



**Kamanda v Murithi & another (Environment & Land Case 219 of 2014)
[2023] KEELC 20265 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 219 OF 2014
EK WABWOTO, J
SEPTEMBER 28, 2023**

BETWEEN

VERONICA KERUBO KAMANDA PLAINTIFF

AND

BENSON RITHO MURITHI 1ST RESPONDENT

PETER NJUGUNA ALIAS WANYAMBURA 2ND RESPONDENT

RULING

1. The application for determination was filed *vide* notion of motion dated April 18, 2023 and accompanied by supporting affidavit sworn by Veronica Kerubo Kamanda on the same day. The plaintiff sought the following orders:
 - i. ...Spent.
 - ii. ...Spent.
 - iii. ...Spent.
 - iv. That the honourable court be pleased to re-open the plaintiff's and the defendant's case for hearing and determination
 - v. That the plaintiff be granted leave to file a further list of witnesses and further witness statement.
 - vi. That the plaintiff's remaining witnesses be granted leave to testify.
 - vii. That costs of this application be in the cause.
 - viii. That the honourable court be pleased to issue any such further orders it may deem fit and convenient in the circumstances.



2. The application was made on the following grounds:
 - i. That if the orders sought are not granted, the plaintiff will suffer irreparable harm and subjected to great prejudice.
 - ii. The plaintiff had tried on various occasions to trace her witnesses but was unable to locate all of them.
 - iii. That on November 22, 2022 when this matter was scheduled for hearing of the plaintiff's case, the advocate for the plaintiff mentioned the matter virtually and while they were proceeding to ELC court for a physical hearing they encountered traffic jam and upon arriving he found that the matter had proceeded and the defendants were heard in absence of the plaintiff.
 - iv. The plaintiff had requested the court that the surveyor by name George Onel be summoned by the court to testify this matter.
 - v. It is in the best interest of justice that this additional evidence is taken.
 - vi. The defendants will not suffer any prejudice if this additional evidence is taken.
3. On April 27, 2023, the application was allowed in terms of prayers 2 and 3. The court directed that the other reliefs sought in the application be canvassed by way of written submissions.
4. In submissions dated September 19, 2023, the plaintiff submitted that failure to attend court for hearing was a bonafide mistake which should not be visited upon her. Relying on article 50 and article 159(2)(d) of the Constitution it was submitted that the right to fair hearing should not be hindered by undue regards to technicalities. Relying on the case of Charles Mwalia v Kenya Bureau of Standard HCCC No 1058 of 2000, it was argued that a judgement can be set aside so that parties can approach the judgement seat on merits of the respective cases.
5. The application was opposed vide a replying affidavit sworn by Benson Ritho dated May 15, 2023 and submissions dated June 8, 2023. It was argued that service of the mention notice and submissions to notify that the matter was listed on February 22, 2023, there was no appearance by the plaintiff. Furthermore, the instant application was made 6 days to delivery of judgement and as such the defendant only became aware of the application during attendance on April 28, 2023. Lastly, it was argued that through the course of the suit, from pre-trial conference and hearing, the plaintiff did not give an indication of willingness to call more witnesses. For this reason, the application appears more as an afterthought than a genuine attempt to bring a credible witness.
6. Having perused the written submissions, court proceedings and supporting documents, it is evident that the main issue for determination before this court is whether this court should reopen the respective parties' cases to allow the suit be heard on merit.
7. Order 18, rule 10, outlines the circumstances under which a witness may be recalled, it stipulates thus;

“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.”



8. 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.”

9. The use of the word “may” speak 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 threshold to re-open a case has been emphasized in several instances. First, 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. In Samuel Kiti Lewa v Housing Finance Company & another [2015]eKLR, the court would not grant the plea if it is intended to fill gaps in the evidence. Lastly, the plea cannot be granted if there is inordinate and unexplained delay on part of the applicant.

10. The court is primarily cognizant that the suit is quite old (being 9 years old) and should be dispensed with in the most prompt and efficient manner possible. Moreover, it is key to uphold the balance of the respective rights of the parties to fair hearing and timely disposition of the suit. In the foregoing, the court finds that the application dated April 18, 2023 is merited and the same is allowed under the following terms:

- i. The plaintiff's and the defendants' case is re-opened for hearing and determination of the suit.
- ii. That the plaintiff's remaining witnesses be granted leave to testify.
- iii. This matter will be heard on a mutually agreed date and when all the parties and their witnesses are present to participate.
- iv. That costs of this application abide determination of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Plaintiff/Applicant

Mr. Amalemba for the Defendants.

Court Assistant; Caroline Nafuna.

