REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.43 OF 2008

ELIZABETH NYAMBURA NJUGUNA

FRANCIS KAMAU NJUGUNA (suing as the administrator of the Estate of

NJUGUNA MWAURA MBOGO (Deceased)..... APPLICANTS/PLAINTIFFS

VERSUS

JUMAA FARMERS COMPANY LTD.....ST RESPONDENT/DEFENDANT

JEREMIAH MUTURA KINYANJUI.....2ND RESPONDENT/DEFENDANT

RUTH WANJIRU.....3RDRESPONDENT/DEFENDANT

JONAH KIMARU.....4TH RESPONDENT/DEFENDANT

JOSPHAT MBURU…….....….....5TH RESPONDENT/DEFENDANT

EZEKIEL KIARIE…….....……6TH RESPONDENT/DEFENDANT

ELIJAH MACHARIA…….....…….7TH RESPONDENT/DEFENDANT

ENDAO COMPANY LIMITED….....……..8TH RESPONDENT/DEFENDANT

RULING

This application is brought by way of Notice of Motion under the provisions of **Section 3A** of the **Civil Procedure Act** and under the provisions of **Order 18 Rule 8** of the **Civil Procedure Rules 2010.**

The applicant seeks the following orders:

1. That following the appointment of the Honourable Justice W. Ouko who was the trial Judge's elevation to the Court of Appeal, the Honourable court do direct that the trial in the suit to start afresh.
2. That costs of the application be provided for.

The applicant relies on the grounds on the face of the application and also on the supporting affidavit made by HARUN K. CHEBOI sworn on the 1st March, 2013.

The dispute relates to land and the matter had proceeded for hearing and was part-heard by the Hon. W. Ouko, J (as he then was). The plaintiff/respondent had testified and had closed their case. On the defendants' side, a witness had testified on behalf of the 1st defendant to the 7th defendant and they too had closed their case.

As for the applicant, who is the 8th defendant, herein, a witness by the name SHADRACK CHEROGONY had testified on its behalf and had been subjected to intense cross-examination. What was remaining was re-examination of the said witness. The 8th defendant had not therefore closed its case. It was at this juncture that the Honourable judge who was seized of this matter, was then elevated to the Court of Appeal.

The applicants contention is that in the best interest of justice, the matter ought to start "*de novo"* to enable the new trial judge who shall be seized of this matter to hear the evidence of each witness afresh, to be enable the judge peruse and examine the documents afresh and to also physically see and evaluate the demeanor of the witnesses, so as to arrive at a fair verdict.

The applicant urged the court to exercise its discretion and to allow the application so that justice may be seen to be done in affording the applicant an opportunity to given an intense explanation on the complex documents.

The application was opposed by the respondents who consist of the plaintiff and the 1st and 7th defendants, herein.

The respondents submit that they had all closed their cases and what was remaining was the re-examination of the applicants witness and for the applicant to close its case. The respondents further submitted that the applicant had a history of filing numerous applications for recusal and adjournment, which applications had all been dismissed by the trial judge. The sole purpose of these numerous applications and the instant one was so as to prolong the matter as the applicant did not want to have the suit finalized.

The respondents aver that the applicant had not demonstrated the prejudice it would suffer were the court to continue with the matter from where it had reached and urged the court to dismiss the application as it was lacking in merit and was an abuse of the court process.

Upon hearing the counsel for the parties, this court finds the following issues for determination:

i. discretionary
ii. *"de novo"*

Order 18 Rule 8(1) of the **Civil Procedure Rules 2010** provides as follows:

"Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the state at which his predecessor left it."

In this instance, the trial judge has been elevated and transferred to the Court of Appeal and is therefore prevented from concluding the trial of this suit.

This court notes from the record that the evidence of the witnesses was recorded under oath and nothing has been placed before this court by the applicant to show that the trial judge left out or failed to consider important issues or to show alleged unsatisfactory recording of evidence by the said judge.

The applicant should also bear in mind that there is a superior court namely the Court of Appeal to which the applicant is entitled to appeal to. The order the applicant seeks to rely on uses the word *"may"* which then leaves it to the discretion of the new trial judge to decided whether or not to proceed with the suit from the stage at which his predecessor left it.

It is trite law that this discretion ought to be exercised judicially to avoid injustice or hardship and not to obstruct or delay the course of justice.

At the threshold of re-examination, the applicant seeks for the case to start *"de novo".* The applicant has other avenues to remedy its case, either through re-examination, recalling of witnesses, through written submissions and highlighting and lastly through the appellant process and therefore starting afresh does not wholly obtain.

In its submissions, the applicant also contends that it places reliance on complex documentary evidence. This court reiterates that the applicant can put in written submissions which can be highlighted. The court also opines that it it is necessary for it to observe and evaluate the demeanor of any witness, that witness may be recalled by the applicant.

The group by the submissions of all the parties and the history of the case, this court finds that this sis not a suitable case for it to exercise its discretion in ordering for the case to start "*de novo".* By so doing, this would be tantamount to delaying and also obstructing the course of justice.

CONCLUSION:

1. The application is found lacking in merit and is hereby dismissed.
2. The proceedings shall be typed and the matter proceed from where it had reached.
3. This suit is hereby referred to the environment and land court for mention for the purposes of fixing a hearing date.
4. The respondents shall have the costs of the application.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 21st day of June, 2013.

A. MSHILA

JUDGE