Ouko & another (Suing as the Administrators of the Estate of the Late Jason Atinda Ouko) v Mworia (Environment & Land Case 502 of 2011) [2023] KEELC 18402 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18402 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 502 OF 2011

JO MBOYA, J

MAY 31, 2023

BETWEEN

ROSALYN DOLA OUKO .... 1ST PLAINTIFF

AARON TAFARI OUKO .... 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JASON ATINDA OUKO

AND

JOHN MWORIA .... DEFENDANT

RULING

Introduction And Background

1. The plaintiff/respondent herein filed and/or lodged the instant suit vide plaint dated the September 19, 2011 and in respect of which the plaintiff sought various, albeit numerous reliefs as against the defendant/applicant.

2. Instructively, upon being served with the plaint and the summons to enter appearance the defendant/applicant duly entered appearance and filed a statement of defense wherein same denied and disputed the claims by the plaintiff and which are contained at the foot of the plaint, whose details have been alluded to in the preceding paragraph.

3. Subsequently and for good measure, the plaintiff herein thereafter filed a reply to the statement of defense dated the October 10, 2011.

4. Suffice it to point out that despite the fact that the suit herein was filed in the year 2011, the Substantive hearing in respect of the subject matter only commenced on the October 11, 2022, same being a

duration of more than 11 years from the date when the instant suit was filed before the Honourable court.

5. Be that as it may, the hearing of the instant matter concluded on the December 6, 2022, culminating into the Honorable court issuing directions pertaining to and concerning the filing and exchange of written submissions in respect of the substantive suit.

6. Moreover, it is appropriate to underscore that the plaintiff herein timeously complied and filed their written submissions dated the January 27, 2023. On the other hand, the defendant also filed his written submissions albeit after some duration of delay. For good measure, the defendant's submissions are dated the March 6, 2023.

7. However, on the same date, namely, the March 6, 2023, the defendant took out and filed a notice of motion application of even date and in respect of which same has sought for the following reliefs:

   i. That this application be certified as urgent and service be dispensed with in the first instance;

   ii. That this Honourable Court be pleased to suspend, arrest and or vacate the Judgement date of this suit scheduled on 23/3/2023 pending the hearing and determination of this application.

   iii. That this Honourable Court be pleased to order the defendant's case to be re-opened for purposes of calling and or adducing the evidence of Nashon Kebwaro Omwenga.

   iv. That the plaintiff be at liberty to recall any witness for further examination, cross examination and re-examination.

   v. That the defendant be permitted to file the witness statement of Nashon Kebwaro Omwenga within Seven (7) days.

   vi. That costs of this application be provided for.

8. The instant Application is premised and/or anchored on the various grounds, which have been enumerated in the foot of the application. Further, the application is supported by the affidavit of the defendant/applicant sworn on the March 6, 2023 and in respect of which the applicant has made various averments thereunder.

9. Upon being served with the Application by the Defendant/Applicant, the 1st Plaintiff/Respondent filed a replying affidavit sworn on the March 17, 2023 and wherein, the 1st Plaintiff/Respondent has averred, inter-alia, that the instant Application has been mounted with inordinate and unreasonable delay, which has not been accounted for or at all.

10. First forward, the Application herein came up for hearing on the March 6, 2023, whereupon the parties agreed to ventilate and canvass the Application by way of written submissions. In this regard, the Honourable court thereafter proceeded to and adopted the agreement by respective Counsel and thereafter circumscribed the timelines for the filing and exchange of the written submissions.

Submissions By The Parties

A.applicant's Submissions

11. The Applicant herein has filed written submissions dated the March 31, 2023 and in respect of which same has raised, highlighted and canvassed Four (4) salient issues for consideration and determination by the Honourable court.

12. First and foremost, Learned counsel for the Applicant has submitted that the witness, whose evidence is sought to be tendered and adduced before the Honorable court, subject to re-opening of the Defendant's case, is a crucial and important witness, whose evidence/testimony shall enable the court to reach and arrive at a fair, just and expedient determination of the dispute beforehand.

13. In addition, Learned counsel has submitted that the evidence of the intended witness shall go along way in vindicating and proving that the Applicant herein is a Bona fide Purchaser for value over and in respect of the segment of the suit property, which is under dispute.

14. Secondly, Learned counsel has submitted that the Honorable court is vested with the requisite Jurisdiction and discretion to enable same to entertain and grant the kind of reliefs, which have been sought for at the foot of the current application.

15. Furthermore, Learned counsel for the Applicant has submitted that the Jurisdiction of the Honourable court to entertain and grant an order for re-opening of a party's case, is primarily underpinned by the provisions of sections 1A and 3A of the *Civil Procedure Act*, which underscore the Inherent Jurisdiction of the Honorable court to deal with each and every situation, with a view to administering justice to the Parties.

16. Thirdly, Learned counsel for the applicant has submitted that the instant Application is neither intended to plug the loopholes and weaknesses that were exposed during cross examination; nor is the Application intended to delay the fair and expeditious hearing and determination of the suit.

17. To the contrary, Learned counsel for the Applicant has submitted that the instant Application has been made in good faith and same is intended to bring forth a witness, whose evidence would be of great assistance to the Honorable court. In any event, Learned counsel has contended that where there exists credible evidence that can help the Honourable court to arrive at a just determination, then it behooves the Honorable court to avail the requisite latitude to facilitate the adduction/ production of such Evidence.

18. Lastly, Learned counsel for the applicant has submitted that even though there is a degree of delay in the filing of the instant Application, which seeks to re-open the Defendant's case, the delay in question is however not inordinate, so as to deprive or dis-entitle the Applicant of Equitable remedy.

19. Further, the Applicant has contended that it is not the duty of the Honourable court to mete out punishment and discipline to the Parties. Instructively, Learned counsel has contended that the Honourable court is called upon to render justice by ensuring a level playing Field.

20. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on various decisions, inter-alia, *Techbiz Limited versus Royal Media Services Ltd* (2021)eKLR, *Baruthi Bundi versus Domtila Obala Ouma & 2 Others* (2022)eKLR, *Gold Lida Limited versus NIC Bank Ltd & 2 others* (2018)eKLR and *Philip Keipto Chemwolo & Another versus Augustine Kubende* (1986)eKLR, respectively.

B.respondent’s Submissions

21. The Respondent herein filed written submissions dated the April 17, 2023; and in respect of which same have raised, highlighted and canvassed Four (4) issues for determination by the Honourable court.

22. Firstly, Learned counsel for the Respondent has submitted that the instant matter was filed in the year 2011; and thereafter the Defendant was duly served with the Plaint and the Summons to enter appearance, in accordance with the law.

23. Furthermore, Learned counsel for the Respondent has further submitted that upon being served with the Plaint and summons to enter appearance, the Defendant duly entered appearance and thereafter filed a statement of defense together with the various documents as envisaged by dint of order 7 rule 5 of the *Civil procedure Rules*.

24. In particular, Learned counsel for the Respondent has submitted that amongst the documents that were filed by the Defendant, included the List of witnesses and the witness statement that the Defendant intended to rely on. However, counsel has added that from the onset, the Defendant did not anticipate and/ or intend to rely on the evidence of Nashon Omwenga, who is the witness now sought to be summoned to testify before the Honourable court.

25. Premised on the forgoing, Learned counsel for the Respondent has therefore submitted that the desire by the Defendant to summon and call the intended witness, has been informed by Mala fides and constitutes an afterthought.

26. Secondly, Learned counsel for the Respondent has submitted that the intention to summon and call the intended witness is aimed at and intended to facilitate the patching and plugging of the Loopholes, which were poked into the Defense case during cross examination.

27. Instructively, Learned counsel has contended that the Defendant herein is merely keen to prop the Defense case, long after taking advantage of the cross examination by and the submissions on behalf of the Plaintiffs. In this regard, Learned counsel for the Respondents has invited the Honourable court to take cognizance of the fact that the Plaintiffs filed their submissions on the January 27, 2023, prior to and before the filing of the current Application.

28. Thirdly, Learned counsel has submitted that the Defendant herein has neither explained nor availed any evidence before the Honourable court to authenticate why the intended witness, was neither mentioned to the court at the onset nor called by the defense to tender evidence during the defense case.

29. Arising from the foregoing, Learned counsel for the Respondents has thus submitted that in the absence of any explanation by and on behalf of the Defendant, pertaining to the failure to include the intended witness in his List of witnesses, affects and militates against the exercise of discretion in favor of the Applicant.

30. Lastly, Learned counsel for the Respondent has also submitted that the instant Application has been mounted and lodged with inordinate and unreasonable delay, which delay has not been accounted for and or explained. In this regard, counsel has invoked and relied on the doctrine of Latches.

31. Arising from the foregoing, Learned counsel for the Respondents has thus submitted that the Applicant has failed to establish and or demonstrate the existence of sufficient cause and or basis to warrant the grant of the reliefs sought at the foot of the instant Application. Consequently, counsel has invited the court to dismiss the Application beforehand.

32. To buttress the foregoing submissions, Learned counsel for the Respondents has cited and relied on, inter-alia, the case of Susan Wavinya Mutavi versus Isaac Njoroge & Another (2020)eKLR, Hasan Hashi Shirwa versus Swalahudin Mohamed Ahmed (20110eKLR, Samuel Kiptoo Rop & Another versus Beatrice Nakumecha Khaoya & 3 Others (2020)eKLR, Samuel Kiti Lewa versus Housing Finance Company of Kenya Ltd & Another (2015)eKLR, Hannah Wairimu Methe versus Francis Mungai Ng'ang'a & Another (2016)eKLR and Rupa Saving & Credit Cooperative Society versus Violet Shidogo (2022)eKLR respectively.

Issues For Determination

33. Having reviewed the Application together with the supporting affidavit thereto; and having similarly taken into account the elaborate Replying affidavit and upon consideration of the written submissions filed by and on behalf of the Parties, the following issues do arise and are thus worthy of determination;

    i. Whether the instant Application has been made timeously and with due promptitude or otherwise.

    ii. Whether the Applicant has tendered and/or availed any explanation underpinning the failures/defaults to summon and call the intended witness prior to the closure of the Defense case.

    iii. Whether the grant of the instant Application will prejudice the Rights of the Respondents to fair hearing/trial, as entrenched in Article 50(1) and (2) of *the Constitution*, 2010.

Analysis And Determination

Issue Number 1. Whether The Instant Application Has Been Made Timeously And With Due Promptitude Or Otherwise.

34. Before venturing to address and deliberate upon the issue highlighted hereinbefore, it is instructive to recall that the instant suit was commenced vide Plaint dated 19th September 2011 and which Plaint was thereafter served upon the Defendant.

35. Furthermore, there is no gainsaying that upon being served with the Plaint and summons to enter appearance the Defendant herein duly entered appearance and thereafter filed as Statement of Defense dated the 3rd October 2011.

36. Additionally, the Defendant herein also filed a List and Bundle of documents; List of witnesses and witness statements, which same intended to rely on during the course of trial.

37. Instructively, during the time when the Defendant filed the Statement of Defense, together with the requisite documents, the Defendant herein did not deem it fit and/or appropriate to include the name of Nashon Omwenga as one of the witnesses intended to be called by and on behalf of the Defendant.

38. Whereas the failure and/or neglect to allude to the name of the said witness was not fatal, it behooved the Defendant to take appropriate and expedient measures/steps to furnish the Honourable court with a List of witness containing the name of the intended witness as well as the witness statement, if any.

39. Suffice it to point out that the Defendant herein neither filed not furnished the court and the Plaintiff with the requisite documents pertaining to the intended witness. For good measure, even when the Defendant testified, same did not intimate that he will be seeking to rely on the evidence of a further witness.

40. Given the foregoing background facts, the question that now needs to be dealt with and addressed is why the Defendant herein waited for more than 12 years before coming to the conclusion that the intended witness, is an important and critical witness for and on behalf of the Defendant.

41. Similarly, the other incidental question that arises relates to why it also took the Defendant a duration of more than three months from the date when the defense case was closed, prior to the filing of the current Application.

42. In my humble view, the duration between the 3rd October 2011, when the Defendant entered appearance and filed statement of defense to the date of the commencement of trial, constitutes an inordinate and unreasonable timeline. For clarity, the Defendant herein ought and should have fathomed that the intended witness was a critical witness and thereafter, same needed to have mounted the requisite Application, timeously and in good time.

43. Further and in addition, even if the Defendant did not deem the intended witness to be of critical importance up to and including the close of the defense case, it was incumbent upon the Defendant to take appropriate steps and measures to file the instant Application seeking to re-open his case in good time, immediately upon discovery of the need to include the said witness.

44. Nevertheless, it is also not lost on the court that the Defendant waited for more than three months, from the date of closure of the Defense case, before springing up with the current Application. In any event, despite the notable delay, the Defendant has not deemed it fit to provide any explanation or justification for such a delay.

45. In my humble, albeit considered view, where a party is seeking exercise of Judicial discretion, it behooves such a Party to place before the Honorable court sufficient and credible evidence to account for the negligence, failure and inaction , for which extension or indulgence is being sought.

46. For good measure, such explanation must be alluded to or deponed to in the affidavit and further, same must be cogent, plausible and credible, so as to invoke/ spur the exercise of Equitable discretion.

47. Despite the foregoing, it is imperative to state that the Applicant herein has neither accounted for nor explained the delay, which is evident in the filing of the current Application after long lapse of time.

48. Be that as it may, in the absence of any scintilla and/or iota of explanation pertaining to and concerning the delay, there is no gainsaying that the duration which has not been accounted for becomes inordinate and unreasonable. For coherence, it is the reason or explanations for delay that goes along way to explaining latches and where none is availed, the Doctrine of Latches becomes relevant and applicable.

49. To buttress the foregoing position and in particular, the need to offer/avail credible explanation, it is instructive to take cognizance of the holding in the case of Habo Agencies Limited versus Wilfred Odhiambo Musingo [2015] eKLR, where the court stated thus;

> " Without any material to explain that period of delay, it would be inordinate and would not avail Habo. As the Privy Council stated in the case of Ratnam v. Cumarasamy [1964] 3 all e r 933 :-
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> "The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion . If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

50. To surmise, I find and hold that the subject Application has been mounted and filed with inordinate and unreasonable delay, which delay has neither been explained nor accounted for, in any manner whatsoever.

51. Further and in addition, where there is no explanation or credible material placed before the court, it is difficult nay impossible for the court to exercise discretion in favor of such a defaulting Party. Clearly, discretion can only be exercised on the basis of material evidence and sufficient cause; and not otherwise.

ISSUE NUMBER 2. Whether the Applicant has tendered and/or availed any explanation underpinning the failures/defaults to summon and call the intended witness prior to the closure of the Defense case.

52. Other than the failure to avail and or supply any cogent, credible and plausible explanation for the delay in the filing of the instant Application without undue delay; the Defendant herein was equally obligated to supply reasons why the intended witness was indeed omitted from the List of witnesses from the onset.

53. Additionally, it was also incumbent upon the Defendant to place before the Honorable court material to show why the evidence of the intended witness was not placed before the court during the period prior to and before the close of the Defense case.

54. Nevertheless and most importantly, it must be remembered that the witness, whose evidence is now being sought to be placed before the court, was well known to the Defendant and in any event; same is the one who is said to have sold the disputed portion of the suit property unto the Defendant.

55. Arising from the foregoing, it is evident and apparent that the Defendant was therefore knowledgeable of and privy to the significance, if at all, of the evidence that could have been tendered by the intended witness.

56. Why then was the intended witness not disclosed beforehand. To my mind, it was incumbent upon the Defendant to atleast place before the Honourable court some scintilla of explanation or difficulty, if at all, that made it impossible/difficult to procure the evidence of the intended witness prior to the closure of the Defense case.

57. Curiously, the only explanation that has been offered by the Applicant herein is to the effect that the said witness could not be called earlier due to factors which were beyond the control of the Defendant. However, it is important to point out that the purported factors which were beyond the control of the Defendant have neither been particularized nor specified, whatsoever.

58. Furthermore, the Defendant has also not ventured to explain when the factors beyond his control, if at all, arose and or ensued. In this regard, the question that does arise is whether the factors beyond the Defendant's control arose at the time of the filing of the Statement of Defense, prior to the Case Conference, after the Defense case or otherwise.

59. Clearly, the Defendant herein cannot imagine that the discretion of the court is to be exercised to and in favor of anyone, the Defendant not excepted, even without any explanation.

60. Perhaps and at this juncture, it is instructive to state and underscore that there is need to draw a distinction between sympathy and empathy on one hand; and discretion on the other hand. Whereas sympathy and empathy evoke emotions and feelings, discretion on the other hand evokes and is underpinned by reason.

61. Consequently and in view of the foregoing, there is no gainsaying that the Defendant herein was called upon to avail explanation why same did not deem it important to summon the intended witness, in the ordinary course hearing. Could it be that the Defendant was keeping the evidence of the intended witness as a secret weapon to be unleashed at the tail- end?

62. Anyway, whatever reason that underscored the failure and/or inaction by the Defendant, it is my position that the Defendant cannot be facilitated to undertake his defense case by instalments and thereby ambush the adverse party with further evidence long after the adverse Party has closed his case; and further after the adverse Party has even tendered/ filed written submissions.

63. Notwithstanding the foregoing, the essential ingredients to be established, demonstrated and proved, before the Court can exercise Discretion, were highlighted and elaborated upon in the case of Susan Wavinya Mutavi versus Isaac Njoroge & Another (2020)eKLR, where the court and held as hereunder;

> " 10. Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

64. Furthermore, the circumstances where court can exercise discretion to order and decree re-opening of a case and recall of a witness, were also elaborated upon in the case of Samuel Kiti Lewa versus Housing Finance Co. of Kenya Ltd & another [2015] eKLR where the court stated thus;

> 17. Uganda High Court, Commercial Division in the case Simba Telecom –V- Karuhanga & Anor (2014) Ughc 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case Smith –versus- New South Wales [1992] Hca 36; (1992) 176 CLR 256 where it was held:
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> > If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered.
> >
> > In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

18. The Ugandan Court in the case SIMBA TELECOM (supra) held thus:

> I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not."

19. The Plaintiff in seeking to reopen his case, other than saying that he wished to testify further and wished to call the Land Registrar did not explain why he did not sufficiently testify when he initially gave evidence and why the Land Registrar is to be called to testify after the Defendants had closed their case.

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay.

65. Guided by the ratio decidendi in the foregoing cases, the golden thread that becomes evident and which runs across is to the effect that an Applicant who seeks to procure an order to re-open a case must supply credible reasons/explanations why the intended evidence was not availed or available during the normal course of the hearing.

ISSUE NUMBER 3.Whether the grant of instant Application will prejudice the Rights of the Respondents to fair hearing/trial, as entrenched in Article 50(1) and (2) of *the Constitution*, 2010.

66. It is common ground that upon the close of the defense case, this court issued and granted directions pertaining to the filing and exchange of written submissions by the Parties.

67. Further and in addition, it is also worthy to recall that pursuant to and in line with the directions of the court, Learned counsel for the Plaintiffs' proceeded to and filed written submissions dated the 27th January 2023.

68. Subsequently, the said submissions were duly served upon Learned counsel for the Defendant, who thereafter proceeded to and filed written submissions on behalf of the Defendant. For good measure, the submissions on behalf of the Defendant are dated 6th March 2023.

69. Other than the foregoing, the Defendant proceeded to and filed the current Application. Notably, the current Application was being filed long after the Plaintiffs had filed and served their written submissions.

70. Moreover, it is also not lost on this court that the current Application was being filed after Learned counsel for the Defendant had taken cognizance of the critical issues of law, if any, raised and canvased in the written submissions by and on behalf of the Plaintiffs.

71. Surely, and taking into account the obtaining circumstances, what the Defendant herein intends to achieve with the current Application is to negate and defeat, not only the cross examination, but also the written submissions which have been filed by the Plaintiffs and duly served upon the Defendant's Learned Counsel.

72. To my mind, the Defendant herein is engaged in a scheme and/or exercise, where same is using the Honorable court as a platform to carry out and undertake investigations and enquiries and upon obtaining the critical perspective of the adverse party's case; then same retreats to re-organize his case, essentially to defeat the issues that have already been raised.

73. In short, what the Defendant is seeking to do is to defeat the established and hackneyed Doctrine of Natural Justice, Principle of fairness, the right to fair hearing and above all; the Rule of Law. To my mind, there must be Equality of arms and not otherwise.

74. Having pointed out the foregoing, it is imperative to state and reiterate that the current Application by the Defendant, if allowed, would catapult the Defendant to a higher pedestal and thereby accrue in his favor undue mileage as against the Plaintiffs. Clearly, such a scenario would be antithetical to the Due process of the court.

75. As a result of the foregoing, it is my humble view that the granting of the instant Application would substantially embarrass and prejudice the adverse Party herein, namely, the Plaintiffs.

76. Consequently and in view of the foregoing, the instant Application must be frowned upon.

Final Disposition

77. Having duly calibrated upon and analyzed the import and tenor of the current Application; and having taken into account the ripple effects that are likely to be caused by the subject Application; I come to the conclusion that the entire Application reeks of and is fraught with mala fides.

78. Consequently and in the premises, the Application dated 6th March 2023 be and is hereby Dismissed with costs.

79. Further and in addition, the instant matter shall now be scheduled for delivery of Judgment, taking into account that all the parties have hitherto filed and exchanged written submissions in respect of the substantive suit.

80. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE