



**Musyimi & 2 others v Muriuki & another (Environment & Land Case 1042 of 2015) [2022] KEELC 2880 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2880 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1042 OF 2015**

**JA MOGENI, J**

**MAY 24, 2022**

**BETWEEN**

**JUSTUS MUSYIMI ..... 1<sup>ST</sup> PLAINTIFF**

**VERONICA NDINDI MUSYIMI (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF MUSYIMI KILOME (DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**TAHIR IQBAL RAFIQUE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JAMES KABAU MURIUKI ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This case came up for hearing on 28/10/2021. The PW-3 Mr Onsando Osiemo testified that he knew the late Mr Joseph Rioba and that he died on 27/12/2011 and not in 2012 as had been stated by the 1<sup>st</sup> Defendant. This fact was contested by the 1<sup>st</sup> defendant who has now filed a Notice of Motion dated 8/12/2021 under Section 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 18 Rule 10, Order 51 of the [Civil Procedure Code](#) and any other enabling provisions of law seeking the following orders:
  - i) Spent
  - ii) Spent
  - iii) This Honorable Court to recall Mr Onsando Osiemo to be re-examined on the witness statement he presented and made before in this matter on 28/10/2021
  - iv) This Honorable Court do find that Mr Onsando Osiemo as a witness willfully gave false evidence that Joseph M. Rioba, Advocate (now deceased) had died in 2012.



- v) The evidence of Mr Onsando Osiemo which was given in this Honorable Court on 28/10/2021 be struck out of the records.
- vi) This Honorable court do find that Mr Onsando Osiemo is guilty of perjury and should be convicted in prison for six (6) months
2. The court directed the parties to canvass the application through written submission.
- This application is premised on the grounds set out in the 1<sup>st</sup> defendant's notice of motion supporting affidavit sworn on 08/12/2021. He contended that Mr Onsando Osiemo testified under oath on 28/10/2021 that he knew the late Joseph Rioba personally and as an advocate. That the late Rioba dies in 2011 and therefore could not have presented the transfer for registration for the 1<sup>st</sup> defendant's property on 10/02/2012. A fact which the 1<sup>st</sup> defendant states is not true since Mr Rioba was his conveyance lawyer and he handled the registration and transfer of his conveyance and that he died suddenly due to cardiac arrest on 26/12/2013. He therefore avers that Mr Onsando Osiemo deliberately misled the court under oath thus committing the crime of perjury under section 108 of the Penal Code.
- To his Supporting Affidavit he attached a certified copy of the Daily Nation Newspaper dated 7/01/2014 Obituary page showing the obituary of the late Joseph Rioba. He further contended that arising from this piece of evidence, there was need to recall Mr Onsando Osiema for re-examination, on the witness statement dated 28/10/2021 and have the evidence given by Mr Osiemo to be struck out. Further that the court finds that Mr Osiemo willfully lied to the court and therefore should be charged with perjury and sent to prison for six (6) months.
3. The plaintiff opposed the application through a replying affidavit sworn on 14/02/2022 by Mr Onsando Osiemo. He deposed that he indeed testified that Mr Joseph Rioba passed on in 2011 and not 2012 as the 1<sup>st</sup> defendant had stated. He stated that he never intentionally misled the court that he made a genuine mistake since he never referred to any document to refresh his memory. He further averred that he was willing to be recalled for cross-examination on the issue of the date of death of the late Joseph Rioba and whether his office closed at the date of the presentation of the registration documents.
4. That since the 1<sup>st</sup> defendant had not rebutted the rest of his testimony on fraudulent acquisition of the property he opposes the application to strike out from the record his evidence adduced on 28/10/2021. Further that his was a genuine mistake of mix up of dates that does not warrant him being charged with perjury.
5. In his submissions the plaintiff submitted that having to strike out his evidence which the 1<sup>st</sup> defendant had not rebutted due the mistake of the date of death would be too drastic because as the advocate acting for the purchaser his evidence is crucial. Save for prayer 3 seeking for recall the advocate for the plaintiff submitted that the 1<sup>st</sup> defendant's application lacks merit and the other prayers should be struck out.
6. I have considered the application, the parties' rival affidavits, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issues in this application. Three key issues fall for determination in the application. The first issue is whether the 1<sup>st</sup> defendant has satisfied the criteria upon which the court exercises jurisdiction to re-call a witness for re-examination. The second issue is whether the Pw 3 deliberately lied to the court with intention of misleading the court and The third issue is whether the evidence by PW 3 adduced on 28/10/2021 should be struck out. I will deal with the three issues sequentially in that order.



7. It is common ground that hearing of the plaintiff's case commenced and ended on 28/10/2021, hearing of the defendant's case is still pending. 14/12/2017. The present application was brought before hearing of the defendant's case commenced.
8. The first issue is whether the plaintiff has satisfied the criteria upon which the court exercises jurisdiction to re-call a witness for re-examination. Both the *Civil Procedure Rules* and the *Evidence Act* do have clear and express framework on how that jurisdiction is to be exercised. Section 146(4) of the *Evidence Act* generally grants the court powers to recall a witness. It provides thus:

“(4) 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

Similarly Order 18 Rule 10 of the *Civil Procedure Rules* grants the court powers to recall any witness who has been examined. It provides thus:

“10. 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.

9. Over the years, courts in the Commonwealth have developed principles which guide the jurisdiction to re-open a case and receive additional evidence in a trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others* (2018) eKLR; *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* [2015] eKLR; and *Ladd v Marshall* [1954] 3 All ER 745).
10. In the present suit, the plaintiffs have not closed their case and the defendants have not yet led their evidence. Therefore there is no prejudice to be suffered by the plaintiff if PW-3 witness is recalled. Secondly, the evidence which the PW-3 Mr Onsando Osiemo is coming to provide relates to the important process that involves acquisition of a valid title to land and the critical actors in the process. The suit seeks to inter alia establish the legal proprietor to the suit property and therefore the process leading to this acquisition has to be examined too. In my view, it is a piece of evidence which may probably have a bearing on the effectual adjudication of the dispute in this suit. Secondly, the defendant has not tendered evidence and will have the opportunity to present controverting evidence should need arise. Taking the foregoing into account, it is my view that the notice of motion dated 08/12/2021 meets the criteria for re-calling of witness who has already testified. I will therefore allow the plea for re-calling PW3 for re-examination.
11. The second issue is whether the PW3 deliberately lied to the court with intention of misleading the court. In *Harrison Wanjobi Wambugu v Felista Wairimu Chege & Another* [2013] eKLR, the Court



of Appeal cited with approval, the words of Madan J.A. in Belinda Murai & Others v Amos Wainaina [1978] LLR 2782 (CALL) where he stated;

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule..”

12. The words of wisdom hereabove capture the true soul and spirit of the law. The words go further to address in wholesome the issue this Honourable court has to confront in this application. I have read the affidavit of Mr Onsando Osiemo and the Supporting Affidavit of the 1<sup>st</sup> defendant and I have noted that the evidence of the Mr Onsando Osiemo was that Mr Joseph Rioba passed on in 2011 but the 1<sup>st</sup> defendant states that Mr Osiemo stated that Mr Rioba passed in 2012. Again this is a genuine mistake from the 1<sup>st</sup> defendant in drafting of his pleadings. I note that Mr Onsando has mentioned this in his affidavit. He has not however stated that the 1<sup>st</sup> defendant is deliberately misleading this court. My point here is that mistakes happen both by word of mouth and written word and if not corrected in time it can cause a lot of pain and suffering. Mr Osando is willing to be recalled to correct this mistake.

13. I am of the view that no harm or prejudice will be occasioned on the 1<sup>st</sup> defendant by not finding Mr Onsando to have lied but to have made a genuine mistake and that the recalling this witness for re-examination will address the anomaly and enable the court hear and determine the suit on merit. The court is still required to weigh the scale of justice and decide whether there is need to compensate the 1<sup>st</sup> defendant for this inconvenience as opposed to wielding the draconian sword of striking out the evidence adduced by Mr Onsando on 28/10/2021 and citing Mr Onsando for perjury for a genuine mistake. The court, in Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another (Supra), the court further cited with approval the decision in the case of Philip Chemowolo & Another v Augustine Kubede [1982-88] KAR 103 at 1040 where Apaloo J.A. held:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline.”

14. I should also hasten to add here the decision of the court in Nicholas Salat v IEBC & 6 Others [2013] eKLR where the court stated as follows:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of



striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

15. Therefore on the issue of perjury and striking out of the evidence of Mr Onsando, I do find that indeed, the plaintiff misled the court on the issue of the date of death of Mr. Rioba. Mr Onsando has however confessed that it was a mistake and I have no reason to doubt him because he has demonstrated his remorse by filing an affidavit under oath to show his willingness to be recalled for re-examination and stating that the same was not done intentionally to mislead the court. However, the verifying affidavit demonstrates that Mr Onsando read the contents of the plaint and therefore, ought to have realized that the contents of the plaint were not true and therefore cannot feign ignorance of the fact. However, this cannot lead to the striking out of the entire evidence of Mr Onsando for 28/10/2021. The only remedy is therefore to order that Mr Onsando to be recalled and re-examined on the fact of the date of death.
16. The third and final issue is whether the evidence by Mr Onsando- PW 3 adduced on 28/10/2021 should be struck out. In addressing the second issue I have largely addressed the issue of striking out the evidence of Mr Onsando and I reiterate the fact that since the 1<sup>st</sup> defendant has not rebutted the entire evidence by Mr Onsando, striking out the entire evidence adduced by Mr Onsando on 28/10/2021 would be too draconian. The plea for striking out the evidence is consequently rejected. The evidence already tendered by Mr Onsando will remain on record. Mr Onsando will therefore take the witness box to be re-examined on the witness statement he presented particularly on the issue of the date of death of Mr Rioba.
17. Lastly, the present application was brought about because of the mistake by the plaintiff. To indemnify the defendant, I will condemn the plaintiff to pay the defendant's throwaway costs of Kshs. 20,000.

### **Disposal orders**

18. In light of the foregoing, the plaintiff's notice of motion dated 08/12/2021 is disposed in the following terms:
  - a) The 1<sup>st</sup> defendant's prayer to recall Mr Onsando Osiemo to be re-examined on the witness statement he presented and made before in this matter on 28/10/2021 is granted.
  - b) Prayers iv, v and vi are declined.
  - c) The plaintiff shall pay the 1<sup>st</sup> defendant's throwaway costs of Kshs 20,000 before the next hearing date.

**DATED, SIGNED AND READ AT NAIROBI ON THIS 24TH DAY OF MAY 2022.**

.....

**MOGENI J**

**JUDGE**

**In the presence of:-**

.....1st Plaintiff\*\*

.....2nd Plaintiff\*\*

.....3rd Plaintiff\*\*



.....1st Defendant\*\*

.....2nd Defendant\*\*

**Mr. Vincent Owuor.....Court Assistant**

