



Shele & another (Suing as the personal representative of the Estate of Jackline Chelangat) v Nyale & 6 others (Environment & Land Case 3 of 2021) [2023] KEELC 22378 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 3 OF 2021
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

**RUTH CHEROTICH SHELE 1ST PLAINTIFF
NEWTON MWANGI GIKONYO 2ND PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
JACKLINE CHELANGAT**

AND

**RONALD MWANGO NYALE 1ST DEFENDANT
CHARLES NJUKI GETHI 2ND DEFENDANT
FRANCIS KAGUMBA GITONGA 3RD DEFENDANT
VINCENT MURIMI 4TH DEFENDANT
TIMOTHY OKEMBA ADENY 5TH DEFENDANT
THE REGISTRAR OF TITLES 6TH DEFENDANT
THE ATTORNEY GENERAL 7TH DEFENDANT**

RULING

1. This ruling relates to submissions made before me on 20/11/2023 by counsel for the parties herein, Mr. Birir for the plaintiffs, Mr. Angima for the 1st, 2nd and 3rd Defendants and Mr. Ojwang for the 6th and 7th defendant. The case was part-heard before Odeny J. sitting at Malindi before her transfer to another station.



2. Mr. Angima urged that the hearing starts *de novo*. In his view, it was an appropriate time to make the application for reason that Odeny J has since been transferred. Mr. Ojwang supported the application.
3. Mr. Birir opposed the application. He argued that the Defendants were well represented at the hearing and that all the documents relied upon are in the court's record. To him, the learned Judge's handwriting was legible.
4. In a rejoinder, Mr. Angima stated that the Defendants have never had any fair representation as conceded by the 1st Plaintiff under paragraph 6 (iv) of her affidavit filed on 11/11/2022.
5. Upon considering the application by Mr. Angima and submissions presented to me by counsel, I ordered that the hearing starts *de novo* for the reasons that I will discuss hereunder.

Order 18 rule 8 (1) of the [Civil Procedure Rules, 2010](#) provides as follows: -

“ 8 (1). Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.”

6. In my view, the test should be one that promotes fair hearing and eventually guarantees justice to the parties. The proper question therefore would be whether any party would be materially prejudiced by the decision to commence a hearing *de novo*.
7. The pertinent and guiding principles in such applications were aptly outlined by Gikonyo J in [Wycliffe Mwavali Ondari v County Council of Narok & another](#) [2022] eKLR as follows: -

“(9) I should also state here that the jurisprudence coming through seems to extend, with appropriate adaptations, application of the Criminal Law principle in section 200 of the [CPC](#) across the board in furtherance of the constitutional right of fair hearing...

(15) In sum, in deciding whether or not a case should start *de novo*, the court should consider: -

- i) Whether the successor Judge is in as good a position as his predecessor would have been in to evaluate the evidence and submissions;
- ii) Availability of witnesses who have testified; may be they are not available or cannot be procured or cannot be procured except with great expense of time, money;
- iii) The dictates of the overriding objective, and the principle of justice in article 159(2)(b) of the [Constitution](#); *inter alia* delay and cost effect of the order;
- iv) The prejudice that will be suffered by the parties; balancing of rights is important here;”



8. Although the outcome in that case was that the learned judge ordered the case to continue from where it stopped, the facts therein were distinguishable to the present case. That notwithstanding, the said principles were aptly laid out and I am guided by them.
9. In this case, the Plaintiffs closed their case on 28/3/2022 after the testimony of one witness, the 1st Plaintiff herein. Notably, one Mr. Ogeto was on record for Mr. Kazungu counsel for the 1st -5th Defendants. He did not ask any questions in cross-examination. He had equally not filed any statement of defence. On 19/9/2022, Mr. Angima came on record for the 1st -3rd defendants, and with consent of the other parties, he was granted leave to file a statement of defence and other documents on behalf of the said defendants.
10. Further, Mr. Angima brought to my attention the contents of an affidavit sworn by the 1st Plaintiff on 24/10/2022 and filed on 11/11/2022. The import of paragraph 6 (iv) therein is that the Plaintiffs admit that the said advocate, Mr. Kazungu, has never been rightly on record for the Defendants. It is also not in doubt that the honourable Justice Odeny has since been transferred and is not in a position to proceed with the hearing.
11. Given those circumstances, and bearing in mind that the Plaintiffs' counsel did not contest the availability of the witness, I find that it is in the interest of justice that this matter commences *de novo*. I must also state that having considered the issue in depth, I do not find any prejudice that the Plaintiffs will suffer if the application is allowed.
12. These are my reasons for allowing Mr. Angima's application on 20/11/2023. The matter shall be mentioned on 1/2/2024.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14TH DAY OF DECEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

