



REPUBLIC OF KENYA



KENYA LAW

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**Ng'ang'a & 3 others v Maina; Daniel Kamau Maina & others t/
a Cactus Self Help Group (Interested Party) (Environment & Land
Case 309 of 2012) [2022] KEELC 3060 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 309 OF 2012**

LA OMOLLO, J

MAY 26, 2022

BETWEEN

MOSES MAINA NG'ANG'A 1ST PLAINTIFF

LOISE WANJIRU MAINA 2ND PLAINTIFF

LUCY NJUHI MAINA 3RD PLAINTIFF

**JANE MUKAMI NGUGI (SUING IN HER CAPACITY AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF JAMES BENSON NGUGI
(DECEASED) 4TH PLAINTIFF**

AND

GEORGE NGANGA MAINA DEFENDANT

AND

**DANIEL KAMAU MAINA & OTHERS T/A CACTUS SELF HELP
GROUP INTERESTED PARTY**

RULING

1. This ruling is in respect to the plaintiffs/applicants' notice of motion application dated February 28, 2022. The said application is expressed to be brought under section 1A, 1B (a), 3A and 63 (e) of the [Civil Procedure Act](#) and order 51 rule (1) and rule 10(2) and order 8.
2. The application seeks the following orders:
 - i. Spent



- ii. That this honourable court be pleased to grant leave to the plaintiffs/applicants to reopen the plaintiff's case limited to production of the memorandum of understanding (Marked as plaintiff exhibit 7)
 - iii. That the costs of the application be in the cause.
3. The application is based on the grounds on its face and supported by the affidavit sworn on February 28, 2022 by the 1st plaintiff Moses Maina Ng'ang'a, with authority from his co-plaintiffs.

Factual Background.

4. The plaintiffs/applicants commenced this suit vide a plaint dated June 29, 2011 which sought the following orders:
 - a) An injunction to be issued against the defendant restraining the defendant by himself and/or through his agents and or employees from subdividing, selling, disposing off and or in any other manner whatsoever from dealing or interfering with Land Reference No 1556/48 (Title Number IR 39720) in Naivasha Town other than in accordance with the terms of the memorandum of understanding executed and dated 1/11/2003.
 - b) An order compelling the defendant to immediately subdivide Land Reference Number 1556/48 (Title Number IR 39720) in Naivasha Town into four equal parcels and to transfer a parcel of each to George Nganga Maina, Loise Wanjiru Maina, Lucy Njuhi Maina and Jane Mukami Ngugi in her capacity as the personal representative of the estate of the late James Benson Ngugi.
 - c) Any other order as the honourable court may deem fit and just to issue.
 - d. Costs of the suit and interest.
5. The defendant filed his statement of defence on October 13, 2011 that was later amended and a counterclaim filed on May 24, 2012. He denied that he holds the suit land in trust and contended that the memorandum of understanding was signed under duress. He sought the following orders in his counter-claim:
 - a) That the plaintiffs suit against the defendant be dismissed.
 - b) That this honourable court be pleased to declare that a memorandum of understanding entered between the plaintiffs and defendants on 1st November, 2003 in which the defendant undertook that he holds the land known as L.R No 1556/48 (Tile No IR 39720) in trust for himself and the plaintiffs void.
 - c) That this honourable court be pleased to declare that the defendant is the absolute owner of land known as LR No 1556/48 (Tile No IR 39720) and by virtue of his registration as such, the same cannot be defeated by the plaintiffs.
 - d) A perpetual order upon the plaintiffs requiring them from entering, claiming, occupying or otherwise dealing in other way with land known as LR No 1556/48 (Tile No IR 39720).
 - e) Costs of the suit.
6. The suit came up for hearing on February 23, 2022 where one of the plaintiffs/applicants' witnesses - Advocate PK Njuguna- who was to testify, arrived in court late after the plaintiffs case had been closed. The plaintiffs/applicants then filed the instant application to reopen their case.



7. The interested parties stated that they would not be opposing the application and did not, therefore, file any response or submissions.

Plaintiffs/Applicants' Contention

8. The plaintiffs/applicants contend that the suit came up for further hearing on February 23, 2022 when one of the plaintiff's witnesses -Advocate PK Njuguna was to testify and produce memorandum of understanding which had been marked as MFIP7.
9. It is the plaintiffs/applicants contention that the witness' car experienced a mechanical problem and therefore, the witness arrived late. This was after the plaintiffs' case had been closed.
10. It is their contention that their advocate on record informed the court of their predicament and sought time allocation for 2 PM but the court declined as there was another matter scheduled for hearing at the proposed time.
11. The plaintiffs/applicants further contend that there is need for the said memorandum of understanding to be produced since it was mentioned by every witness who testified in court and that is production in evidence would also shed more light.
12. It is the plaintiffs/applicants contention that the defendant will suffer no prejudice if the application is allowed since they will have opportunity to cross-examine the witness in question.
13. It is also their contention that they will be exposed to extreme prejudice, loss and damage if they do not get to produce this crucial document.
14. He ends his deposition by stating that it would be just and fair that the application be allowed since the circumstances that happened on the said hearing date were beyond human control.

Defendant/Respondent's Contention.

15. The defendant/respondent contends that the instant application is incompetent and misconceived and should be dismissed as it is pegged on hearsay, half-truths and intended to mislead the court.
16. The defendant/respondent further contends that the plaintiffs/applicants are attempting to have a second bite of the cherry because during the hearing on February 23, 2022 the court declined to adjourn the matter adding that the reason for the delay of the plaintiffs/applicants witness is not sufficient to reopen the case.
17. He contends that the plaintiffs/applicants have not in any way demonstrated that the new evidence they propose to introduce was not within their knowledge even after exercise of due diligence before they closed their case.
18. He also contends that the instant application is another attempt by the plaintiffs/applicants to fill the gaps in their case and after having the benefit of hearing the testimony of the defendant/respondent and the interested parties/respondents adding that this is untenable under the law.
19. He contends further that the plaintiffs/applicants have been indulged by the court on several occasions prior to them closing their case and that the proposed evidence was in their possession all through and they were granted more than enough time to produce it.
20. It was the defendant/respondent's contention that the court does not issue orders in vain and as such the orders barring the plaintiffs/applicants from further adjourning the matter as was held during the hearing on 23rd of February, 2022 ought not to be circumvented through the instant application.



21. It was further their contention that the plaintiffs/applicants have taken a wrong trajectory of seeking sympathy and pity by claiming that their witness had mechanical challenges and yet no evidence has been availed.
22. It is the defendant/respondent's contention that the reasons being given in the instant application for reopening of the plaintiffs/applicants case are not plausible noting the circumstances of this case which are the age and stage of the case.
23. It is their contention that the court should not be swayed by such claims of sympathy and pity and should ensure justice and fairness.
24. It is also their contention that the application is full of falsehoods and half-truths that are only meant to mislead the honorable court and serve the selfish interests of the applicants herein.
25. It is their further contention that the honorable court has discretion to allow re-opening of a case but it must exercise the said discretion judiciously and the applicant must demonstrate the existence of special circumstances and/or give cogent reasons before the court exercises that discretion.
26. The defendant/respondent contends that no reasons or special circumstances have been advanced by the plaintiffs/applicants to warrant the court to exercise its discretion. That prior to allowing the re-opening of a case by a litigant, the court must consider the prejudice that might be occasioned to other parties and also consider at what stage the hearing of the matter has reached.
27. It is their contention that in the instant case, parties have already closed their respective cases and are ready to take directions on filing of submissions and therefore should the present application be allowed, it would be unfair and prejudicial.
28. The defendant/respondent urged the court to disallow the application in the interest of justice for being devoid of merit and an abuse of court process.

Issues For Determination

29. The plaintiffs/applicants filed their submissions on April 4, 2022 and identified the following issues for determination:
 - i. Whether the plaintiff has satisfied the criteria upon which the court exercises jurisdiction to re-open defence case.
 - ii. Whether the plaintiff's notice of motion application should be allowed.
30. The defendant on the other hand filed his submission on April 1, 2022 and identified the following issues for determination:
 - i. Whether the plaintiffs/applicants were given an opportune time to present their whole case prior to their case being closed.
 - ii. Whether the reopening of the plaintiffs case and introduction of a document at this stage shall be prejudicial to the defendant and the interested parties who have already testified and closed their respective cases.
 - iii. Whether there are any valid grounds to warrant re-opening of the plaintiff's case
 - iv. Whether costs should issue.



Analysis And Determination

31. Upon perusal of the application, supporting affidavit, replying affidavit and the rival submissions and judicial decisions cited.
32. In my view, the twin issues for determination are
 - a. Whether the plaintiffs/applicants should be granted leave to re-open their case and produce the memorandum of understanding marked as MFI P7.
 - b. Who shall bear costs of the application?

A. Whether the plaintiffs/applicants should be granted leave to re-open their case.

33. On February 23, 2022, the matter came up for further hearing of the plaintiffs/applicants case. They sought an adjournment of their case for the reason that one Mr Njuguna Advocate, who they were expecting to give evidence had not arrived in court since his car had developed a mechanical problem.
34. The court allowed an hour's wait for the plaintiffs/applicants to secure attendance of their witness. The hour passed and the witness, still, did not show up in court. The plaintiffs/applicants closed their case and the matter proceeded to defence hearing.
35. The defendant and Interested Parties tendered evidence and subsequently closed their cases. At the close of the interested party's case, the plaintiffs/applicants advocate made an oral application which sought to re-open their case and the court directed them file the instant application.
36. The plaintiffs/applicants relied on section 146 (4) of the *Evidence Act* and submitted that, it allows the court to permit a witness to be recalled either for further examination in chief or further cross examination. They have also relied on order 18 rule 10 of the *Civil Procedure Rules* and submitted that it grants the court powers to recall any witness who has been examined. They further submitted that the law allows the court to exercise unfettered discretion in allowing a party to re-open its case, recall a witness for further examination-in-chief, cross- examination and re-examination. They have cited the decision in *Susan Wavinya Mutavi Vs Isaac Njoroge & Another* [2020] eKLR.
37. The defendant/respondent on the other hand submitted that the plaintiffs/applicants were accorded ample time to produce all their evidence prior to their case being closed and as such they do not deserve the court's further indulgence. They also submitted that they would be prejudiced if the plaintiffs/applicants are allowed to re-open their case when all the parties had already closed their case. They cited the decision in *Johana Kipkemei Too Vs Hellen Tum* [2014] eKLR where the court refused to allow the plaintiffs to produce new evidence after they had already closed their case as it would have fundamentally altered the character of their case.
38. They further submitted that the court retains the discretion to allow reopening of a case which discretion must be exercised judiciously. In exercising that discretion, the court should ensure that the re-opening of a case should not be allowed where it is intended to fill gaps in evidence as a result of the indolence and lack of diligence of the applicant. On this point they cited the decision in *Emily Cherono Kiombe Vs Jacob Kamoni Kari* [2018] eKLR.
39. The circumstances presenting in the present case are different and I therefore, in the subsequent paragraphs, distinguish them from those in the judicial decision cited.
40. In this matter the plaintiffs/applicants are seeking to re-open their case to produce the Memorandum of Understanding dated November 1, 2003 that was referred to by Loise Wanjiru Maina who testified



as PW2. This document was marked for identification as MFIP7(b). The said memorandum of understanding was referred to extensively by George Nganga Maina who testified as DW1. The interested party's witness, Daniel Kamau Maina who testified as IP1 also referred to the Memorandum of Understanding.

41. The memorandum of understanding (MFIP7) has also been referred to in the defendant's counterclaim, in which they seek the following order;

That this honourable court be pleased to declare that a memorandum of understanding entered between the plaintiffs and defendants on November 1, 2003 in which the defendant undertook that he holds the land known as LR No 1556/48 (Tile No IR 39720) in trust for himself and the plaintiffs void.

42. The plaintiffs/applicants request to re-open their case is limited to the production of the memorandum of understanding which forms part of the plaintiff's list of documents contained in the court records and exchanged between parties.

43. The Uganda High Court, Commercial Division in the case *Simba Telecom Vs 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.”

44. The court went on to hold as follows;

“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.” (Emphasis is mine)

The upshot of the above is that 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

45. An analysis of the Ugandan case of *Simba Telecom Vs Karuhanga & Another* (*Supra*) point to the following to be considered in allowing or disallowing and application to re-open a case:

- a. The application to re-open a case is at the discretion of the court
- b. That the discretion is to be exercised judiciously



- c. That in exercising the discretion, the court should ensure that:
 - i. A re-opening of a case should not embarrass or prejudice the opposite party.
 - ii. A re-opening of a case should not be allowed where it is intended to fill gaps in evidence.
 - iii. A prayer for re-opening of the case will be defeated by inordinate and unexplained delay.

46. As has been shown in the preceding paragraphs, the memorandum of understanding is an important document in the resolution of this dispute to the extent that the plaintiffs have extensively referred to it in support of their claim while the defendant is seeking orders to have it declared void. To this end, I find that no prejudice will be occasioned to the defendant and interested party. The assertions that it is intended to fill the gaps in the evidence of the plaintiff are unfounded. In any event, the defendant and interested party will have opportunity to test its veracity through cross examination.

47. It is also expected that an application to reopen a case should be made without inordinate delay. The plaintiffs/Applicants filed this application on March 1, 2022 after their case had been closed on February 23, 2022. Consequently, I find that there was no delay in filing the instant application.

B. Who shall bear the costs of this suit?

48. The general rule is that costs shall follow the event in accordance with the provisions of section 27 of the *Civil Procedure Act* (cap 21).

49. A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise.

Disposition

50. The upshot of the foregoing is that the plaintiffs/applicants have demonstrated that their application is merited. It is therefore in the interest of justice that the plaintiffs/applicants be allowed to reopen their case, produce the memorandum of understanding MFIP7 (b) and the other parties given opportunity to cross-examine its maker.

51. Consequently, and in exercise of my discretion, the application dated February 28, 2022 is allowed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF MAY, 2022

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Chepngetich for the plaintiffs/applicants

Miss Karungu for the defendant

Mr. Kariuki for the Interested Party.

Court clerk; Mr. Lepikas.

