



**Benard & another v Kang'ethe & another (Environment & Land Case 138 of 2014) [2023] KEELC 19809 (KLR) (30 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19809 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 138 OF 2014  
EK WABWOTO, J  
AUGUST 30, 2023**

**BETWEEN**

**WACHIRA BENARD ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN KARIUKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KIHARA KANG'ETHE ..... 1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Application for determination was filed vide Notion of Motion dated July 28, 2022 and accompanied by Supporting Affidavit sworn by Wachira Benard. The Plaintiffs sought the following orders:
  - i. Spent...
  - ii. Spent...
  - iii. That the Court re-opens the case and cross examines the 1<sup>st</sup> Defendant.
  - iv. That the 1<sup>st</sup> Defendant/ Respondent be estopped from denying/renegeing on his testimony/evidence before BPRT case no 995/2009 and the Ruling thereon dated September 3, 2010.
  - v. That this Court impeaches the credit of the 1<sup>st</sup> Defendant witness and finds that he is not a credible witness.
  - vi. That upon cross-examination, the court should rule on whether an order should be issued directing the police to charge the Plaintiff with the offence of perjury contrary to Section 108 of the *Penal Code*.



- vii. That the 2<sup>nd</sup> Defendant be compelled to produce a report/information on the history and current status of the Shauri Moyo Estate and Ex-pangani Residents; and further be compelled to correct/delete the untrue/misleading information thereon forthwith.
  - viii. That costs of this application be provided.
2. The Application was premised on the following numerous grounds;
- i. That the matter came for hearing on June 9, 2022.
  - ii. That the 1<sup>st</sup> Defendant/ Respondent witness was called on the stand and sworn in. That further, 1<sup>st</sup> Defendant/ Respondent was chief examined and his witness statement was adopted as part of the Court records.
  - iii. Upon examination in Chief, Plaintiff/Applicant's Counsel proceeded to cross examine the Defence witness based on his testimony.
  - iv. From cross examination, it was clear that the Defence witness is not a credible witness as he seemed to make contradicting statements.
  - v. What stood out was the 1<sup>st</sup> Defendant/Respondent witness constantly denying that the Plaintiff/ Applicant are or were his landlords at the material time.
  - vi. This statement contradicts the 1<sup>st</sup> Defendant position in Nairobi BPRT Case No 995/2009 Kihara Kangethe (Applicant) vs. Macharia wa Gachira (1<sup>st</sup> Respondent/Landlord), John Kariuki Macharia (2<sup>nd</sup> Respondent) and Wachira Benard (3<sup>rd</sup> Respondent).
  - vii. According to the said BPRT Case, the 1<sup>st</sup> Defendant deponed that; he was a protected tenant of the Plaintiff herein as at November 5, 2009 when the BPRT Application was filed and he was paying rents to the 2<sup>nd</sup> Defendant herein in the name of the Plaintiff's deceased father between February 2009 and upto September 2009.
  - viii. The Honourable Chair in the BPRT Ruling arrived at the conclusion that; the 1<sup>st</sup> Defendant was a tenant of the Plaintiff as at September 3, 2010 the date of the ruling, the 1<sup>st</sup> Defendant was protected as under a controlled tenancy having been a business partner of his deceased father and the 1<sup>st</sup> Defendant was paying rent to the 2<sup>nd</sup> Defendant.
  - ix. That the conduct of the Defendant is therefore not only contradictory but is discriminatory, depriving the Plaintiff equal protection and benefit of the law, opaque, procedurally unfair, illogical and in bad faith.
  - x. It is in the interest of justice that the 2<sup>nd</sup> Defendant be compelled to produce an updated report on the history of the Shauri Moyo Estate and Ex-pangani residents to assist the Honourable Court reach a truthful and just decision.
  - xi. That no prejudice shall befall the Defendant if the prayers sought herewith are issued.
3. The Application was canvassed by way of written submissions. The 1<sup>st</sup> Defendant submitted on the following issues in his submissions dated November 28, 2022;
- i. Whether the court should allow the plaintiffs application should re-open the case and re-examine the 1<sup>st</sup> defendant?
  - ii. Who should bear the costs of the application?



4. Relying on the case of *Jasbir Singh & 3 Others vs Tarlochan Singh Rai & 4 Others* [2007] eKLR, it was argued that the application is a gross violation of the principle of finality and the principle of expeditious determination of disputes. It was emphasized that the suit began in 2014 and in the 8 years following, the Plaintiffs had enough time to prepare arguments, submissions and evidence. The 1<sup>st</sup> Defendant further relied on the considerations in the case on *Samuel Kiti Lewa v Housing Finance Company & Another* [2015] eKLR, to which it was submitted that allowing the application would be allowing fresh evidence that was neither useful to the court nor timely in dispensation of justice.
5. In the Plaintiffs submissions dated October 12, 2022 and supplementary submissions dated March 1, 2023, the Plaintiffs submitted on the following four issues;
  - i. The facts as presented by the 1<sup>st</sup> Defendant are distorted, calculated to further attempt to mislead the Honourable Court.
  - ii. Authorities of the 1<sup>st</sup> Defendant are misguided and distinguishable
  - iii. The status/ relationship between the Plaintiff and the 1<sup>st</sup> Defendant prior to the irregular issue of card to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant is material
  - iv. Oxygen rule.
6. It was submitted that the main reason for reopening the case is due to the contradictory statements uttered by the 1<sup>st</sup> Defendant during cross-examination. Relying on Paragraph 28 of the 1<sup>st</sup> Defendant's submissions, it was reiterated that there was misrepresentation of facts.
7. It was also highlighted that during cross-examination the 1<sup>st</sup> Defendant contradicted himself to a point of falsehood under oath. Specifically, that; a) the tenancy prior to the irregular issue of lease became an issue. b) Perjury became evident and an issue, c) lack of credibility of the 1<sup>st</sup> Defendant and his testimony was exposed and became an issue. Relying on article 159 of *the Constitution*, together with Section 1A, 1B and 3A of the *Civil Procedure Act* and *Fair Administrative Action Act*, it was argued that the 1<sup>st</sup> Defendant committed perjury which would prejudice the Plaintiffs' case and attack the dignity of the judicial process.
8. Having perused the written submissions, court proceedings and supporting documents, it is evident that the issues for determination before this Court are:
  - i. Whether the Plaintiffs/Applicants application is merited?
  - ii. Who should bear costs of the Application?
9. Order 18, Rule 1, 2 and 3 of the *Civil Procedure Rules*, dictate the manner in which hearing ought to be carried out. In this case, it is undisputed that the parties exercised their respective rights to present their witnesses and evidence and duly cross-examine them.
10. Order 18, Rule 10 of the *Civil Procedure Rules* outlines the circumstances under which a witness may be recalled:

“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.”



11. With regards to the issue of re-opening the case, this Court must consider the balance of fairness for all Parties as outlined in Section 146 (4) of the Evidence Act:

“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.”

12. The use of the word “may” speaks to the discretionary powers of the Court to ensure discovery of evidence is done effectively and allows both parties to appraise the strength or weakness of their relevant cases. The discretionary powers of the Court must equally weigh the weight of the evidence and its impact on the final determination of the Court. The Court of Appeal in Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited & 2 others) [2016] eKLR highlighted that the Court exercises discretionary powers when determining to re-open a case but would be not grant the plea if it is intended to fill gaps in the evidence. Moreover, the plea to re-open cannot be granted if there is unexplained delay on part of the Applicant.

13. In Patriotic Guards Ltd v James Kipchirbir 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.”

14. In my opinion, of the above-mentioned considerations, time is most crucial. My perusal of the Court record confirms that this suit has dragged on for months on end due to interim applications and mentions for compliance on at least four instances. After close of hearing on June 9, 2022, the judgement date was set for September. Even so, the Plaintiffs proceeded to make this application, in effect arresting the judgement. I believe the application was brought in bad faith and the effect of re-opening the case would lead to a waste of precious judicial time and worse off occasion extreme delay in dispensation of justice.

15. With regards to the issue of impeaching the credibility of the 1<sup>st</sup> Defendant, the Court has considered Section 162 and 163 of the Evidence Act; which stipulates as follows;

“When a witness has been asked and has answered any question which is relevant to the proceedings only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him but if he answers falsely he may afterwards be charged with giving false evidence:

Provided that—

- (i) if a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction;
- (ii) if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, evidence may be given of the facts.

163.



- (1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—
  - (a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
  - (b) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
  - (c) by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;
  - (d) when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.
- (2) A person who, called as a witness pursuant to paragraph (a) of subsection (1) of this section, declares another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

16. Under Section 162 of the *Evidence Act*, the Court is again called upon to exercise its discretion in making its determination. In this case, my interpretation of Section 163 is that the Plaintiffs' counsel had two golden opportunities to impeach the credibility of the 1st Defendant. Firstly, by calling upon a witness who had knowledge of the 1<sup>st</sup> Defendant's character or secondly, by producing documents that highlighted the inconsistencies. I align myself with the sentiments of the then Court of Appeal in East Africa in *Mahati Bin Ruadiha -vs- Rex* [1938] EACA 52 where it was stated;

“...The credit of a witness may be impeached by the adverse party or with the consent of the Court, by the party who calls him by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The proper procedure is to apply for leave to treat as hostile, prove and put in the former statements and then put to the witness the passages which are alleged to be inconsistent with the evidence given by at the trial. It is essential that the witness should be given an opportunity of explaining the inconsistencies as it sometimes happens that apparent inconsistencies are capable of completely satisfactory explanation. If serious and substantial inconsistencies are proved the effect is to render the witness unworthy of belief and not to make what he said in the former statement available as evidence at the trial.”

17. By virtue of each party having sufficient time and audience before the Court, I find that the application was made late in the day with an attempt to aid the Plaintiffs in its gap filling pursuits.
18. In the foregoing, the Court finds that the Application dated July 28, 2022 is unmerited and the same is hereby dismissed. Costs will abide the final determination of the suit.



19. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF AUGUST 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

N/A for the 1<sup>st</sup> Plaintiff/Applicant.

N/A for the 2<sup>nd</sup> Plaintiff/Applicant.

Mr. Beyo h/b for Mr. Menegene for the 1<sup>st</sup> Defendant/Respondent.

N/A for the 2<sup>nd</sup> Defendant/Respondent.

