



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 95 OF 2010

EVANGELINE NYEGERA (SUING AS THE LEGAL REPRESENTATIVE OF FELIX

M'IKIUGU ALIAS M'IKIUGU JEREMIAH M'RAIBUNI (DECEASED)....PLAINTIFF

-V-

GODWIN GACHAGUA GITHU.....DEFENDANT

MILCHAH MWARANIA KIAMAAPPLICANT

RULING

1. Before me is a Notice of Motion Application dated 10.12.2018 and brought is pursuant to provisions of **Order 51 Rule 1 of the Civil Procedure Rules, Order 9 Rule 1 & 2 of the Civil Procedure Rules, Sections 1A,1B, 3 & 3A of the Civil Procedure Act, Order 12 Rule 7 of the Civil Procedure Rules and Article 159 2 (d) of the Constitution of Kenya 2010**, in which the Applicant herein one Milchah Mwarania seeks to be appointed as an agent of the defendant in this suit and further to be allowed to proceed with the suit and cross examine the plaintiff and her witnesses.

2. The application is premised on the affidavits sworn by the proposed agent Milchah Mwarania and Mr.B.G Kariuki, counsel who is on record for the defendant herein. The proposed agent deposed inter alia that she is the wife of the defendant herein who had been ailing from a stroke related ailment. On the morning of 5.12.2018, defendant was unable to communicate or to attend court and hence the case proceeded in his absence. On 7th December 2018, applicant took defendant to his doctor in Nairobi who on examination concluded that he cannot attend court indefinitely. In the circumstances, applicant urges the court to appoint her as a recognized agent of the defendant and take over the case where it had stopped.

3. Mr. B.G Kariuki counsel for the defendant has deposed that on the morning of 5th December 2018, he was unable to be in court on time due to a minor accident involving two *boda boda* cyclists and also due to police traffic operations who were enforcing Michuki rules.

4. The application was opposed via a replying affidavit filed in court by the plaintiff herein where she deposed that the hearing date of 5th December 2018 was taken by consent by the respective advocates and that on the material day she brought her witness M' Anampiu Rutere who is very old and it would be extremely difficult to bring him to court to testify again. Further, the plaintiff avers that Milchah Mwarania is a stranger to these proceedings and has no locus as she ought to apply for appointment as a guardian under the provision of Order 32 of the Civil Procedure Rules.

5. Briefly it was submitted for the Applicant that if she was appointed as an agent of the defendant herein, the plaintiff would not be prejudiced in any way as she would cross examine the applicant. It was further submitted that setting aside of any ex parte proceedings was a matter of courts discretion.

6. I have carefully considered the rival arguments proffered by the parties. The issues to determine are whether the proceedings herein should be re-opened and whether one Milchah Mwarania ought to be allowed to act as an agent of defendant.

Re-opening the case

7. This matter proceeded on 5.12.2018 before Judge Cherono in absence of defence where by plaintiffs case was closed and the matter is pending Judgment. In determining the issue as to whether the case ought to be re-opened or not, the court has considered two aspects of the case; **Conduct** and **Delay**.

8. It is not lost on this court that when both parties appeared before Cherono J on 26th November 2018, the parties agreed to have the matter start *de novo* and to be heard on 5th December 2018 at 8:00AM. Parties were required to comply with order 3, 7 and 11 of the civil

procedure rules by 30.11.2018. Although defence proceeded to file a list of documents, no single statement of a witness was filed. According to the Applicant, defendant failed to communicate on the morning of 5.12.2018 which then would imply that defense had been ready for the trial before 5.12.2018. The question is, how comes defendant and his witnesses, (if any) had not recorded their statements as per the courts directions of 26.11.2018. No explanation has been given for this short coming.

9. Similarly, the record clearly shows that on 5th December 2018, neither the defendant nor his advocate was present in court. Counsel for defendant and defendant himself were aware that the matter had previously been taken out of the cause list and the new date had been taken by consent of the parties. The least counsel could have done was to send an advocate to hold his brief or inform the court of his predicament. This he never did.

10. Further, the contention by the applicant that the defendant was sick on the date of the hearing (i.e. 5th December 2018) was not supported by any evidence. The letter annexed to her affidavit is dated 7th December 2018 and it makes reference to having reviewed the patient at the clinic which implies this was not an initial visit. The letter does not capture the nature and extent of defendant's ailments so as to arrive at the conclusion that defendant cannot attend court. I am therefore not persuaded that defendant and his counsel have proffered sufficient reasons as to why they failed to attend court on 5.12.2018.

11. On the aspect of delay, I have perused the entire record and I find that the odyssey of the dispute has been treacherous. The transaction giving rise to the dispute took place in 1982, while the actual dispute arose in 1988. Litigation commenced in 1989 via Meru H.C.C.no 276 of 1989. The original claimant Felix M'Ikiugu is long dead. This suit has been in this court for the last 8 years! Whereby plaintiff testified before Judge P. Njoroge on 19.3.2014. She had to testify all over again on 5.12.2018 before another Judge, Cheron J, when the case started de-novo. Delaying this matter further would certainly be prejudicial to the plaintiff.

12. Further, I have taken into account the circumstances under which this case was fixed for hearing. In year 2018, the Kenyan Judiciary had embarked on a strategy to expedite old matters. The back drop of this program was the consideration of the case backlog menace in the court systems.

13. One of the cardinal principles in our constitution is "**the expeditious delivery of justice**" –see **Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17th century maxim of "**Justice delayed is justice denied**". This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their family. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred.

14. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print "**Sustaining Judiciary Transformation - (SJT)**" where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases that had clogged the justice system for years. The matters identified as falling under this category were cases which were five years old and/or older. This case fell in this category and that is why it was being heard during the service week where a visiting Judge, Honorable Judge Cheron was to deal with the matter. Thus the parties were on notice that these old matters needed to be heard and determined speedily.

15. I have also considered plaintiff's averment that her witness M'Anampiu is very old. This must be the witness mentioned in the transaction of 1982 in the plaint. I therefore concur with plaintiff's arguments that she would stand to be prejudiced if this case is re-opened.

16. In the celebrated case of ***Shah v Mbogo and another [1967] EA 116, Harris, J*** stated as follows as regards the power of the Court to set aside an ex-parte judgment made in exercise of a discretion:

"I have carefully considered, in relation to the present application, the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

17. Justice cuts both ways and in the instant case, it would be prejudicial to the plaintiff to put her and her witnesses on the dock all over again. I must point out that this case is distinguishable from the case of ***Tree Shade Motors vs. D.T.Dobie and Company (k) ltd & Another (1998)eKLR*** cited by the defence since in the latter case, the court was dealing with the issue as to whether defendant ought to be allowed to file a defence. The circumstances of that case are totally different from the present one.

18. From the circumstances of this case and due to the reasons aforesaid, I am not satisfied that the applicant has demonstrated to the satisfaction of this court as to why this court's discretion ought to be exercised in her favour. I disallow the prayer to have the matter reopened for cross examination of plaintiff's witnesses and for tendering defence case.

Appointment of an agent

19. I am alive to the provisions of Article 159 (1) (d) which enjoins this court to administer justice without undue regard to procedural technicalities. However in ***Raila Odinga v. I.E.B.C & others (2013) eKLR***, the Supreme Court stated that;

"Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."(Emphasis added).

20. Applicant wants to participate in these proceedings as an agent of defendant. An agency relationship occurs when a principle gives legal

authority to an agent to act on the principle's behalf.

21. The definition of an agency as captured in Black's Law Dictionary is as follows:

“A relationship that arises when one person (a principal) manifests asset to another (agent) that the agent will act on the principal's behalf, subject to the principal's control, and the agent manifests asset or otherwise consents to do so”

22. The question arises; Can an agency relationship arise in a scenario where the principle is incapable of sanctioning the said relationship?.

23. **Order 9 rule 2 of the Civil Procedure Rules** (which applicant has relied on) gives guidance on the instances where the agency relationship can arise. The said order stipulates as follows;

“The recognized agents of parties by whom such appearances, applications and acts may be made or done are— (a) subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties; (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts; (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal”.

24. It is clear that these rules of procedure do not cover situations where the principle is incapacitated.

25. In paragraph 2 of her affidavit, applicant avers that defendant is suffering from a stroke. The medical report availed by the applicant contains absolutely nothing regarding the nature and extent of defendant's ailment. However, what applicant wants is to step into the shoes of defendant. The applicable law and procedure in such instances lies in order 32 rule 15 of the Civil Procedure Rules and section 26 of the Mental Health Act.

26. In the case of Isaac **Kipkemboi Chesire & 40 Others vs Joseph KimiteiKwambai & 3 Others and 4 interested parties, Eldoret ELC no. 520 of 2012**, the Judge while making reference to subsection 2 of section 26 of the mental health act stated as follows;

“The import of this section is that the order for guardianship ad litem is to be made by "the court" which is defined at Section 2, as the High Court. It follows that orders for the management of any property of a mentally disabled person can only be made by the High Court. This court finds that it has not been established that Matilda Rose Sawe is the guardian ad litem of the estate of John Malan Sawe hence the application for substitution is not well founded”.

27. The upshot of these findings is that a judicial inquiry on the degree of infirmity of the applicant has to be conducted whereby a guardian ad litem is then appointed. The applicant therefore ought to obtain the order of guardian ad litem before the high court, then she can apply to be substituted in place of defendant.

28. Taking into totality all the circumstances in this case, it is my considered opinion that the application dated 10th December 2018 is without merit and the same is dismissed in its entirety with costs to the plaintiff.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Dennis

Kariuki B.G for defendant/applicant

Kaumbi for plaintiff

Respondent

HON. LUCY. N. MBUGUA

ELC JUDGE