence will prejudice the plaintiffs' case.

## **Evaluation of the Evidence, Findings and the Law:**

I have carefully considered the affidavit evidence of the parties, submissions of both counsel and the applicable law. I find from the affidavit evidence that the plaintiffs have already closed their case and the defendant has also finished testifying in his defence.

The order expunging the witness statement of John Nyaga was made over 7 months ago by the High Court (***Oloa, J***) in Kerugoya. This application is coming after the plaintiffs have closed their case and the defendant has also finished testifying. It is my finding that there is inordinate delay in bringing this application.

Furthermore, if the defendant was allowed to have this potential witness to testify, it will prejudice the plaintiffs' case. The reason is that they have testified on the basis that this particular witness was not going to give evidence. If, it had been brought to their attention before the close of the plaintiff's case that they intended to call him as a witness by having the expunging order reviewed, it is likely that they would have taken that into account in producing the necessary evidence including the change of their trial strategy. They now do not have that opportunity. In this, lies the prejudice which is likely to be caused if this witness was allowed to testify.

In view of what I have stated, I express no view as to whether this court has the jurisdiction to review the order of the High Court (Olao, J) which was made on 17<sup>th</sup> June 2014.

**Verdict and Disposal Order:**

In the light of what I have stated in the foregoing paragraphs, I hereby make the following orders:

1. The application to call John Nyaga as a witness is hereby dismissed.
2. Costs of this application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this.. 5<sup>th</sup> day of **FEBRUARY,..2015**

In the presence of the 2<sup>nd</sup> plaintiff and the defendant and in the absence of their counsel and in the absence of the 1<sup>st</sup> plaintiff.

Court clerk Mr. Muriithi.

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**