



**Nyutho v Njoroge & 3 others (Environment & Land Case
98 of 2013) [2022] KEELC 83 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 83 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 98 OF 2013
LC KOMINGOI, J
MAY 12, 2022**

BETWEEN

MARGARET WAKURU NYUTHO PLAINTIFF

AND

JOSEPH KIARIE NJOROGE 1ST DEFENDANT

DOMINIC KIBIGO KARANJA 2ND DEFENDANT

MAURINE KAWIRA KIBIGO 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

1. There are two applications pending within this court. The first is the notice of motion dated 5th October 2021.
2. It is brought under Chapter 11 part IX, Chapter V part II of the *Evidence Act*, Article 40, 50 and 159 of *the Constitution* and all other enabling provisions of the law.
3. The Plaintiff seeks for orders;
 - a. That this Honourable court be pleased to allow the Plaintiff herein to reopen her case, call a further witness and produce further documents being; handwriting report dated 22nd December, 2005 prepared by the Directorate of Criminal Investigations and all documents examined by the handwriting expert.
 - b. That the Honourable court does make such other orders as it shall seem just and fit to meet the ends of justice.
 - c. That the costs of this application be provided for.



4. The grounds in support of the application are listed at paragraphs (a) to (h) of the motion. The application is also supported by the Plaintiff's affidavit sworn on 5th October 2021.
5. The Plaintiff deponed that she has appointed new counsel who has realized that the hand writing expert report was not filed or produced in court despite it being listed as one of the Plaintiff's documents in the Plaintiff's list of documents dated 21st January, 2013. She further deponed that forgery is at the Centre of this dispute and as such, the court will be guided by an expert opinion and since the Defendants' case has not commenced, the Defendants will not be prejudiced.
6. The 1st Defendant Joseph Kiarie Njoroge, filed a replying affidavit sworn on 20th January 2022, in opposition to the application. He deponed that the Plaintiff filed the case in 2013 and has already closed her case hence he will be prejudiced if the case is re-opened.
7. The 2nd and 3rd Defendants also opposed the application. They filed the 2nd Defendant's replying affidavit sworn on 12th November 2021. The 2nd Defendant admitted that whereas the document in issue is listed as a Plaintiff's document, a copy of it was never filed and the Plaintiff did not include an expert witness in her list of witnesses. He further deponed that the matter was certified ready for hearing at the pre-trial directions stage and the Plaintiff testified and closed her case. He added that the 2nd and 3rd Defendants will be prejudiced since they will have no opportunity to cross-examine the Plaintiff's witnesses who have already testified.
8. He also deponed the Plaintiff is trying to reframe issues which will unnecessarily restart the case yet the dispute has dragged in several courts for years. He pointed out CR Case No.1318 of 2005 R v Joseph Kiarie Njoroge, Hcc 492/11 Margaret Wakuru Nyutho v Joseph Kiarie Njoroge, Dominic Kibigo Karanja & Maurine Kawira Kibigo.
9. The Plaintiff filed a further affidavit sworn on 23rd February 2022. She annexed the report dated 22nd December 2005 prepared by the expert witness and stated that as far as this dispute is concerned, this is the only pending matter.
10. The 4th Defendant did not file a response.
11. The notice of motion was canvassed by written submissions

The Plaintiff's submissions

12. They are dated 24th February 2022. Plaintiff's counsel submitted that the Plaintiff ought to be allowed to produce the evidence since the Defendants will not be prejudiced as they knew and expected an expert witness to testify as the entire case rests on the issue of fraud. He further submitted that the Defendants will have a chance to respond to any additional evidence adduced as the right to cross-examine a witness is not curtailed.
13. He put forward the case of *St Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018]e KLR to persuade the court to be guided by Article 159(2) (b) of *the Constitution* in arriving at its decision.
14. The Defendants did not put in written submissions.
15. I have considered the notice of motion and the affidavit in support. I have also considered the affidavits in response, the written submissions and the authorities cited. The issues for determination are:-
 - a. Whether the Plaintiff has made a case for re-opening of her case.
 - b. Whether the Plaintiff should be granted leave to file additional evidence.



16. The Plaintiff closed her case on 21st September 2020. The Defendants are yet to testify. This court has discretion to re-open a case. In *Samuel Kiti Lewa v Housing Finance Company Limited & another* [2015] eKLR. The court stated; “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.”
17. I have considered that the Plaintiff had in her list of documents filed on January 21, 2013 listed the report as a document to be relied on; so that means she is not seeking to fill in gaps in her evidence. I have also considered the fact that the Defendants are yet to testify on their case. They will have opportunity to cross-examine the witnesses on this new evidence. I have also considered that in her plaint dated 21st January 2013, the Plaintiff disputes the signature on the agreement for sale and the transfer in respect to the suit land; thus the claim is centered on forgery. The intended witness will add value in determining all the issues herein.
18. I have also considered that further documents intended to be produced being; handwriting expert report dated December 22, 2005 prepared by the Directorate of Criminal Investigations and all documents examined by the handwriting expert were in possession of the Plaintiff since 2005 and Plaintiff only sought an expert opinion vide the letter dated February 22, 2022 upon change of counsel. I have weighed my observations with her contention that her previous Advocates did not realise the omission. I’m guided by the Supreme court’s decision in *Raila Odinga & 5 others v IEBC & 3 other* [2013] eKLR; where the court made the following observations to be considered while bringing in additional evidence; “.....The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”
19. I’m also guided by the court of appeal’s decision in *Wadhwa (As Legal Representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others* (Civil Appeal 33 & 148 of 2019 (Consolidated)) [2022] KECA 25 (KLR), where a similar application was allowed after the case had concluded. The court observed: “It is therefore not too late for the high court and courts of equal status to allow such an application, if in exercise of its discretion it is judicious to do so, even where the case has been concluded but before judgment”. In this case, only the Plaintiff has closed her case.
20. The second application is the Plaintiff’s Notice of Motion dated 27th January 2022. It is brought under order 1 rule 3 and 10, order 8 rule 3 of civil procedure rules, Article 40,50, and 159 of *the Constitution* and all other enabling provisions of the law.
21. The Plaintiff seeks for orders;
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this suit this Honourable court be pleased to allow the Plaintiff herein to amend the plaint and enjoin Mamut Hardware Stores Limited and Family Bank Limited as Defendants in this suit.



- d. That the Honourable court does make such other orders as it shall deem just and fit to the ends of justice.
- e. That the costs of this application be provided for.
22. The grounds in support of the application are listed on the face of the motion and are contained in Paragraph 1 to 10. It is also supported by the annexed supporting affidavit sworn by the Plaintiff on 27th January 2022.
23. The Plaintiff deponed that she has appointed a new counsel who has realized that the matter was not handled well and upon conducting a search over the suit property, the Plaintiff realized that it was transferred to Mamut Hardware Stores Limited on 16th December 2015 and is charged to Family Bank Limited for kshs.10 million and further charged at kshs.3 Million.
24. She further deponed that the 2nd and 3rd Defendants' title is challenged herein on account of fraud and the same affects any subsequent transfers of the property thus it is important that the two parties be enjoined for a full and effectual determination of the dispute.
25. The application is opposed by the 2nd and 3rd Defendants. They filed the grounds of opposition dated 23rd February 2022 contending that the application is frivolous and an afterthought since there is a similar application on record dated 6th October 2016 seeking to enjoin the same parties but it has never been prosecuted.
26. The 1st and 4th Defendants did not file a reply to the application. All the parties did not put in written submissions.
27. I have considered the notice of motion and the affidavit in support. I have also considered the affidavit in response. The issue for determination is whether this application is merited
28. The substitution and addition of parties to a suit is governed by Section 100 of the *Civil Procedure Act* and Order 1 Rule 10 (2) of the *Civil Procedure Rules* which provides; "The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."
29. This matter is part heard, further, the suit land in contention has been transferred to the proposed Defendants. The Plaintiff is in pursuit of her interest in the suit land. In a similar matter; *Catholic Diocese of Kericho v James Tapkei & 3 others* [2016] eKLR the judge allowed an application to enjoin Defendants who the subject land transferred to them in that matter, stating; "...In our case, the matter has partly proceeded and I appreciate that there may be some prejudice to the defendants. However, I think this prejudice is far outweighed by the need to allow the plaintiff to plead her case as she so wishes. The case of the plaintiff in this suit is for recovery of certain property which it believes belongs to her and ought to be registered in her name..."
30. In conclusion, I find merit in the two applications and grant the orders sought namely:-
- a. That an order is hereby issued allowing the Plaintiff to reopen her case, call further witness to produce further documents being the handwriting expert report dated 22nd December 2005 and all documents examined by the handwriting expert.



- b. That the Defendants do have corresponding leave to file additional witness statement/ documents if need be.
- c. That the Plaintiff is hereby allowed to amend the Plaint to enjoin Mamut Hardware Stores Limited and Family Bank Ltd as Defendants in this suit.
- d. That costs of these applications be borne by the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Twei for Mr. Kirimi for the Plaintiff

Mr. Gachuhi for Advocate for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

Mr. Mwambonu for Ms Njuguna for the 4th Defendant

Steve - Court Assistant

