



Nurani & another (Suing as the Legal Administrators of the Estate of Sadrudin Shamsudin Ismail Nurani) v Gulam & 2 others (Environment & Land Case 596 of 2014) [2022] KEELC 3492 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 596 OF 2014**

**OA ANGOTE, J
MAY 19, 2022**

BETWEEN

**FARRAH SADRUDIN NURANI 1ST PLAINTIFF
FEISAL SADRUDIN NURANI 2ND PLAINTIFF
SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SADRUDIN
SHAMSUDIN ISMAIL NURANI**

AND

**GALEB GULAM 1ST DEFENDANT
SUNSHINE COTTAGES LIMITED 2ND DEFENDANT
DIAMOND TRUST BANK 3RD DEFENDANT**

RULING

Introduction

1. In the Notice of motion dated April 1, 2022, the 2nd Defendant has prayed for the following reliefs;
 - a. That this Court be pleased to recall Farrah Sadrudin Nurani for further cross examination.
 - b. That costs of this application be in the cause.
2. The application is premised on the grounds that this suit commenced on March 7, 2022; that on the said date, Ms. Farrah Sadrudin Nurani testified in support of the Plaintiffs' case and that on cross-examination by the 2nd Defendant's advocate, Ms. Farrah Sadrudin informed the court that she was not aware of the existence of the suit property or the sale of the same before the year 2014.



3. According to the affidavit of the 2nd Defendant's Director, it has come to the 2nd Defendant's attention that Farrah Sadrudin Nurani had in proceedings Civil Case Number 393 of 2003 deponed on oath that she was aware of the suit property and that the suit property had been sold.
4. It is the deposition of the 2nd Defendant's Director that Ms. Farrah Sadrudin swore the Affidavits in Civil Case No. 393 of 2003 in the year 2005; that the 2nd Defendant seeks to recall Farrah Sadrudin Nurani to further cross-examine her on the issues relating to her sworn testimony and the Affidavits she swore in 2005 and 2006 and that recalling Farrah will afford this court and the parties an opportunity to fully interrogate the issues in dispute in this matter.
5. In response to the application, the Plaintiffs filed Grounds of Opposition in which they averred that the application seeks to re-open case management and/or conference midstream a trial; that the application is solely meant to delay the just and speedy determination of this matter and that the application is meant to sustaining a narrative that is otherwise not supported by the evidence on record.
6. The Plaintiffs averred that the application has been brought very late in the day and after the Plaintiffs' and the 1st Defendant's witnesses have testified and that the orders sought will cause greater injustice to the Plaintiffs' case because it will change the course of the proceedings by re-opening trial, necessitating the filing of further documents by the Plaintiffs and even calling further witnesses.
7. The Plaintiffs finally averred that this court does not have jurisdiction under section 146(4) of the Evidence Act to grant the orders sought and that the application should be dismissed.

Submissions

8. In his submissions, the 2nd Defendant's/Applicant's advocate informed the court that they wish to recall PW2; that under paragraph 10 (vi) of the Plaint and the Amended Plaint at paragraph 22 and in her witness statement, PW2 stated that she was not aware of the existence of the suit property.
9. Counsel for the 2nd Defendant/Applicant submitted that in cross-examination, PW2 insisted that she was not aware of the existence of the suit property and that she disclosed during cross-examination that her brother never told her about the existence of the suit property.
10. Counsel submitted that it has now transpired that PW2 was aware of the existence and sale of the suit property way back in the year 2005; that she swore an affidavit in response to an application by the Defendant in High Court Civil Case No. 3939 of 2003 in the year 2005 and that she referred to the suit property in her Affidavit.
11. The 2nd Defendant submitted that the knowledge of the witness about the existence of the suit in the year 2005 is critical because they have pleaded that the suit was time barred; that the said witness has not filed an Affidavit to dispute these assertions and that the witness misled the court.
12. Counsel finally submitted that this court has the discretion of recalling the witness for cross-examination on the Affidavits that she swore in HCCC No. 393 of 2003; that the court should not shut out the affidavits that the witnesses swore in HCCC NO. 393 of 2003; that the 2nd Defendant did not know about these issues as at the time they cross-examined PW2 and that the application should be allowed. Counsel relied on authorities which I have considered.
13. The 1st and 3rd Defendants' advocates supported the 2nd Defendant's advocates' submissions. According to the 3rd Defendant's advocate, the importance of a Replying Affidavit is to controvert facts and that the 1st Plaintiff has not filed a Replying Affidavit in response to the application.



14. The Plaintiffs' advocates submitted that the affidavits annexed on the application are new documents and do not form part of the record; that under section 146(4) of the *Evidence Act*, the court does not have power to admit documents which were not part of the pre-trial bundle and that the 2nd Defendant has not even sought for leave to have the said documents admitted.
15. The Plaintiffs' counsel submitted that the Plaintiffs have closed their case; that should the court allow the application, it will change the course of proceedings thus necessitating the filing of further documents by the Plaintiffs and that there is no explanation why the 2nd Defendant's advocate did not ask the questions he now wants to ask.
16. Counsel submitted that there has been no explanation to demonstrate that the evidence in the 2nd Defendant's possession is new or that it was difficult to get the documents during trial; that the Defendants are trying to fill the gaps in their evidence and that re-opening of the case should not be allowed.
17. It was submitted by the Plaintiffs' counsel that the 2nd Defendant sought to amend its Defence because they had become aware of the documents in HCCC No. 393 of 2003; that the 2nd Defendant's advocate perused the court file in HCCC No. 393 of 2003 and that the witness they seek to recall was cross-examined on the contents of HCCC No. 393 of 2003.
18. Counsel for the Plaintiffs submitted that recall of a witness for cross-examination should only be allowed in special circumstances; that it cannot be a special circumstance for a party to litigate in instalments and that PW2 cannot be recalled to be cross-examined on the basis of documents that are not before the court. Counsel relied on several authorities which I have considered.

Analysis & findings

19. This suit was commenced by way of a Plaint dated 16th May, 2014. In the Plaint, the Plaintiffs have averred that at all material times, the deceased who was their father was the registered owner of land known as 1160/230 (the suit property) having purchased the same from Hafidh Mohammad Shante.
20. It is the Plaintiffs' case that upon the death of their father on 22nd November, 1996, the 1st Defendant was confirmed by the court as the deceased's legal representative and that in breach of his obligations under the Law of Succession Act, the 1st Defendant unlawfully transferred the suit property to the 2nd Defendant vide a transfer dated 14th April, 1998.
21. The Plaintiffs have sought, inter alia, for a declaration that the sale and transfer of the suit property by the 1st Defendant to the 2nd Defendant was illegal, unlawful, fraudulent and for a rectification order to issue directing the Chief Lands Registrar to cancel entry number 14 transferring the suit property to the 2nd Defendant.
22. The record shows that on 7th March, 2022, the Land Registrar, PW1, testified on behalf of the Plaintiffs. On the same day, the 1st Plaintiff, PW2, testified and was cross-examined by the Defendants' advocates, including the 2nd Defendant's counsel.
23. In the current application, the 2nd Defendant has sought for an order of this court to recall PW2 "because it has come to the 2nd Defendant's knowledge that Farrah Sadrudin Nurani (PW2) in affidavits she swore in 2005 and 2006 in High Court Civil Case No. 393 of 2003 knew about the suit property and was aware of the suit property having been sold."



24. Section 146 (4) of the *Evidence Act* provides as follows:
- “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.”
25. Just like section 146 (4) of the *Evidence Act*, Order 18 Rule 10 of the *Civil Procedure Rules* grants the court the power to recall any witness who has been examined. It provides as follows:
- “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.”
26. The decision on whether to recall a witness is left to the discretion of the court, which discretion must be exercised judiciously. Various principles have been developed over time by courts and eminent authors governing the circumstances that the court should consider while exercising its discretion to recall a witness.
27. The learned authors of *Murphy on Evidence*, 12th Edition at paragraph 17.17 state as follows:
- “The general rule of practice in both criminal and civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case and before closing his case. This involves the proposition that the parties should foresee, during their preparation for trial, what issues will be and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a civil case, by exchange of statements of cases and witnesses’ statements is designed to enable this to be done wherever possible.”
28. Indeed, good advocacy requires parties to bring forward their whole case during examination in chief, cross-examination and re-examination. Although the trial court has the discretion to recall a witness, the discretion must involve a scrupulous balancing of the accountability of parties and their counsel for their decisions regarding the prosecution of their respective cases and the interest of justice.
29. Re-opening a case is an extreme measure and should only be allowed sparingly and with the greatest of care. The need for a party to have exercised reasonable diligence in discovering the evidence, or asking questions that will assist his case, though not absolute, is paramount. In fact, in my view, re-opening of a case should not be permitted where the evidence was discovered and was not adduced originally either because of a tactical decision by counsel or out of sheer negligence.
30. It has also been held that re-opening a case should ensure that it 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 (see *Samuel Kiti Lewa vs Housing Finance Company Limited & Another* [2015] eKLR).
31. In an attempt to show that the 1st Plaintiff (PW2) lied when she said in her evidence in chief and cross-examination that in the year 2006, she was not aware that the suit property had been sold, the 2nd Defendant has annexed on its application the Affidavit purportedly sworn by the 1st Plaintiff on 10th April, 2006 in HCCC No. 393 of 2003.
32. In the same breath, the 2nd Defendant annexed a copy of the application that was filed by Cyrus Shakhilaga Kwah Jirongo, the Defendant/ Applicant in HCCC No. 393 of 2003. The 1st Plaintiff’s (PW2) Replying Affidavit sworn on 10th April, 2006 was in response to the said application.



33. The record shows that before the trial of this suit commenced, the 2nd Defendant was aware of the existence of HCCC No. 393 of 2003. In the application dated 21st June, 2019 in which the 2nd Defendant sought the leave of the court to amend its Defence, the 2nd Defendant filed a draft re-emended Defence in which it averred as follows;

“...The Plaintiffs’ however have in their further list of documents filed on 5th June, 2018 exhibited an affidavit sworn by Feizal Sadrudin Nurani on 11th September, 2003 in High Court Civil Case No. 393 of 2003 annexing an agreement made between the 1st Defendant and Cyrus Shakhllaga Kwah Jirongo on 10th May, 2002.”

34. Other than knowing the existence of HCCC No. 393 of 2003 way back in the year 2019, the record shows that the 2nd Defendant’s counsel extensively cross-examined the 1st Plaintiff (PW2) on the contents of that suit, and whether she knew that the suit property had purportedly been sold to Mr. Jirongo, thus the claim in HCCC No. 393 of 2003.

35. While answering one of the questions posed by the 2nd Defendant’s advocate in respect of HCCC No. 393 of 2003, PW2 stated as follows;

“...My brother knew the land had been sold. Jirongo in his Affidavit confirmed that the land had been sold in his Replying Affidavit filed in 2004. In 2004, we were pursuing Mr. Jirongo for the land. At the time we were beneficiaries...”

36. That being the case, it follows that the 2nd Defendant or his counsel knew or ought to have known that PW2 had sworn the Affidavit in the year 2006 in response to the application by Mr. Jirongo in HCCC No. 393 of 2003.

37. In any event, the impugned Replying Affidavit sworn in HCCC No. 393 of 2003 having not been filed by either the Plaintiffs or the Defendants as a document in this matter, it would be prejudicial to the Plaintiffs to allow the Defendants to recall PW2 to be cross-examined on an Affidavit that is not before the court.

38. It cannot be right for this court to allow a party to be re-called for cross-examination just because counsel has come across a document, which document could have been obtained before trial with the exercise of due diligence, and more importantly, when the said document was not filed by any party in this case.

39. Having arrived at the conclusion that the Defendants’ advocates knew or ought to have known of the existence of all the Affidavits filed in HCCC No. 393 of 2003, and the 2nd Defendant’s advocate having cross-examined PW2 on the contents of the said suit, it is my finding that this is not a proper cause for recalling of PW2 to be cross-examined on her Affidavit in HCCC No. 393 of 2003.

40. For those reasons, the 2nd Defendant’s application dated 1st April, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF MAY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Luseno for the 2nd Plaintiff

Ms. Impano for Mutinda for 1st Plaintiff



Mr. Koech for 1st Defendant

Mr. Shah for 3rd Defendant

Mr. Kahura for Gachuhi for 2nd Defendant

Court Assistant: John Okumu

