



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**E.L.C. CASE NO. 15 OF 2016**

**EVANSON MWANGI KIHUMBA.....PLAINTIFF**

**VERSUS**

**EVELYNE WAMUYU NGUMO.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR EMBU DISTRICT.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**DAISY NJERU NDWIGA.....4<sup>TH</sup> DEFENDANT**

**CHARLES M. MUSAU.....5<sup>TH</sup> DEFENDANT**

**AND**

**SILAS MURIITHI MBUI.....APPLICANT/INTERESTED PARTY**

**RULING**

1. By a chamber summons dated 6<sup>th</sup> March 2017 and filed on 17<sup>th</sup> March 2017, the Plaintiff sought following orders.
  - a. That this honourable court be pleased to take and preserve the evidence of the Plaintiff *de bene esse* and that the said evidence do form part of the evidence in this suit.
  - b. That the costs of this application be in the cause.
2. The said application was based upon the grounds shown on the face of the application which stated, inter alia, that there was a need to preserve the Plaintiff's evidence on account of his advanced age and failing health and that it was in the interest of justice for the said application to be allowed.
3. The said application was supported by the affidavit of the Plaintiff sworn on 6<sup>th</sup> March 2017 in which he swore that his health has been failing and has previously been bedridden for long periods of time. He annexed a medical report from Dr Muriithi Nyamu, who described himself as a consultant physician and cardiologist. The said report indicated that the Plaintiff was suffering from multiple medical conditions including complications arising from diabetes mellitus, hypertension, hypertensive heart disease,

parkinson's disease, hyperthyroidism, benign prostatic enlargement and bilateral knee osteoarthritis.

4. The Plaintiff further swore in paragraph 6 of his affidavit that he had been advised by his said doctor that parkinson's disease may lead to severe decline in "mental activity" and "irreversible memory loss". He therefore prayed that the said application be allowed to enable him testify in this suit while his mind and memory were still sound.

5. Although the Defendants did not file any affidavit or medical evidence to counter the averments in the Plaintiff's supporting affidavit, the 4<sup>th</sup> Defendant filed grounds of opposition dated 7<sup>th</sup> April 2017 in opposition to the said application. Mr Kathungu for the Defendant submitted, *inter alia*, that the plaint described the Plaintiff as a person of sound mind; that the medical report indicated that he had been ailing for about 2 years and that the said report did not indicate that he was about to die.

6. Mr Kathungu also submitted that the Plaintiff's evidence could be preserved by way of a witness statement which he had already filed and that he was at liberty to give a power of attorney to a third party to testify or his behalf. An alternative of appointment of a next friend was also given. Mr Kathungu finally submitted that the Plaintiff had not made out a case for granting the orders sought and he asked the court to dismiss the said application.

7. The main issue in this application is whether or not the Plaintiff has made out a case for the taking of his evidence *de bene esse*. The material provisions of **Order 18 Rule 9 of the Civil Procedure Rules** under which the instant application was filed provide as follows:

**9 (1) "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 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 hereinbefore provided.**

**(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the court thinks sufficient, of the day fixed for the examination, shall be given to the parties.**

**(3) The evidence so taken shall be signed by the Judge and shall be evidence in the suit".**

8. So has the Plaintiff shown sufficient cause to the satisfaction of the court that his evidence should be taken immediately without waiting for the hearing of the suit in the normal manner? The Plaintiff has adduced affidavit evidence that he is 78 years old and of ill health. He exhibited a medical report indicating the nature of the medical conditions he is living with. His medical evidence was not controverted by any contrary evidence. The court accepts his uncontroverted evidence.

9. Whereas it is true that the Plaintiff was described in the plaint as a person of sound mind in 2015, that does not mean that he was not susceptible to adverse medical conditions such as the ones captured in his medical report. A person whose health is failing is capable of maintaining a sound mind and the court finds no contraction between the plaint and the instant application.

10. The court also finds no basis for barring the Plaintiff from giving his evidence in person on the basis that it is legally possible to have a donee of a power of attorney or a next friend to conduct the case on his behalf. The best evidence rule requires that oral evidence in judicial proceedings should be direct evidence within the meaning of section 63 of the Evidence Act (Cap 80). There would be no good reason for this court to opt for hearsay evidence later on when direct evidence is available at this stage.

11. The court is also not satisfied that it would be sufficient to order that the Plaintiff's evidence be preserved solely by the witness statement recorded and filed under the Civil Procedure Rules. It must be remembered that the statement is unsworn and untested through cross-examination. It is always prudent for the court to rely upon the best evidence when it is available.

12. The upshot of the foregoing is that the court is satisfied on the basis of the material on record that the

Plaintiff has shown sufficient cause why the application should be allowed. Consequently, the Plaintiff's chamber summons dated 3<sup>rd</sup> April 2017 is hereby allowed as prayed. Costs of the application shall be in the cause. The court shall fix a date for the examination of the Plaintiff at the time of delivery of this ruling.

13. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **20<sup>th</sup> day of JULY, 2017**

In the presence of Mr Guantai for the Plaintiff and Mr Kathungu for the 4<sup>th</sup> Defendant and in the absence of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> Defendants and the Interested Party.

Court clerk Njue/Leadys.

**Y. M. ANGIMA**

**JUDGE**

**20.07.17**