



**Karura Investments Limited v Magugu & 3 others (Environment and Land Case Civil Suit 329 of 2016) [2023] KEELC 16849 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16849 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 329 OF 2016  
SO OKONG'O, J  
APRIL 19, 2023**

**BETWEEN**

**KARURA INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**MARGARET WAIRIMU MAGUGU ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEYS ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. On March 18, 2019, this suit was heard and stood over to December 18, 2019 for further hearing in the presence of all the advocates for the parties. On that date, the plaintiff's first witness (PW1) gave evidence in chief. When the matter came up on December 18, 2019 for further hearing, the advocates for all the parties appeared in court except the advocates for the 1<sup>st</sup> defendant. No explanation was given to the court for the 1<sup>st</sup> defendant's advocate's absence. On that date, PW1 was cross-examined by the advocates for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and was re-examined by the plaintiff's advocate. The court also took the evidence of the plaintiff's second witness (PW2) who gave evidence in chief and was cross-examined and re-examined. The matter was thereafter adjourned to July 15, 2020 when the evidence of the plaintiff's third witness (PW3) was taken in part. On July 15, 2020, the advocates for all the parties were present. The matter was thereafter adjourned on several occasions until October 14, 2021 when PW3 concluded his evidence and the plaintiff's case closed.
2. What is now before me is the 1<sup>st</sup> defendant's application dated June 22, 2020. In the application, the 1<sup>st</sup> defendant has sought an order re-calling the plaintiff's witnesses, PW1 and PW2 who gave evidence on December 18, 2019 for cross-examination by the advocates for the 1<sup>st</sup> defendant and leave for the 1<sup>st</sup>



- defendant to file witness statements for two witnesses the 1<sup>st</sup> defendant intends to call to give evidence on her behalf in this matter.
3. The application has been brought on the grounds set out on the face thereof and on the affidavits of the 1<sup>st</sup> defendant's advocates, Hannah Gathoni Njeri and Charles Mwangi Ndegwa sworn on June 22, 2020. The 1<sup>st</sup> defendant has contended that due to an inadvertent error by an associate advocate, Mr Thuku in the firm of J.M.Kariuki & Company Advocates which was on record for the 1<sup>st</sup> defendant, the hearing date of December 18, 2019 was put in the said firm of advocates' diary as February 18, 2020. The 1<sup>st</sup> defendant has averred that this is the reason why the matter was heard on December 18, 2019 in the absence of the advocates for the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant has averred that it was on February 18, 2020 when the suit was not listed in the cause list for the day that the 1<sup>st</sup> defendant's advocates perused the court file and noted that the matter was heard on December 18, 2019. The 1<sup>st</sup> defendant has averred that she should not suffer due to the inadvertent mistake of her advocates.
  4. The 1<sup>st</sup> defendant has averred that the two witnesses who gave evidence in the absence of the 1<sup>st</sup> defendant were the plaintiff's key witnesses and that it is necessary for the 1<sup>st</sup> defendant to cross-examine them on their witness statements and the documents they produced as exhibits. The 1<sup>st</sup> defendant has averred further that she also wishes to file witness statements for two witnesses, Father Julius Muranga Gichure and Anthony Macharia whom she wishes to call in the matter as her witnesses. The 1<sup>st</sup> defendant has cited section 146(4) of the *Evidence Act*, chapter 80 Laws of Kenya and order 18 rule 10 of the *Civil Procedure Rules* in support of the limb of her application seeking the recall of the plaintiff's witness who testified in her absence.
  5. The application is opposed by the plaintiff through a replying affidavit sworn by Sureshchandra Raichand Shah on July 27, 2022. The plaintiff has contended that the application is mischievous, misconceived and has been brought in bad faith. The plaintiff has also contended that the application has been brought belatedly 4 months after the 1<sup>st</sup> defendant's alleged discovery on February 18, 2020 that the matter had been heard on December 18, 2019 in her absence. The plaintiff has averred that it was until October 14, 2021 after the plaintiff had called its last witness and closed its case that the 1<sup>st</sup> defendant brought its application dated June 22, 2020 to the attention of the court several months after it was filed. The plaintiff has averred that the 1<sup>st</sup> defendant was indolent in that she sat on the application for over 14 months before bringing the same to the attention of the court.
  6. The plaintiff has averred further that the 1<sup>st</sup> defendant has not placed any evidence before the court showing that the hearing date of December 18, 2019 was wrongly diarized by her advocates as February 18, 2020. With regard to the leave sought to file witness statements, the plaintiff has averred that the matter was certified as ready for hearing on February 15, 2017 in the presence of the 1<sup>st</sup> defendant's advocate who confirmed to the court that the 1<sup>st</sup> defendant had complied with order 11 of the *Civil Procedure Rules*. The plaintiff has averred that on October 16, 2017, the court gave the parties a further opportunity to file any document that they had not filed. The plaintiff has averred that this leave was given to the parties in the presence of the advocate for the 1<sup>st</sup> defendant. The plaintiff has averred that the 1<sup>st</sup> defendant has not annexed to the application copies of the witness statements that she wishes to file to enable the plaintiff to assess whether any prejudice will be occasioned to the plaintiff by the filing thereof. The plaintiff has averred that it has closed its case and that the orders sought if granted would cause it grave prejudice.

### **Submissions By The Parties:**

7. The 1<sup>st</sup> defendant's application was argued by way of written submissions. The 1<sup>st</sup> defendant filed her submissions dated June 25, 2022. The plaintiff and the other defendants did not file submissions. In



summary, the 1<sup>st</sup> defendant has submitted that an inadvertent mistake of an advocate should not be visited upon a client and that in the circumstances of this case, valid grounds have been put forward to warrant the recalling of the plaintiff's witnesses for cross-examination. The 1<sup>st</sup> defendant has cited several authorities in support of these submissions. The 1<sup>st</sup> defendant has submitted that it is not disputed from the material placed before the court that the 1<sup>st</sup> defendant failed to attend court as a result of a mistake of her advocate and that the mistake was not willful. The 1<sup>st</sup> defendant has submitted that this mistake should not be visited upon the 1<sup>st</sup> defendant whose right to defend the suit and the property in dispute will be seriously affected if not lost unless the orders sought are granted.

### **Analysis And Determination:**

8. I have considered the 1<sup>st</sup> defendant's application together with the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiff in opposition to the application and the written submissions by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant's application was brought under order 18 rule 10 of the [Civil Procedure Rules](#), section 146(4) of the [Evidence Act](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#). This court has power under section 146(4) of the [Evidence Act](#), chapter 80 Laws of Kenya and order 18 rule 10 of the [Civil Procedure Rules](#) to recall a witness for further examination in chief or cross-examination. The court also has an inherent power to allow a party to file additional witness statements. Section 146(4) of the [Evidence Act](#) provides that:

“The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

Order 18 rule 10 of the [Civil Procedure Rules](#) provides as follows:

“The court may at any stage of the suit recall any witness who has been examined, and may subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit”.

section 3A of the [Civil Procedure Act](#) provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

9. The power granted to the court under the foregoing provisions of the [Civil Procedure Act](#) and rules and the [Evidence Act](#) are discretionary. Discretionary powers must be exercised judiciously. In [Patriotic Guards Ltd v James Kipchirchir Sambu](#) [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

10. It is common ground that the 1<sup>st</sup> defendant's advocates were aware of the hearing date of December 18, 2019. The date was given in the presence of the advocates for all the parties. For the 1<sup>st</sup> defendant's advocates to have taken the date as February 18, 2020 could only be as a result of a mistake on the



part of the advocate who appeared in court for the 1<sup>st</sup> defendant when the date was given. Whether the hearing date of December 18, 2019 was mistaken as February 18, 2020 by the advocates for the 1<sup>st</sup> defendant is however debatable. The said hearing date was given on March 18, 2019. There was no way the court could have given a part-heard matter a hearing date almost one year away after an adjournment. I also doubt if the court had opened the diary for 2020 at that time to be able to give such a date. As correctly submitted by the plaintiff's advocates, there is no evidence that the 1<sup>st</sup> defendant's advocates had wrongly diarized the hearing date as February 18, 2020 instead of December 18, 2019. The 1<sup>st</sup> defendant's advocates who are seeking the exercise of this court's discretion had a duty to be candid with the court. It behooved them to place before the court the relevant pages of their diaries for December 2019 and February 2020 to demonstrate that indeed the date that was to be entered in the diary as December 18, 2019 was entered as February 18, 2020. The doubt about the truth of the 1<sup>st</sup> defendant's advocates' alleged mistake in entering the hearing date in their diary gets heightened when the date for the filing of the present application is considered.

11. The 1<sup>st</sup> defendant alleged that her advocates discovered on February 18, 2020 that they had got the hearing date wrong and that the suit was to be heard on December 18, 2019 and not on February 18, 2020 and that the hearing of the suit proceeded on that date. Although the 1<sup>st</sup> defendant's application is dated June 22, 2020, the same was filed on July 14, 2020 on the eve of the further hearing of this suit on July 15, 2020. There is no explanation why the 1<sup>st</sup> defendant could have waited for 5 months to file the present application if indeed the 1<sup>st</sup> defendant's advocates discovered on February 18, 2020 that a hearing had taken place on December 18, 2019 in their absence. I am not convinced that there was a mistake in entering the hearing date in the 1<sup>st</sup> defendant's advocates' diary. In my view, the 1<sup>st</sup> defendant's advocates and the 1<sup>st</sup> defendant failed to attend court on December 18, 2019 for other reasons which have not been disclosed to the court. Even if the 1<sup>st</sup> defendant is given the benefit of doubt that her advocates wrongly took the hearing date of December 18, 2019 as February 18, 2020, filing of the present application 5 months after the discovery of the mistake amounts to indolence that should disentitle the 1<sup>st</sup> defendant to the discretionary orders sought.
12. I am in agreement with the 1<sup>st</sup> defendant that an inadvertent mistake of an advocate as a general rule should not be visited on a client. However, before the court can consider whether the general rule should apply to a particular case, it must be demonstrated that indeed there was a mistake and that the same was inadvertent. In the case before me, I have not been persuaded of the existence of a mistake on the part of the 1<sup>st</sup> defendant's advocates. A mistake of an advocate cannot therefore be a ground for granting an order for the recall of the plaintiff's witnesses who testified on December 18, 2019. In the absence of a good reason or valid ground for the order for recall of witnesses, that limb of the application is not for granting.
13. On the issue of leave to file additional witness statements of Father Julius Muranga Gichure and Anthony Macharia, I am again of the view that no sufficient cause has been put forward to warrant the grant of the same. In *Attorney General v Law Society of Kenya & another* [2017]eKLR the court defined sufficient cause as follows:

“Sufficient cause or good cause in law means:
14. ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary*, 9th Edition, page 251.
15. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”



16. From the record, I am satisfied that the 1<sup>st</sup> defendant was given ample opportunity to file statements of the witnesses that she wished to call in her defence in this matter. On August 29, 2016, the court ordered among others that the defendants do file their statements of defence, bundle of documents and witness statements within 15 days from the date of service upon them of summons to enter appearance by the plaintiff. When the matter came up for mention on November 23, 2016, the 1<sup>st</sup> defendant's advocate confirmed to the court that the 1<sup>st</sup> defendant had complied with the directions that the court had given on August 29, 2016 aforesaid. On that date, the plaintiff's advocate sought leave that was granted by the court to file additional witness statements. The court granted to the 1<sup>st</sup> defendant corresponding leave to file supplementary witness statements and bundle of documents. On February 15, 2017, the parties appeared before the court for mention to confirm if the matter was ready for hearing. The 1<sup>st</sup> defendant confirmed to the court that the 1<sup>st</sup> defendant had complied with order 11 of the *Civil Procedure Rules* and that the matter could be set down for hearing. The court fixed the suit for hearing on October 16, 2017. On October 16, 2017, the matter did not take off because the plaintiff's advocates sought leave to file an additional bundle of documents. On that day, the court granted the leave sought by the plaintiff and extended the same to the defendants. The defendants were given leave to file a supplementary list and bundle of documents and additional witness statements.
17. The 1<sup>st</sup> defendant has not explained why she did not file the witness statements she now seeks to file following the leave that she was granted earlier. In the absence of such an explanation, there is no basis upon which the court can exercise its discretion in favour of the 1<sup>st</sup> defendant. I have also noted that the 1<sup>st</sup> defendant has not annexed to her application copies of the additional witness statements that she wishes to file. The court is in the circumstances unable to appreciate the importance of the proposed witnesses to the 1<sup>st</sup> defendant's case. The court is also unable to determine whether the introduction of the said witnesses at this stage would be prejudicial to the plaintiff which has already closed its case.

**Conclusion:**

18. For the foregoing reasons, it is my finding that the 1<sup>st</sup> defendant's notice of motion application dated June 22, 2020 has no merit. The application is dismissed with costs to the plaintiff.

**DELIVERED AND DATED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF APRIL 2023**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Githui for the Plaintiff

Mr. Kago and Mr. Kamau for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Mr. J.Omondi-Court Assistant

