



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 115 OF 2011**

**BERNARD MBALUKA NGULA .....PLAINTIFF**

**VERSUS**

**ZUHURA NJERI KURIA .....1<sup>ST</sup> DEFENDANT**

**MUGO NJERU .....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. Coming up for determination is a Notice of Motion application dated 26<sup>th</sup> May 2021 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants seeking an order to recall the Plaintiff for cross examination and that costs be provided for. The Applicants aver that when this matter came up for hearing on 4<sup>th</sup> December 2019, their advocate was absent due to his health condition having been ill and on bed rest between 3<sup>rd</sup> and 6<sup>th</sup> December 2019, hence the advocate did not have an opportunity to cross examine the Plaintiff.
2. The Plaintiff vide a replying affidavit dated 28<sup>th</sup> September 2021 contends that the application was made in bad faith and was an abuse of the court process because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocate was well aware that the matter was coming for hearing on 4<sup>th</sup> December 2019 but neither informed the parties of his indisposition nor did the Defendants appear in court. And as such the matter proceeded to trial. It was further stated that there had been an inordinate delay in filing the application in year 2021.
3. The application was canvassed by way of written submissions.

The Applicants were to file their written submissions by 1<sup>st</sup> December 2021 but they filed on 6<sup>th</sup> December 2021 and dated on the even date. It was submitted that recalling of a witness for cross examination was articulated by **Article 50 (1)** of the Constitution on fair hearing; **Article 159 (2) (d)** that justice shall be administered without undue regard to procedural technicalities; **Section 146 (4)** of the **Evidence Act** which allows the Court to permit a witness to be recalled either for further examination in chief or further cross-examination; **Sections 1A and 1B** of the **Civil Procedure Act** on overriding objectives in the administration of justice; **Section 3A** of the **Civil Procedure Act** which gives Courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court; and **Order 18 Rule 10** of the **Civil Procedure Rules** which provides that a Court may 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 it thinks fit.

4. It was argued that the court has unfettered discretion to allow a party to reopen its case and recall a witness any time before judgement is passed and should allow the application so that the issue of ownership of the suit property is settled noting that no prejudice would be occasioned on the plaintiff if the application was to be allowed.

5. To buttress their averments, the applicants relied on the cases of **Presbyterian Foundation (A Company Limited by Guarantee) v Bernard Ole Mereu & 4 others [2018] eKLR**; **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR**, **Esther Kathambi Delfin v M'imbere Keraine [2019] eKLR**, and **Tana & Arthi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR**.

**Respondents' /Plaintiffs' Submissions**

6. The Plaintiff's/Respondent's submissions are dated 7<sup>th</sup> December 2021 where it is argued that as much as **Section 146 (4) of the Evidence Act** as well as **Order 18 Rule 10** of the **Civil Procedure Rules** grants the Court powers to recall a witness, this discretionary power should be exercised judiciously without prejudicing the other party. The Respondent notes that since 4<sup>th</sup> December 2019, the Defendants had adequate time to file the application but only did so in May 2021 and served on 18<sup>th</sup> October 2021 a month before the matter came up for the next hearing. It was stated that reopening should not be allowed if it is meant to fill gaps in a case or if the application is

made where there has been an inordinate and unexplained delay. Reference was made to the case of Allan Kamau Gichuki -vs Samuel Gichuki Kimani & 2 others [2017] eKLR.

**Analysis and determination**

7. Having analysed the application together with the affidavits, submissions, relevant legal framework and jurisprudence, this court finds that the issue for determination is whether:

*i. The court should allow the 1<sup>st</sup> and 2<sup>nd</sup> defendants to recall the plaintiff for cross examination.*

8. This court takes cognisance that **Section 146 (4)** of the **Evidence Act** provides that:

*“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. Additionally, **Order 18, Rule 10 Civil Procedure Rules, 2010** provides:

*“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”.*

10. This court notes that the Plaintiff testified on 4<sup>th</sup> December 2019 and a further hearing date was set for 8<sup>th</sup> June 2020 but the matter did not proceed on the said date. Notably, advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was also absent on this date. The matter then came up for hearing again on 3<sup>rd</sup> December 2020 and on this day, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants indicated that he would apply to recall the PW1 and PW2 for cross examination of which the application is dated 26<sup>th</sup> May 2021 (5 months later and more than 1 year after PW1 and PW2 testified).

11. Jurisprudence on the issue of reopening of cases and recalling of witnesses is usually divided. However, the rule of the thumb is that courts should exercise their discretion based on particular circumstances of each case to arrive at a just and fair conclusion and in the interest of justice. This was the holding by the Supreme Court of Philippines in the case of The People of Philippines v Asterio Valera G.R. No. L-20286. October 29, 1965:

*“ The power of the court to recall a witness to clarify certain matters covered by his original testimony or testify on other material points is discretionary, it being allowed to promote the ends of justice” .*

12. This court notes that the inordinate delay in filing the current application from 4<sup>th</sup> December 2019 when the Plaintiff testified to 26<sup>th</sup> May 2021 is unexplained. I find that recalling a witness who testified over 2 years ago to be cross examined would not only be prejudicial but unfair and unjust. Reopening of a case is defeated where there is inordinate and unexplained delay, see- **Raindrops Limited v County Government of Kilifi [2020] eKLR**. Similarly, this case has been in court since 2011 which is over a decade and as such it ought to be dispensed with.

13. Thus the application dated 26<sup>th</sup> May 2021 is disallowed and the Applicants (1<sup>st</sup> and 2<sup>nd</sup> Defendants) are condemned to pay costs thereof to Plaintiff/Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

**MS NDANU HOLDING BRIEF FOR MS. NDEGWA FOR THE**

**DEFENDANTS/APPLICANTS**

**NZUVA FOR THE PLAINTIFF/RESPONDENT**

**COURT ASSISTANT: EDDDEL BARASA**