



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 333 OF 2015 (O.S)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION OF LAND PARCELS NOS.

GATURI/WERU/10398, 10399 AND 10404

BETWEEN

MARGARET RWAMBA NJAGI.....PLAINTIFF

VERSUS

JOSEPH MUGO NGAI.....1ST DEFENDANT

DAVID KIONGO WACHIRA.....2ND DEFENDANT

LAWRENCE P.K. NYAGA.....3RD DEFENDANT

RULING

1. By a notice of motion dated 5th December 2017 brought under sections 62 and 63 of the Evidence Act (Cap 80) and sections 1, 1B, 3, and 3A of the Civil Procedure Act (Cap 21) the 1st Defendant sought the following orders;

- a. This application be certified urgent and/or a hearing date be given on priority basis.*
- b. The court directs that the matter be heard urgently and the evidence of the defendant be taken.*
- c. The costs be in the cause.*

2. The said application was based on the grounds that the 1st Defendant was ailing and he was apprehensive that unless his evidence is taken immediately, it may be lost. The said application was supported by the 1st Defendant's own affidavit sworn on 5th December 2017 in which he stated that the suit was filed in 2015 hence unlikely to be heard anytime soon due to existing backlog. He further stated that he was ailing and under medication hence wished to have the court take his evidence immediately. He annexed to his said affidavit a handwritten medical note from Njoki Memorial Clinical Services and copies of various receipts for medical expenses.

3. The Plaintiff filed a statement of grounds of opposition in response to the said application. The main grounds were firstly, that the medical report did not indicate that the 1st Defendant was suffering from any life threatening ailment and that his mental faculties may be affected. Secondly, that the medical records and notes did not indicate that the 1st Defendant was suffering or likely to suffer any impairment that may lead to his inability to follow the proceedings. Thirdly, the medical report was not prepared by a qualified medical doctor but a clinical officer whose report could not be relied upon. It was further stated that, in any event, the said report indicated that the 1st Defendant had been treated and that he was in a stable condition.

4. The said application was listed for hearing on 17th January 2018 when Ms Beth Ndorongo prosecuted the said application on behalf of the 1st Defendant whereas Mr Okwaro followed the script of his grounds of opposition.

5. The court has perused the provisions of **sections 62 and 63 of the Evidence Act (Cap 80)**. They deal with oral evidence generally but have nothing to do with the instant application seeking to have the evidence of the 1st Defendant taken *de bene esse* before the trial of the action. In my view, the applicable provisions would be **Order 18 rule 9 (1) of the Civil Procedure Rules** which provides that;

“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 hereinafter provided.”

6. Although the application was not grounded upon the correct provisions of the law, the court shall, nevertheless, consider the application on merit in view of the provisions of **Article 159 (2) of the Constitution and section 19 of the Environment and Land Court Act**. The court also takes the view that the Plaintiff did not thereby suffer any prejudice since her advocate was able to competently respond to the application.

7. The main question for consideration is whether or not the 1st Defendant has shown “sufficient cause”, within the meaning of **Order 18 Rule 9 of the Civil Procedure Rules** why his evidence should be taken immediately without awaiting the trial of the action. The court is aware that there is a backlog at the Environment and Land Court at Embu. The court is further aware that priority is currently being given to suits which are 10 years or older.

8. The handwritten medical report dated 27th November 2017 from Njoki Memorial Clinical Services indicates that the 1st Defendant was diagnosed as suffering from some form of asthma and that he was treated and was in a stable condition. The 1st Defendant was put on broncho-dilators and there is no mention of any other medical complications to his health.

9. The court has noted that, as submitted by Mr Okwaro for the Plaintiff, there is no indication in either the supporting affidavit or medical report that the Plaintiff’s condition may lead to significant impairment of his mental and physical abilities in the near future. There is no indication that his condition poses an imminent danger to his existence on earth. There is no allegation that it may lead to imminent death.

10. Although the qualifications of the author of the 1st Defendant’s medical report were questioned by the Plaintiff’s counsel, there is no evidence so far to demonstrate that he is unqualified. The report was signed by Warui Munene as “specialist lung/skin diseases.” There is no indication that he is a clinical officer as submitted by Mr Okwaro. The Court is of the opinion that even if he were a clinical officer, he would not necessarily be disqualified from preparing a medical report if the diagnosis was done at his clinic.

11. The court has considered the material on record including the fact that the 1st Defendant is aged 67 and is not satisfied that sufficient reason has been shown to warrant his evidence being taken

immediately. The court, therefore, finds no merit in the 1st Defendant's notice of motion dated 5th December 2017 and the same is hereby dismissed. Costs of the application shall be in the cause.

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **22ND** day of **FEBRUARY, 2018**

In the presence of Ms Beth Ndorongo for the Defendants and in the absence of Duncan Muyodi & Co Advocates for the Plaintiff.

Court clerk NJue/Leadys.

Y.M. ANGIMA

JUDGE

22.02.18