



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 41 OF 2004

MOSES WATAYI KITERESI PLAINTIFF

VERSUS

- 1. DANIEL WANYONYI**
- 2. RUSINA MUSAMIA**
- 3. THE DIRECTORS OF SURVEY DEFENDANTS**

RULING

The application dated 25th February, 2013, is by the plaintiff and is for orders that the evidence of Joseph Macharia Ndereitu of Galore & Co. Associates given in court on 15th June, 2004 be treated as evidence of the plaintiff's witness No.1 (PW1) in the main hearing. The basic grounds for the application as that the said witness cannot be found and that his presence cannot be obtained without an amount of delay and expense which in the circumstances will be unreasonable and prejudicial to the applicant.

Section 34 of the Evidence Act and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act have been involved for the purposes of the application which is vehemently opposed by the defendants/respondents on the basis of the facts contained in a replying affidavit deposed by the first defendant dated 22nd March, 2013.

Section 34 of the Evidence Act provides for admissibility of evidence given in previous proceedings only in circumstances where the witness is dead, or can not be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without or amount of delay or expense which in the circumstances of the case the court considers unreasonable.

None of the aforementioned circumstances have been credibly demonstrated by the applicant in his supporting affidavit and in particular that the subject witness can not be secured and availed for the purposes of this trial. The witness is crucial to the plaintiff's case. It is therefore upto the plaintiff to obtain his presence without necessarily incurring unreasonable expenses considering that the witness is within the borders of this county and within the Rift Valley region. There was no affidavit from the witness's brother to confirm that the witness upon retiring from the civil service lived in Narok from where he disappeared to an unknown destination in the year 2011 as alleged by the applicant.

In any event, the evidence given by the subject witness on 15th June, 2004, related to an annexure marked "MWK2" in the application dated 24th May, 2001 by the plaintiff/applicant. The annexure was a deed plan for the parcel of land known as LR NO.5389/8. The witness was required to explain the deed plan in relation to an alleged access road which plan was never produced as an exhibit for purposes of the full trial of the case. It would in the circumstances be unfair to the defendants if the deed plan is admitted into this trial on the basis of what was stated by the subject witness considering that his evidence was not conclusive and in effect, led to the issuance of a third party notice against one Sheldon Washington

Sakwa Muchilwa. Apparently, the facts of the case do not render it mandatory that the subject witness is the only surveyor who can be availed by the plaintiff to testify with regard to the land in dispute. The defendants have rightly suggested that the District Land Surveyor Trans-Nzoia, may as well be called to testify and shed light on the dispute at hand.

For all the foregoing reasons, it is this court's opinion that the present application is unmerited. It is therefore dismissed with costs to the defendants. Since the plaintiff is yet to close his case, further hearing of the suit shall be on a date to be agreed between the parties today.

J. R. KARANJA,

JUDGE

11/02/2014

(Read and signed this 11th day of February, 2014).

11/2/2014

Before J. R. Karanja, J

C/C: Lokwang

M/S Arunga for plaintiff

Defendant: Present in person

J. R. KARANJA,

JUDGE

11/02/2014

COURT: Ruling delivered to parties. Further hearing of the main suit on 12/3/2014.

J. R. KARANJA,

JUDGE

11/02/2014