



**Chebril (Suing as the Administrator of the Estate of Asha Jabril  
Mohammed - Deceased) v Mburugu & 6 others (Environment & Land Case  
001 of 2021) [2023] KEELC 21977 (KLR) (4 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 21977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE 001 OF 2021  
PM NJOROGE, J  
DECEMBER 4, 2023**

**BETWEEN**

**MARYANN MOHAMMED CHEBRIL (SUING AS THE ADMINISTRATOR OF  
THE ESTATE OF ASHA JABRIL MOHAMMED - DECEASED) ..... PLAINTIFF**

**AND**

**MICHAEL KOOME MBURUGU ..... 1<sup>ST</sup> DEFENDANT  
ISIOLO COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT  
JEDIEL KIRIMI RUTERE ..... 3<sup>RD</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT  
THE DIRECTOR OF SURVEY ..... 6<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This application is dated 28/8/2023 and states that it has been brought to court under various cited provisions of the law. It seeks the following orders:-
  1. That this application be certified as urgent and be heard ex-parte in the first instance.
  2. That this Honourable Court be pleased to review, set aside and/or vary the ruling and order issued on the 26<sup>th</sup> July, 2023 pending the hearing and determination of this application.
  3. That leave be granted to recall the Plaintiff's witness to adduce/produce and rely on the documents filed on 26<sup>th</sup> July, 2023 by the Attorney General In The Alternative the Assistant



Land Administrator, Mr Simiyu be recalled to produce the documents filed by the Attorney General on 26<sup>th</sup> July, 2023.

4. That the costs of this application be provided for.
2. The application is supported by the affidavit of Ahmed Khadhar Momamed and has inter alia, the following grounds:-
1. The ruling and order of 26<sup>th</sup> July, 2023 be reviewed, varied and/or set aside and that the Plaintiff deserves a chance to be heard as a matter of right in the interest of justice and to ensure fair administration of Justice.
  2. The Honourable Court inadvertently failed to consider the issue of admissibility, credibility and relevance of the documents in question as provided under Section 35 (4) of the Evidence Act.
  3. There are issues for determination which ought to be heard and determined in the interest of justice and fair trial. The documents filed by the Attorney General on 26<sup>th</sup> July, 2023 are crucial and relevant in this matter.
  4. The Plaintiff urges this Honourable Court to exercise its discretion under Section 22 of the Civil Procedure Act and order Production under oath, subject to such condition as the court may prescribe.
  5. The principles upon which a court in civil cases will exercise such discretion and allow the reception of further evidence are:-
    - a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
    - b. The evidence must be such that, if given, it would probably have an important influence on the result of the case.
    - c. The evidence is on the face of it credible.
  6. The plaintiff wish (sic) to adduce/produce additional documents which (sic) was not within the knowledge of the plaintiff until the Attorney General filed them on 26<sup>th</sup> July, 2023. The same been the Public documents records of the 4<sup>th</sup> defendant which evidence will assist the court to make a fair and just determination of this case and also assist the court to do justice and justice in a fair manner.
  7. The Plaintiff was unable to adduce the documents for reasons that they did not know the same were in possession of the 4<sup>th</sup> defendant for the production thereof as exhibits and the Plaintiff will suffer great loss and prejudice if the application for review is not allowed as prayed.
  8. The production of the documents would cause no prejudice to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants and further the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants still have an opportunity to cross examine and shatter the veracity of the documents.
  9. The evidence sought to be adduced is credible and discloses a strong Prima facie case and that it will assist the court to make a fair final determination bearing in mind the nature of the dispute.
  10. The Plaintiff has brought this newly discovered material to the Honourable Court's attention which was not within her own knowledge and/or could not be reasonably within her own knowledge earlier.



11. This Honourable Court ought to consider and exercise its discretion to allow the documents in the interests of justice and to ensure no prejudice is occasioned to either party in this matter.
  12. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall have an opportunity to examine the documents and seek to challenge them as no prejudice will be occasioned to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in allowing to be adduced as they can challenge such documents.
  13. The documents are credible as it consists of official public documents of the 4<sup>th</sup> defendant written, issued and received in the course of public duty and that they originate from public offices having proper custody.
  14. The additional documents sought to be adduced meets the criteria and guidelines laid out by the Supreme Court in the Mohamed Abdi Mohamed Versus Ahmed Abdullahi Mohamed and 3 Others eKLR [2018].
  15. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will not suffer prejudice and their right to a fair hearing guaranteed under *the constitution* will not be prejudiced.
  16. The Plaintiff is apprehensive that if the Orders are not granted as prayed, the Plaintiff will be greatly prejudiced and is at risk of not only suffering irreparable loss, but also being denied of her rights to fair hearing.
3. The application was canvassed orally.
  4. Advocate Lakicha, for the plaintiff told the court that in prayer 2 of the application, he was seeking review and the setting aside of this Court's ruling delivered on 26/7/2023. He told the court that he was relying on the affidavit of Ahmed Kadhar Mohamed, the applicant which affidavit was in support of the grounds in the body of the application. He explained that the applicant only came to learn about the new documents he wants introduced when the Attorney General filed them. This was after the Plaintiff, the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant and the 3<sup>rd</sup> defendant had testified and closed their cases. He opined that production of the new documents would not prejudice any of the other parties as they would get an opportunity to conduct the necessary cross-examination.
  5. The Plaintiffs Advocate proffered 8 cases to buttress his assertion that the orders sought in the application are merited. The said authorities are:
    1. Mohamed Abdi Mohamed Vs Ahmed Abdullahi Mohamed and 3 Others (2018).
    2. IEBC Vs Robert K Nyengi (2015) eKLR.
    3. E.O VS C.O.O (2020) eKLR.
    4. Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) Vs Mohamed & 4 Others (2022) KECA (KLR).
    5. Otieno, Ragot & Company Advocates V National Bank of Kenya (2020) eKLR.
    6. Sylvester Nthenge V Johnstone Kiamba Kiswili (2021) eKLR.
    7. Shanzu Investment Ltd V Commissioner of Lands (1993) eKLR.
    8. James Bosire Machogu V Brian Kipkemboi Kirui (2022) eKLR.
  6. The 1<sup>st</sup> defendant's advocate, Advocate Mwirigi Kaburu opposed the application. He argued that the applicant had not demonstrated that the refusal to adjourn the hearing of the case on 26/7/2023 and



the refusal for production of new documents after the plaintiff, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants had testified and closed their cases, had not been judicious.

He opined that the courts discretion to refuse to adjourn the case and refuse to allow the filing of new documents had be exercised properly.

7. The 1<sup>st</sup> defendant's advocate told the court that the prayer to recall the 3<sup>rd</sup> defendant's witness was unmerited as the Plaintiff's advocate had extensively cross-examined the said witness and all the witnesses proffered by the 1<sup>st</sup> to 3<sup>rd</sup> defendants. He opined that this prayer was a ply to close perceived loopholes and gaps as the plaintiff had the advantage of seeing all documents of the defendants.

Regarding the prayer that Mr Simiyu, the 3<sup>rd</sup> defendants advocate be recalled, Mr Mwirigi told the court the witness appeared in court pursuant to court summons when the plaintiff had objected to the production of allotment documents to the 3<sup>rd</sup> defendant and insisted that the documents be produced by the allocating authority.

8. Mr Mwirigi felt that after extensively Cross-examining Mr Simiyu, who in any case had been summoned to court at the instance of the plaintiff's advocate, the plaintiffs advocate was attempting a second bite at the Cherry. He urged the court to firmly deny the Plaintiff this second chance and to dismiss this application.

9. Mr Ken Muriuki, the 2<sup>nd</sup> defendant's advocate opposed the application and termed it an abuse of the court process.

He opined that it was tantamount to the court sitting on its own appeal. He felt that if the applicant had been dissatisfied, he ought to have lodged an appeal in the court of Appeal and contemporaneously sought leave in the appellate court to adduce additional evidence. He told the court the circumstances of this case and the circumstances of the authorities adduced by the applicant were different.

10. Advocate Murango Mwenda, the 3<sup>rd</sup> defendant's advocate told the court that he associated himself fully with the submissions made by the counsels for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He told the court that whereas Section 80 of the Civil Procedures Act grants the court power to review its orders, Order 45 of the Civil Procedure Rules sets out the conditions to be met by a party seeking review. He said that they are

- a. A mistake or error on record.
- b. Discovery of new and important evidence which could not have been produced by the party at the time of hearing the suit after exercising due diligence.
- c. Or for any other sufficient reason.

11. Mr Murango submits that the applicant only discovered the new evidence after the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants attempted to persuade the court to admit new documents after the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants had testified and closed their cases, is evidence that the plaintiff had not conducted due diligence and more so since the Plaintiff says that the said documents were public documents. He submits that the plaintiff's affidavit has not even attempted to show what due diligence she had conducted. He submits that by admitting that the new documents sought to be introduced are public documents, the plaintiff admits culpability in her failure to exercise due diligence. He opines that the applicants' cries to the court is what she ought to have considered at the initial stage of filing the suit.

12. Advocate Murango Mwenda opines that allowing this application would be tantamount to allowing the plaintiff to introduce and prove a new case. He submits that the Rule on review cannot be used to allow a party to patch up its case. He submitted that he was fortified by the authorities of E.O Versus



C.O.O [2002] eKLR where the court held that “this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant...to patch up omissions in his case”. The also relies on a case proffered by the plaintiff as one of his authorities: the Case of James Bosire Versus Brian Kipkemboi [2002] eKLR where the court at page 4 opined, “A review cannot be asked merely for fresh hearing or corrections”

13. Advocate Murango Mwenda submitted that allowing calling of witnesses when parties have closed their cases and have filed their final submissions would greatly prejudice the defence.

He further submits that introducing new evidence would disarrange the 3<sup>rd</sup> defendant’s defence which he has concluded.

Finally, Mr Mwenda submitted that the Rule of review must be applied on a case to case basis and that the courts discretion must be based on the law and the circumstances of each case. He asked the court to find no merit in the application and to dismiss it with costs.

14. Advocate Kimathi for the Attorney General for the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants told the court that he was relying on the affidavit of John Patroba which had been filed on the day this application was being heard. Without ado, I will not consider that affidavit as it had not been served upon the other parties and may have been filed without leave of the court.

He said that the 3<sup>rd</sup> defendant, and by extension, the 1<sup>st</sup> defendant had procured ownership of the suit property unprocedurally. He categorically submitted that the documents sought to be admitted were admissible.

15. Advocate Haji, the representative of the National Land Commission, asked the court to allow the admission of the new evidence in the interest of justice. He asked the court to eschew procedural technicalities and allow the application.

16. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties to buttress their sometimes diametrically incongruent assertions. I opine that all the authorities proffered by the parties are good authorities in their facts and circumstances.

However, not all cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

17. The facts of this case are that it was filed on 9<sup>th</sup> March, 2017, almost seven years ago. The Judge who initially heard the case recused herself on 18<sup>th</sup> March, 2019 after the plaintiff had filed a complaint against her with the Judicial Service Commission.

By consent of the parties, the suit was transferred to Chuka Law Courts and eventually came to Isiolo Law Courts. Through oral applications and filing of Interlocutory applications, hearing and determination of this case has taken an inordinately long time. At one time, delay was occasioned by an Appeal at the Court of Appeal, which the Plaintiff eventually withdrew.

18. During the hearing of the suit all the witnesses, including the 3<sup>rd</sup> defendant’s witnesses were extensively Cross-examined. The plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants closed their cases. It was after closure of the apposite case that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants made an oral application to have new evidence introduced. Through a ruling delivered on 26<sup>th</sup> July, 2023, this court dismissed the oral application and gave reasons why the application was dismissed.

19. I do find that introducing new evidence at this stage will be akin to restarting the hearing of this case afresh, almost seven years after it was filed. Indeed I find that the applicant has not persuaded this court that the ruling delivered on 26<sup>th</sup> July, 2023 was not made judiciously and in accordance with all



necessary legal tenets. I also find that the applicant has not demonstrated to this court that she had undertaken due diligence concerning the evidence she asks the court to admit 7 years after this suit was filed. One is inclined to the view that by the filing of this application after an earlier similar application had been dismissed and after final submissions had been filed, the plaintiff contrives to patch up gaps in her suit. The application in a clever way almost seeks to have this suit heard afresh. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants would be forced to recast their defences, seven years after the suit was filed. I find that they would be mortally prejudiced.

20. In the circumstances, I issue the following orders:-

- a. This application is dismissed. Having dismissed this application, I do not find it necessary to hear the application by the Attorney General which supported this application.
- b. Costs shall follow the event and are awarded to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 4<sup>TH</sup> DAY OF DECEMBER, 2023 IN THE PRESENCE OF:**

Court assistant: Balozi/Rahma

Lakicha for the Plaintiff.

Ken Muriuki for the 2<sup>nd</sup> Defendant.

Ken Muriuki holding brief for Mwirigi for the 1<sup>st</sup> Defendant.

Miss Mbogo holding brief for Murango Mwenda for the 3<sup>rd</sup> Defendant.

Benjamin Kimathi present for 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.

Benjamin Kimathi holding brief for Haji for the 5<sup>th</sup> Defendant.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

