



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

ELC CASE NUMBER 1234 OF 2016

DAVID MUTHAMI MUTHEE.....PLAINTIFF/APPLICANT

VERSUS

ESTATE OF JAMES TITUS WAMBUA.....1ST DEFENDANT

ANDREW MUTUA TITUS.....2ND DEFENDANT

CHARLES KIMELI MUGE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF

ELPHAS KIMUGE KIMNYANGO (DECEASED).....3RD DEFENDANT

CHARLES KIMELI MUGE.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL

SUED ON BEHALF OF THE CHIEF LAND REGISTRAR.....5TH DEFENDANT

RULING

(Application to reopen plaintiff's case to adduce additional evidence; application made after both plaintiff's and defence cases were heard and closed; the plaintiff had prior to closing his case attempted to procure the new evidence now sought to be produced but it was unavailable; the new evidence has since become available. Application allowed on conditions.)

The hearing of this suit having proceeded and both the plaintiff's and the defence cases having been heard and closed, parties agreed to file and exchange written submissions. The court then set a date for highlighting of submissions virtually.

Three days before the highlighting of submissions, the Plaintiff filed Notice of Motion dated the 27/01/2022 brought pursuant to **Article 159 of the Constitution of Kenya 2010, Sections 13,17,18 & 19 of the Environment and Land Act, Section 1A & 1B of the Civil Procedure Act (Cap 21) and Order 51 of the Civil Procedure 2010** and all other enabling provisions of the law, in which he sought the following orders: -

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2. THAT the Honourable Court be and is hereby pleased to stay proceedings and/or taking further direction in respect of the filing of written submissions and/or fixing a judgment date pending the hearing and determination of the instant Application.

3. THAT the Honourable court be and is hereby pleased to review and set aside its ruling delivered on 8th November, 2021 declining to issue summons to the Deputy Registrar High Court of Kenya at Nairobi, Family Division and the orders closing the Plaintiff's case and allow the Plaintiff to re-open his case and recall the Plaintiff to produce the further supplementary list of documents and issue summons to the Deputy Registrar High Court of Kenya at Nairobi, Family Division to testify herein.

4. THAT the Honourable Court be and is hereby pleased to review and set aside its orders issued on 8th November 2021 and grant leave to the Plaintiff to file further list of documents and supplementary list of witnesses as per the attached draft.

5. THAT the Honourable court be and is hereby pleased to issue further directions and/or fix a further hearing date or issue

such orders it may deem just and fit to grant.

6. THAT the costs of the Application be costs in the cause.

The application is grounded on the grounds stated on the face of the application and are set out in paragraphs (i) to (v). The application is supported by the affidavit of David Muthami Muthee who is the Plaintiff sworn on 27/01/2022 in which he deposes that through his advocate, they had severally reached out to the Deputy Registrar of the High Court of Kenya Family Division, requesting a confirmation whether file no. 613 of 1994 relates to the Estate of James Wambua Titus (Deceased) but the same was not availed before the hearing date on 8/11/2021. The matter proceeded for hearing on 8/11/2021 wherein the Plaintiff's advocate sought for an adjournment and summons to be issued to the Deputy Registrar of the High Court of Kenya Family Division to testify and produce the file no. 613 of 1994 but the same was declined. In the circumstances, the parties proceeded with the hearing and thereafter closed their cases even though the Plaintiff had intended to use the said file to fortify his case. That on 25/1/2022 and 27/1/2022, the Plaintiff's advocate received an email and letter respectively from the Deputy Registrar of the High Court of Kenya Family Division being a response to the several letters to the said Registrar indicating that Nairobi File No. 613 of 1994 relates to the estate of Peter Wachira Kooro (Deceased). He thus prays that the application be allowed, and the ruling delivered on 8/11/2021 declining to adjourn the matter and issue summons to the Deputy Registrar of the High Court of Kenya Family Division and also for leave to re-open his case and he be allowed to file the further documents and call the Deputy Registrar to testify.

It is the Plaintiff/Applicant's case that it is prudent to note that the 3rd & 4th Defendants in response to the Plaintiff's suit alleged that letters of administration intestate and Certificate of confirmed grant were issued in Nairobi Succession cause No. 613 of 1994 in the matter of the estate of James Titus Wambua (Deceased) to the 2nd Defendant in respect of the 1st Defendant's estate on 29/04/1994 and 19/01/1995 respectively. He avers that the emails and letters from the Deputy Registrar High Court of Kenya Family Division clearly shows that the purported grant issued to the 2nd Defendant does not exist in the court records.

The application is opposed by the 4th Defendant through a replying affidavit sworn on 4/02/2022. He deposes that the alleged evidence sought to be produced shows that the Plaintiff doesn't acknowledge that the 3rd and 4th Defendants title is valid and as such the Plaintiff does not have any business attaching the doctrine of adverse possession to his claim since it is trite law that for a party to succeed in a claim of adverse possession then one must acknowledge the title that he/she is adverse to and this is not the case hence the additional evidence would not add probative value or change the trajectory of the case thereof ought to be dismissed.

The 4th Defendant adds that it is not certain that the additional evidence annexed by the Plaintiff will add any probative value to the Plaintiff's case carefully considering the nature of the additional evidence vis-a-vis the nature of the claim before this Honourable Court that of adverse possession since a party cannot plead adverse possession and at the same time assert cancellation of the same title by way of fraud. Lastly, it is their contention that the Plaintiff/Respondent has not attained the legal threshold required for the court to grant the orders sought on the discretion of courts to reopen a case for the purposes of adducing additional evidence long after the matter has been closed.

The applicant also filed a supplementary affidavit dated 11/02/2022 in response to the 4th Respondent's Replying Affidavit sworn on 4/02/2022. He reiterates that the applicant is seeking for review of the ruling of this Honourable Court delivered on 8/11/2021 due to the discovery of new and crucial information which pertains to the core matters disputed in the suit therefore my application is not Res Judicata as alleged by the 4th Defendant. He relied on Article 159 (2) d of the constitution of Kenya. The Plaintiff/Applicant humbly prays that his application be allowed, and the court do review the ruling it delivered on 8/11/2021 and issue summons to the Deputy Registrar High Court of Kenya at Nairobi Family Division to come testify and also grant him leave to re-open his case and he be allowed to file the further documents.

The Court ordered that the application be disposed of by way of written submissions. In that regard, the plaintiff/applicant filed submissions on 15/02/2022. The 4th defendant/respondent filed their submissions on 12/02/2022. The applicant also filed list of authorities on 15/02/2022 in which he cited the cases of *Khalif Sheikh Adan vs Attorney General (2019) eKLR and Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (Now Known as King Woolen Mills Limited & 2 Others [2016] eKLR (the Standard Chartered Case)*. On the other hand, the 4th Defendant/Respondent has filed list of authorities on 12/02/2022 in which he cited the cases of *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR, Nakuru Automobile House Ltd v Lawrence Maina Mwangi & another [2017] eKLR, Emily Cheroni Kiombe v Jacob Kamoni Kari (2018) eKLR, Odoyo Osodo v Rael Obara Ojuok & 4 others (2017) eKLR, Johana Kipkemei Too v Hellen Tum (2014) eKLR and Garissa Maize Millers Limited vs. Attorney General & 2 others (Civil Appeal (Application) 160 of 2016) [2021J KECA 197 (KLR) (Civ) (5 November 2021) (Ruling) Neutral citation number: [2021] KECA 197 (KLR)*. I have considered the application, the rival affidavits, submissions and authorities.

Analysis and Determination

The application herein is seeking to reopen of the plaintiff's case with a view to producing the email and letter from the Deputy Registrar of the High Court of Kenya Family Division and it also seeks an order granting leave for the Plaintiff to call the Deputy Registrar, Nairobi High Court, Family Division as a witness to give evidence with regard to Succession file No. 613 of 1994. The application was filed after close of both plaintiff's and defence cases, and after an order for written submissions had been made. Submissions had been filed at the time the application was filed and the parties were coming to pick a judgment date.

The principles governing an application such as this one before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in *Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR* Kasango J. stated:

“17. Uganda High Court, Commercial Division in the case Simba Telecom –V- Karuhanga & Anor (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an

Australian case *Smith –Versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case *SIMBA TELECOM* (supra) held thus:

“I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

The record shows that counsel for the plaintiff sought for an adjournment on 8/11/2021 seeking to be granted leave to call one more witness and also to adduce a document that was not initially provided, but the application was dismissed. In the circumstances, the plaintiff’s case was ultimately closed on 8/11/2021. Hearing of defence case subsequently commenced on the same date. Defence case was closed on 8/11/2021, after the 4th defendant’s witness was heard. The parties had all filed submissions by 31/01/2022 when the matter was coming up for highlighting of submissions.

The plaintiff has explained that he made efforts to procure the new evidence so as to produce it prior to closing his case. The record confirms that he had intended to produce it prior to closing his case. I accept the plaintiff’s explanation that he only closed his case when it appeared that the new evidence couldn’t be procured. The Deputy Registrar has now responded to the Plaintiff’s letters and informed them that Succession Cause No. 613 of 1994 is under the names of Peter Wachira Kooro as the deceased and not James Titus Wambua. The application is thus not an afterthought. The defendant has not suggested that any prejudice will be occasioned to him if the application is allowed.

I however do not think that it is in the interest of justice to give an open-ended order. The reopening must be done within clearly defined parameters so as not to throw the proceedings generally open and cause delay. It is enough to produce the letter by the Deputy Registrar High Court, Family Division in Nairobi as evidence regarding succession cause no. 613 of 1994. It is also crucial that there be a witness from the said registry who will produce the said document. It is up to the plaintiff to procure the attendance of such a witness using the usual procedure for calling witnesses.

In the end, I make the following orders:

1. I allow **prayer 2** on stay of proceedings **and/or taking further direction in respect of the filing of written submissions and/or fixing a judgment date pending the hearing and determination of the instant Application.**
2. I allow **prayer 3** and hereby review and set aside Ruling delivered on 8/11/2021 in so far as declining to allow the Plaintiff to call one more witness and to adduce a new document at this late stage of the proceedings.
3. The plaintiff’s case is hereby reopened but limited strictly to production of the further list of documents and supplementary list of witnesses as per attached draft in relation to Nairobi High Court Succession Cause Number 613 of 1994 The estate of Peter Wachira Kooro.
4. The documents in (3) above to be produced by an officer from Nairobi High Court Succession or Probate registry. The plaintiff to procure the attendance of the witness using the usual procedure for calling witnesses.
5. The defence case is similarly reopened but limited strictly to responding to the evidence adduced under (3) above.
6. Additionally, I allow **prayer 4** on orders issued on 8/11/2021 regarding filing of submissions.
7. Costs in the cause.
8. Hearing scheduled for 15/03/2022

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 23RD DAY OF FEBRUARY 2022.

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MOGENI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

Vincent Owuor.....Court Assistant