



Azzuri Limited v Ziro (Sued as the administrator of the Estate of Lawrence Kadenge Ziro - Deceased) & 5 others (Land Case 217 of 2014) [2023] KEELC 22488 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 217 OF 2014
MAO ODENY, J
DECEMBER 20, 2023**

BETWEEN

AZZURI LIMITED PLAINTIFF

AND

KAMBI KADENGE ZIRO 1ST DEFENDANT

GEORGE KADENGE ZIRO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF LAWRENCE KADENGE ZIRO - DECEASED) 2ND DEFENDANT

VALERIO BUCIARELLI 3RD DEFENDANT

KADZIRO BEACH LIMITED 4TH DEFENDANT

LAND SETTLEMENT FUND BOARD OF TRUSTEE (SFT) 5TH DEFENDANT

KILIFI COUNTY REGISTRAR 6TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 21st January 2023 by the 1st and 4th Defendants seeking the following orders:
 - a. Spent
 - b. The 1st defence witness (Mr. Felix Nyakundi) is hereby recalled to appear before court on 23.02.23 for further examination in chief, cross-examination and re-examination as dictated by the law of evidence.
 - c. The 5th defence witness (Mr. Boaz Oketch) (or his alter ego) as 6th defendant and the Secretary of the Land Control Board Malindi is recalled to produce and table before court on 23.02.2023 the original complete register, all documents and receipts presented by parties in this litigation,



original Minutes of the meeting of Malindi LCB of September 2014 and deed/correspondence files kept by the Kilifi Land Registry respecting Chembe/Kibambmshe/356 for purposes of giving effect to prayer No 2 above.

- d. To further give effect to the recall of the two witnesses who are serving public officers, the accompanying summonses to witness do issue for advance timely service on the two witnesses by the 1st and 4th defendants' counsel.
- e. Costs of this recall of a witness be provided for.

1st and 4th Defendant/Applicant's Submissions

2. Counsel cited section 146 (4) of the *Evidence Act* on the law of recall of witnesses and relied on the case of *Fernandes v Noronha* [1969] EA at pg 512 and submitted that a judge has powers discretionary to permit a recall a witness at any stage of the trial either suo moto or at the instance of a party for examination in chief or cross examination. The power to recall after taking evidence has been completed and a party has closed his case is to be exercised in exceptional circumstances where an injustice may otherwise result.
3. Counsel gave a detailed background of the case and submitted that DW1 and 5 are serving public officers as County Land Registrars who served at different times as the custodians of registration records of the suit plot,
4. Counsel further submitted that DW1 had testified but did not have the original records in court when he took the witness stand. Further that DW5 also testified and produced defence exhibit No 8 which had 33 photocopies of the documents which he stated that he had found in the register and deed file.
5. Mr. S M Kimani submitted that reopening the case would supplement and correct any misrepresentation and elicit explanation of the highlighted anomalies or provide the omitted data on the register. Counsel therefore urged the court to allow the application as prayed.

2nd Defendant/Respondent's Submissions

6. Counsel relied on the grounds of opposition dated 10th February 2023 and submitted that the Applicants have not met the threshold for recall of witnesses as provided for under Section 146 (4) of the *Evidence Act* and Order 18 rule 10 of the *Civil procedure Rules*.
7. Mr. Shujaa further submitted that DW1 was called as a witness for the 1st & 4th Defendants who had closed their case and that if the purpose of re-calling DW1 is to adduce new evidence then the Applicants must first apply to re-open their defence case as they are not at liberty to adduce new evidence without first re-opening their defence case. That there is no specific prayer for the Court to re-open the defence case and that the application to re-open the defence cannot be done during submissions.
8. It was counsel's submissions that DW1 was at one time the Land Registrar at Kilifi Land Registry and he swore an affidavit dated 12th October 2015 which he adopted as his Witness Statement during his testimony. That in the affidavit, DW1 informed that court of the documents that were in the Register or parcel file for the suit property at the time he swore the affidavit. Further, that the Applicants have not indicated the areas that they intend to examine or cross-examine DW1 and DW5.
9. Counsel urged the court to dismiss the application with costs.



Plaintiff's Submissions

10. Counsel gave a brief background to the case and submitted that DW1 and DW2 who were former Kilifi District Land Registrars and DW4 was the 4th Defendant's Director who testified in 2020.
11. Mr. Mwadilo further submitted that all the witnesses were examined, cross-examined and re-examined by the Advocates on record and questioned on the documents produced by the Plaintiff and the Defendants. Counsel further stated that the allegation that the Attorney General served the Applicant with the documents late is not tenable, as they did not raise any objection.
12. Counsel submitted that the Applicant has not explained the inordinate delay in seeking to recall DW1 and 5 more than 2 years after they testified. Further, that DW1 testified on 5th October 2020 and the affidavits filed were within the Applicants' knowledge.
13. Counsel relied on the case of *Johana Kipkemei Too v Hellen Tum* [2014] eKLR where the court held that the plaintiffs would be greatly prejudiced if the court were to allow the application by the defendant where the Plaintiffs had already closed their case.
14. Mr. Mwadilo further cited the case of *Odinga v Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) and urged the court to dismiss the application with costs.

5th and 6th Defendants' submissions

15. Counsel for the 5th and 6th Defendants opposed the application vide grounds of opposition dated 15th February 2023 and submitted that the 6th Defendant is the custodian only of master records existing in Kilifi Land Registry and that the 6th Defendant is not a Secretary to the Land Control Board.
16. Ms Lutta further submitted that the Applicants have not provided sufficient grounds for recall of the witnesses as the issues of facts and documentary evidence produced by the 6th Defendant were well covered during the hearing on 19th January 2023 and all parties had an opportunity to cross examine the witness. Counsel therefore urged the court to dismiss the application as it offends the right to a fair hearing as provided for under Article 25 of *the Constitution*.

Analysis and Determination

17. The issues for determination are whether the Applicants have given sufficient reasons why DW1 and DW5 should be recalled to give evidence and whether the application was filed without inordinate delay.
18. Section 146 (4) of the *Evidence Act* generally grants the Court powers to recall a witness and 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.”



19. Order 18 Rule 10 of the Civil Procedure Rules grants the Court powers to recall any witness who has been examined and provides that:

“ 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.”

20. The decision to recall a witness or not is discretionary and the court must be guided by the principles of a right to fair trial and hearing. In the case of Cason v State 140 MD App 379 {2001} the principles of recall were expounded as follows:

“Whether good cause is shown, whether the new evidence is significant; whether the jury or Judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony.”

21. The Applicants contend that DW5 who gave evidence produced documents especially instruments of transfer between Lawrence Kadenge Ziro and Kadziro Beach Limited whose content was at variance with the already produced in the court file and the one in Malindi ELC Misc Application No 56 of 2015 Azzuri Limited v Land Registrar Kilifi County and AG.

22. With due respect to counsel, the witness gave evidence and counsel had an opportunity to cross-examine the witness and could have put questions to DW5 to explain the variance of the documents produced. Even if this witness were to be recalled, he is likely to give the same evidence and nothing would change unless he would be lying or disowning his testimony or documents produced.

23. What would be the intention of the recall, is it to fill in the gaps that the Applicants have noticed after the close of the Plaintiff's and the defence case or is it to prejudice the Respondents and delay the matter further. A party applying for a recall of a witness must demonstrate why such further evidence was not given in the normal way at the time when the witnesses gave evidence. The court must also be satisfied that the further evidence is likely to have material effect.

24. In the case of Samuel Kiti Lewa v Housing Finance Company Limited & another {2015} eKLR the court held that :

“ in my view if the plaintiff was allowed to re-open his case to so prove it that a document produced by the defendant was different to the one he had would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”

25. It should be noted that reopening of a case, which the Applicant did not apply for, is a draconian measure, which should only be allowed sparingly as it has an effect on the rights of the parties to the litigation or prejudicing the Respondent.

26. I find that the Applicants have not given sufficient reasons to enable the court make an order of recall of the witnesses and therefore the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER 2023.

M.A. ODENY

JUDGE



NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

