# Ngugi & another (Suing as Administrators of the Estate of Salome Wambui Waititu) v Hussein (Environment & Land Case 270 of 2014) [2023] KEELC 17955 (KLR) (24 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17955 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 270 OF 2014**

**LL NAIKUNI, J**

**MAY 24, 2023**

**BETWEEN**

**KIARI NGUGI ........................................................................ 1ST APPLICANT**

**PETER KENNETH WAITITU ........................................................ 2ND APPLICANT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF SALOME WAMBUI WAITITU**

**AND**

**HAWA NUR HUSSEIN ........................................................................ RESPONDENT**

**RULING**

## I. Introduction

1. What is before the Honorable Court is the Notice of Motion application dated 18th February, 2022 by the Applicants. It was brought under the dint of Sections 1A, 3A, 63 (c) of the *Civil Procedure Act*, Cap. 21 Laws of Kenya, Section 146 (4) of the *Evidence Act*, Chapter 80, Order 18 Rule 10 of the Civil Procedure Rules, 2010 andArticle 159 of *the Constitution* of Kenya, 2010 of the Laws of Kenya.

## II. The Plaintiff/Applicant’s Case

2. The Plaintiff/Applicant sought for the following orders;

   i. Spent.

   ii. That this Honourable Court be pleased to order the applicants’ case to be re - opened and heard for purposes of adducing development plans and the Will dated 18th July 2010.

   iii. That this Honourable Court be pleased to recall the applicants’ witness number 1 Kenneth Kiari Ngugi for further examination in chief, for further cross-examination and re-examination respectively for the purposes of adducing development plans and the will dated 18th July 2010.

Iv. That costs of this application be in the cause.

3. The application was premised on the grounds, testimonial facts and the averments made out on the 13 Paragraphed Supporting Affidavit sworn by Kenneth Ngugi Kiari and dated 18th February, 2022. He averred that:

   a. He was the Co – Administrator in the estate of the Salome Wambui Waititu with authority to swear this affidavit (hereinafter referred to as "The Deceased").

   b. During his examination in chief, the Plaintiff/Applicant was not in a position to reach the Development Plan and the Probate Will touching on the suit property.

   c. When applicants were doing a random search in the deceased's documents after the close of the Plaintiff/Applicants' case, they came across the two vital documents that are intended to shed more light on the issued in question raised by the Respondent on development of the suit property.

   d. The Plaintiff/Applicant had an arguable case with a high probability of success.

   e. This Court could only administer substantive justice by allowing this evidence already adduced by the Plaintiff/Applicant to be further produced by way of showing Development Plans and the Probate Will dated 18th July 2010.

   f. The Respondent was yet to close its case and that the application is necessitated by the fact that the Respondent brought out the issue of development of the suit property whichwere done by the deceased.

   g. The failure to produce and or omission was not intentional but rather inevitable and its production will not be prejudicial to the other party as it is evidence that is already beforethe Court and not novel.

   h. This Honourable Court be pleased to order the Plaintiff/Applicants' case to be re-opened and heard for purposes of adducing development plans and the will dated 18th July 2010.

   i. This Honourable Court be pleased to recall the Plaintiff/Applicant's witness number 1 - KENNETH KLARI NGUGI for further examination in chief, for further cross-examination and re-examination respectively for the purposes of adducing development plans and the will dated 18th July 2010.

   j. This application was brought pronto without any unreasonable delay and in the interest of justice.

**III. Submission**

4. On 13th March, 2023, while all the parties were present in Court it was directed that each of them file and serve skeletal submissions as a way of disposing off the Notice of Motion application dated 18th February, 2022 by the Plaintiff/Applicant herein. From the records only the Respondent complied. The Honorable Court reserved a date for the delivery of the ruling accordingly.

**A. Written Submissions by the Defendant/Respondent**

5. On 12th April, 2023 the Learned Counsel for the Defendant/Respondent from the Law firm of Messrs. Asige Keverenge & Anyanzwa Advocates filed their written submissions in opposition to the Notice of Motion application dated 18th February, 2022. Mr. Asge Advocates commenced his submission by

stating that the application was incompetent, misconceived and an abuse of the due process. Thus, it should be dismissed with Costs. He objected having the Plaintiff/Applicant seeking to re – open a case that was closed on 30th September, 2019 and adducing of more documents being the development Plan and the Probate Will. He stated that assuming there was a Will then the applicant was guilty of non disclosure of material facts contrary to the provision of Sections 51 ( 2 ) and 52 of the Laws of Succession, Cap. 160 as they obtained Letters of Administration to administer the estate of the deceased – Salome Wambui Waititu yet they had a Will which was never disclosed. These made them busy bodies and intermeddlers. Indeed, the entire Originating Summon should be dismissed. PW – 1 – Kenneth Kiarie Ngugi had already testified on behalf of the other Plaintiffs/Applicants and the case was closed on 30th September, 2019. He further objected to the production of these documents holding that they were discovered after the case had been closed.

6. The Counsel averred that the Applicants had not explained why they delayed for nearly three (3) years before this motion was filed. In any case the Plaintiff had already testified and closed its case. Indeed the Defendant had commenced its case and had to be stood down arising from this application. It makes this application to e an afterthought and intending to re – open the case in order to fill in the gaps and loopholes in their case which will prejudice the Defendant. Furthermore, these two documents were not attached to the supporting affidavit.

7. The Learned Counsel averred that in an adversarial legal system parties were bound by their own pleadings. The Applicant could not under the guise of chancing on a document after the closure of their case to raise a fresh case and re open the closed case. This tantamount to ambushing the Defendant. It would bring confusion, contradiction and complication to the case. To allow the application would mean amending the Originating Summons. To buttress on this point, the Counsel relied on the decisions of "IEBC – Versus – Mutinda Mule & Another (2014)" ;Charles Mukoma Chira & 2 Others – Versus Kenya Power & Lighting Company Limited (2022) KEELC 2519 (eKLR) and Beatrice Ngonyo & Another – Versus – Samwuel K. Kanyuro & Others (2017) eKLR where the Courts held:-

> " It is a serious issue for the party to apply to recall further evidence after a matter has been heard. The greatest risk, of Course is that the parties to the suit stand to be prejudiced for they have already presented their case and have revealed their cards. It will need to be an extremely exceptional case to allow a party to call additional evidence after the hearing has closed.........This Court would not wish to make a precedent that a party is free to apply to re – open his case merely to seal loopholes revealed at the hearing of the suit or after the submissions of the other party......."

8. In conclusion the Counsel urged the Court to dismiss the application with costs.

**IV. Analysis and Determination**

9. I have considered with anxious care the Notice of Motion application dated 18th February, 2022, the supporting affidavit evidence in support to this application. It is instructive that while the Defendant never filed any response and the Plaintiff failed to file written submission by the time I retired to write down this ruling.

10. In order to arrive at an informed, fair, reasonable and just decision, the Court has framed the following three ( 3 ) issues for its determination. These are:-

    a. Whether the Notice of Motion application dated 18th February, 2022 by the Plaintiff/ Applicants has any merit?

b. Whether the parties herein are entitled to the reliefs sought

c. Who will bear the costs of the application.

**Issue No. a). Whether the Notice of Motion application dated 18th February, 2022 by the Plaintiff/ Applicants has any merit?**

11. The main issue to ponder herein under this Sub – heading is when and under what circumstances may a party apply to recall a witness; re – open a closed case and adduce any documents after the case has been closed. The provision of Order 18 Rule 10 Civil Procedure Rules, 2010 allows the court to recall any witness at any stage of the proceedings. Further, the provision of Section 146 of the *Evidence Act* (Chapter 80 Laws of Kenya) provides that the court may permit a witness to be recalled either for further evidence 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.

12. In the case of "Susan Wavinya Mutavi – Versus - Isaac Njoroge & another [2020] eKLR, the Court in disallowing an application similar to this one held that:-

> " 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 party'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 the 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."

13. Similarly, in the case of: "Samuel Kiti Lewa – Versus - Housing Finance Co. of Kenya Limited & another [2015] eKLR, the Court observed as follows-

> " Uganda High Court, Commercial Division in the case of Simba Telecom –versus - 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:
>
> > "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."

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."

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 inordinate and unexplained delay."

14. As stated above, the provision of Order 18 Rule 10 of the Civil Procedure Rules, 2010 grants the court powers to recall any witness who has been examined. It provides thus:

> " 10. 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."

15. Likewise, the provision of Section 146 (4) of the *Evidence Act*, Cap. 80 generally grants the court powers to recall a witness. It provides as follows:

> " (4) 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."

16. Be that as it may, I have observed that the above provisions do not specifically address the issue of re - opening of cases with a view of calling additional witnesses. The powers to make orders for reopening of cases for purposes of calling additional witnesses is a matter exercised under the inherent powers of the Court as per the provisions of Section 3A of the *Civil Procedure Act*. It is a matter that calls for the Court to grant such orders in the interest of justice so that all the evidence available to the parties can be put before a Court for consideration and determination.

17. In this case, the Applicants have stated that when Kenneth Ngugi Kiari gave evidence in court on 4th February, 2019, was not in a position to specifically reach the development plan and will touching on the property. On a random search they did on the deceased's documents after the close of the plaintiff's case, they came across the two vital documents that are intended to shed more light on the issued in question raised by the Respondent on development of the suit property.

18. I fully concur with the Submission by the Learned Counsel for the Defendant that the general tenor of the Civil Procedure Rules, 2010 is that parties ought to disclose their case at an early stage to avoid surprise, ambush, delay and increase of costs. The rules require the Plaintiff to file a list of witnesses, statements of witnesses and copies of documents to be relied upon at the trial under Order 3 Rule 2 and Order 11 of the Civil Procedure Rules, 2010. This has not been the case herein

19. A similar requirement is imposed upon a Defendant when filing his/her defence and/or counterclaim under the provision of Order 7 Rule 6 of the Rules. Before the pre-trial conference, written statements

may be filed and served with the leave of the court at least 15 days prior to the pre-trial conference under Order 11 of the Rules. After the pre-trial conference, the matter is set down for hearing.

20. It is expected that at the pre-trial conference stage, all the parties will have made full disclosure so that either party knows the case that they will face at the trial. Even after the pre-trial conference, Order 18 Rule 10 Civil Procedure Rules and Section 146 of the *Evidence Act* still gives the courts a wide discretion to allow the parties to call further witnesses or produce further documents.

21. However, this power is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of *the Constitution*. However, a fair trial does not exist in a vacuum, but is governed by rules which ensure that each party is given an opportunity to present or defend his case fairly. That in my view informed the drafters of *the Constitution* in Article 159 (2) (b) which provides that justice shall be administered without undue regard to technicalities. Those Constitutional imperatives are further supplemented by the overriding objective under Sections 1A, 1B and 3A of the Civil Procedure Rules Chapter 21 Laws of Kenya.

22. When this case came up for hearing on 4th February, 2019, the Plaintiffs did not indicate that there were some documents which they were unable to trace for purposes of production. They did not even seek an adjournment to enable them look for the same. But I will consider the fact that they contend that this evidence was not in their possession when the 1st Plaintiff witness testified.

23. In the case of Raila Odinga & 5 Others – Versus - IEBC & 3Others SCK Presidential Petition No. 3, 4 and 5 of 2013 (2013) eKLR the Supreme Court had to consider whether to allow additional evidence filed outside the contemplation of the rules and held as follows:-

> " The parties have a duly to ensure they comply with their respective time-lines, and the court must adhere to its own. There must be a fair and level playing field so that party or the court loses the time that he/she, it is entitled to, or inadvertences which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it then the court ought to be considerate taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavit and/or admission of additional evidence."

**Issue No. b). Whether the parties are entitled to the relief sought.**

14. Under this sub heading, the Honorable Court will proceed to apply the legal principles already enumerated herein in the instant case. The jurisdiction to re-open a case and receive additional evidence in a trial court 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 party's case does not embarrass or prejudice the opposite party. Secondly, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. The plea for re-opening of a case will also be rejected if there is inordinate and unexplained delay on the part of the applicant in bringing the application. The applicant is also required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing his case. Further, 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 need not be incontrovertible. (see Mohamed Abdi Mohamed - Versus - Ahmed Abdullahi Mohamed & Others

(2018)eKLR; Samuel Kiti Lewa vs Housing Finance Company Limited & Another (2015)eKLR; and, Ladd vs Marshall (1954) 3 ALL ER 745).

15. While considering a similar application, Hon. Mr. Sila Munyao J. in the case of Johanna Kipkemei Too – Versus - Hellen Tum (2014) eKLR held as follows:

> "........when the Plaintiffs testified and tendered their evidence, they had in mind that all that the Defendant would call two witnesses and that the Defendant would not be relying on any engagement document. The document sought to be introduced was not in their contemplation. They were never cross-examined on it. They never thought fit to mention it, assuming they knew of its existence. Before the Defendant started giving evidence, she never gave any indication that after listening to the Plaintiff's evidence, she would wish to call more witnesses in addition to those that she had earlier finished in her list of witnesses. She also never gave any indication that she would be relying on the subject document. When the Defendant testified, she never alluded to the documents sought to be introduced. Indeed she never mentioned that there was ever an engagement document signed. It is after her cross-examination that she has now sought to introduce new evidence. No reason has been given as to why the Defendant did not contemplate furnishing this new evidence earlier...."

14. As I mentioned elsewhere in this Ruling, the 1st Plaintiff witness testified on 4th February, 2019. Although he never alluded that there were some documents that he did not have in his possession and took them almost 3 years after the close of the Plaintiffs' case to have brought out this application, however, under the Overriding Objectives and principles which vests this Honorable Court with inherent and the of enshrined. Taking that the Plaintiff/Applicant has specifically mentioned the two documents – Development Plan and Probate Will, I discern these are critical evidence which will assist this Court arrive an informed determination in the long run. For that very reason I proceed to allow the application but on condition its only for purposes of producing the said documents. All the other evidence adduced remain intact.

**Issue No. c). Who will bear the costs of the application**

14. It is now trite law that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action or proceeding of a litigation. The proviso of Section 27 ( 1 ) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By events it means the result or outcome of the legal action.

15. In this case, although the Plaintiff/Applicant has succeeded in prosecuting its application, taking that this matter is still to procced on to its logical conclusion, it is just fair and reasonable the costs to be in cause.

**V. Conclusion & findings**

14. Taking the foregoing into account, it is my view that the Notice of Motion dated 18th February, 2022 does meet the criteria for re-opening of a closed case but with certain pre – conditions. Specifically, the Honorable Court proceeds to make the following orders:-

    a. That the Notice of Motion application dated 18th February, 2022 has merit and thus be and is hereby allowed to wit:-

        i. The applicants' case be re - opened and heard strictly for purposes of adducing the Probate Will dated 18th July, 2010 and marking for identification of the Development Plans to be produced by its Maker thereafter.

ii. Honorable Court do order for the recall of the Applicants' witness number 1 KENNETH KIARI NGUGI for further examination in chief but strictly for purposes of adducing the Probate Will dated 18th July, 2010 and marking for identification of the Development Plans to be produced by its Maker thereafter.

iii . The Defendant to be granted corresponding leave to file and serve any further documents arising from the amendment.

b. That for expediency sake, by the consensus of the parties, the part heard matter be fixed for hearing on 2nd November, 2023.

c. That the Costs shall be in the cause.

IT Is So Ordered Accordingly

**RULING DEILIVERED THROUGH MICROSOFT TEAM VIRTUALLY, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF MAY 2023.**

**……………………………………………..**

**HON. JUSTICE L. L. NAIKUNI, (JUDGE)**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

Ruling delivered in the presence of:

a. M/s. Yumna, Court Assistant;

b. Mr. Oyugi Advocate holding brief for Mr. Ojienda for the Plaintiffs

c. Mr. J. Asige Advocate for the Defendant