



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO. 189 OF 2015**

**AVTAR SIGH BACHU.....1<sup>ST</sup> PLAINTIFF**

**JAGJEET VIRDEE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HENRY TAITA TUM.....DEFENDANT**

**RULING**

1. This Ruling is in respect of the defendant's application dated 15th September, 2017 for leave to substitute the defendant who is 97 years old with his son. The application is supported by the affidavit of one Joseph Cheruiyot, the defendant's son sworn on the 15<sup>th</sup> September 2017. The main reason for the application is that the defendant is now of an advanced age and has donated a Power of Attorney to his son to represent him in this suit. The said Power of Attorney which was registered as no. 1970 19.6.2012 is annexed to the defendant's application.
2. Ordinarily such applications are not opposed but interestingly this one was strenuously opposed by the plaintiffs. The grounds for opposing the same are contained in the Replying affidavit of Avtar Singh, the 1<sup>st</sup> plaintiff herein. He depones that the Power of Attorney is witnessed by counsel for the defendant and his clerk. Secondly he depones that the supporting affidavit is sworn by a stranger to the suit and for those reasons the application is incompetent.
3. The application was argued orally and Mr. Migiro learned counsel for the applicant argued that the reasons advanced by the Respondent are frivolous and intended to delay the hearing of this matter. He pointed out that the Power of Attorney was duly registered at the Lands Office on 19.6.2012.
4. As regards the supporting affidavit, he stated that the deponent was the son of the defendant and was therefore competent to swear the affidavit. He relied on Article 159 (2) (d) of the Constitution of Kenya, 2010 which enjoins the Courts to administer justice without undue regard to procedural technicalities. He argues that the respondent would suffer no prejudice if the application was granted.
5. In opposing the application learned counsel for the Respondents Mr. Sigira submitted that the fact that a person who swore the supporting affidavit is not a party to the suit is not a mere technicality. He further argued that Mr. Migiro ought not to have witnessed the Power of Attorney for his client and this demonstrated that he has an interest in the case.
6. I have considered the application, affidavits, annexures as well as the rival submissions. The main bone of contention is that the supporting affidavit is sworn by a person who is not a party to the suit.
7. The deponent has stated in his affidavit that he is the son of the defendant who is indeed an old man aged 97 years. This fact is not controverted by the respondents. The respondents would have preferred that the 97-year-old defendant swears the affidavit. They have not demonstrated what prejudice they will suffer if the application is granted. One would have expected that they would be more interested in having the suit heard and determined owing to the defendant's advanced age rather than raising technical objections that are in my view intended to delay the finalization of this matter.
8. Whereas I agree with Mr. Sigira that counsel should refrain from witnessing their client's documents in matters where they are representing the same client in court as this may put them in an awkward position, this does not afford a ground for striking out a non-contentious application in a matter that has been pending in court for almost ten years.
9. I agree with counsel for the applicant that article 159 (2) (d) of the Constitution enjoins me to administer substantive justice without undue regard to procedural technicalities. Further the oxygen rule under Sections 1A and 1B of the Civil Procedure Act is intended to ensure the just, expeditious, proportionate and affordable disposal of cases. I therefore invoke the court's inherent powers conferred by section 3A of

the Civil Procedure Act and allow the application for substitution of the defendant.

10. Consequently, the Amended Defence shall be served upon the Plaintiff within 7 days from the date hereof.

11. The costs of this application shall be in the cause.

**Dated, signed and delivered at Kericho this 18<sup>th</sup> day of May, 2018.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of**

1. Mr. Siele Sigira for the Respondents
2. Miss Kitur for Mr. Migiro for the Applicant
3. Court Assistant – Abdi