



**Mutune (Deceased) & another v Gitonga & another (Environment & Land  
Case 442 of 2014) [2023] KEELC 19099 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19099 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 442 OF 2014**

**JO OLOLA, J  
JULY 28, 2023**

**BETWEEN**

**MUCHEMI MUTUNE (DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPH NDIRITU THUITA - SUBSTITUTED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BERNARD KIMATHI GITONGA ..... 1<sup>ST</sup> RESPONDENT**

**JOYCE WANJIRA NDUHIU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Motion dated January 12, 2013, Joseph Ndiritu Thuita (the Substituted Plaintiff/ Applicant) prays for orders:
  - (i) ...
  - (ii) That the Honourable Court be pleased to re-open the Plaintiff's case in order to admit additional evidence;
  - (iii) That this Honourable Court be pleased to permit the Plaintiff to file a further Witness Statement within 21 days;
  - (iv) That this Honourable court be pleased to grant the Plaintiff leave to file a further List of Documents;
  - (v) That this Honourable Court be pleased to recall the Plaintiff herein for further examination for purposes of producing additional evidence for hearing and determination of this case;
  - (vi) That the costs of this application be in the cause.



2. The application is supported by an Affidavit sworn by the Applicant's Advocate Juliana Wanjiku King'ori and is premised on the grounds that:
  - (a) The Plaintiff's case was heard and marked as closed;
  - (b) The Plaintiff was not represented by an advocate during the hearing and upon enlisting the services of an advocate it has been discovered that crucial information was left out during the hearing of the Plaintiff's case;
  - (c) That it is prudent to recall the witness for further examination in support of his case which will assist the Court to make a fair and just determination of the case;
  - (d) The Plaintiff stands to suffer prejudice if the application is not allowed leading to an injustice;
  - (e) The Defendants will not suffer any prejudice if the application is allowed as they will have an opportunity to interrogate the information and rebut it; and
  - (f) That it is in the interest of justice to grant the orders sought before filing of submissions.
3. Bernard Kimathi Gitonga (the 1<sup>st</sup> Defendant/Respondent) is opposed to the application. In his Replying Affidavit sworn on January 23, 2023, the 1<sup>st</sup> Defendant avers that the Plaintiff's case is already closed and it was his case which was to be heard. The 1<sup>st</sup> Defendant asserts that this case does not belong to the substituted Plaintiff and that the same belongs to Muchemi Mutune who passed away before the matter was concluded.
4. The 1<sup>st</sup> Defendant avers that the said Muchemi Mutune was represented by Counsel who prepared the pleadings and documents on his behalf and that this application is merely aimed at delaying the conclusion of this matter and to ensure that the memory of the 2<sup>nd</sup> Respondent who is extremely old to be lost.
5. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the written submissions placed before me by the Learned Advocates representing the Parties herein.
6. By the application before me, the Applicant urges the Court to re-open the Plaintiff's case in order to admit additional evidence. It is the Applicant's case that he needs to file a further Witness Statement, a further List of Documents and to have the Plaintiff recalled for further examination for purposes of producing the additional evidence.
7. The circumstances under which a Court may allow additional evidence to be adduced were set down by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR where the Court observed that for the same to be allowed:
  - (a) The additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
  - (b) It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
  - (c) It must be shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
  - (d) The additional evidence sought to be adduced ought to be evidence that removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;



- (e) The evidence must be credible in the sense that it is capable of belief;
  - (f) The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
  - (g) The party seeking to adduce the additional evidence would have reasonably not have been aware of and procured the same in the course of the trial;
  - (h) It ought to disclose a strong prima facie case of willful deception of the Court;
  - (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The court must find the further evidence needful;
  - (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence, to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;
  - (k) The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”
8. While those principles were designed by the Supreme Court to guide appellate Courts on what to consider while allowing additional evidence, it was clear to me that the same equally offer great insight in a situation such as this where a party seeks to adduce additional evidence before the trial is concluded.
9. As it were 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.”
10. Section 146(4) of the *Evidence Act* (Cap 80) provides in that regard as follows:
- (4) The Court may in all cases permit a witness to be recalled either for further examination-in-chief, and if it does so, the parties have the parties have the right of further cross-examination and re-examination respectively.”
11. In the matter herein, while it is true that the original Plaintiff the late Muchemi Mutune had an advocate representing him when he instituted this case in the year 2011, it was evident that such representation ceased way back in the year 2013 and the Plaintiff had since not been represented by Counsel. There was therefore every possibility that something crucial could have been omitted from the evidence of the Party acting in person.
12. Having considered the Supporting Affidavit to the application, it was apparent that the information sought to be adduced was not voluminous and that the same is merely meant to clarify, certain aspects of the Plaintiff’s case. In the circumstances such as this where the application was made before the Defendants had opened their case, I think it would be fair and just that such evidence be considered by the Court to enable it to determine the real issues in controversy.
13. It was also apparent to me that the Defendants would not suffer undue prejudice as they will have an opportunity to cross-examine the Plaintiff on the additional evidence and to offer their own evidence in rebuttal during the hearing of the defence case.



14. In the premises, I am persuaded that there is merit in the Motion dated January 12, 2023. I allow the same with costs in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 28TH DAY OF JULY, 2023.**

In the presence of:

Mr. Makura holding brief for M. Wa Gathoni for the Applicant

Ms Mwangi holding brief for Kiminda for the Respondent

Court assistant - Kendi

.....

**J. O. Olola**

**JUDGE**

