



**Nderu v Ng'ang'a (Environment & Land Case 303 of 2019)
[2022] KEELC 12571 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 12571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 303 OF 2019**

**MD MWANGI, J
JUNE 16, 2022**

BETWEEN

MARGARET WANGUI NDERU PLAINTIFF

AND

ALICE WACHEKE NG'ANG'A DEFENDANT

(In respect of the Notice of Motion Application dated 11th March 2022 seeking for orders that the court re-opens the Defendant's case to allow her file documents and be adequately represented by Counsel and further that the court recalls the Plaintiff for cross-examination)

RULING

Background

1. The Application before me for determination is a Notice of Motion Application dated 11th March 2022 filed by the Defendant under Certificate of Urgency. The Defendant seeks to re-open this case to enable her file documents in support of her case and recall the Plaintiff for cross-examination.
2. By the time the application was filed in court, this matter was scheduled for judgment on 29th March 2022. The court however, arrested the judgment, albeit temporarily to give the Defendant an opportunity to present her application and have it considered on its merits.
3. The Defendants' application is based on the grounds on the face of it and on the supporting affidavit of Alice Wacheke Ng'ang'a sworn on 11th March 2022. In a nutshell, the Defendant states that the case proceeded when she was not represented by an advocate. She states that because of lack of representation on her part, she was disadvantaged and had not filed her defence and other necessary documents to support her case. She therefore prays for an opportunity to re-open the case, in the interest of justice.



Response by the Plaintiff

4. The Plaintiff strongly opposes the Application by the Defendant through her replying affidavit sworn on the 21st day of March 2022.
5. The Plaintiff avers that after the Defendant's former Advocates withdrew from acting for her, the Defendant was given an opportunity to instruct another advocate. However, by the date of the hearing that was rescheduled to allow her time to instruct another advocate, the Defendant had not retained one and her attempts to adjourn the case for another time was rejected by the court.
6. The case proceeded to hearing and the Defendant had the opportunity to cross-examine the Plaintiff. She also testified in her own case.
7. The Plaintiff reads mischief in the Defendant's application since she already had had the opportunity to present her case and cross-examine her, which she did. The Plaintiff states that the application by the Defendant is an attempt to delay the determination of this case.
8. The Plaintiff reiterates that this case was filed in court way back in the year 2009. Over the years, the Defendant has kept on changing Advocates thereby delaying the hearing of this case for over 10 years. The Plaintiff prays for the dismissal of the Defendant's application.

Court's Directions

9. The court directed parties in this case to file written submissions. Both parties have complied and the court has had the opportunity to read the submissions.

Submissions by the Parties

10. I wish to start by observing that the Defendant/Applicant has not cited the provisions of the Law under which her application is grounded. The submissions of the Defendant/Applicant in support of the Application have also not cited any legal provisions whatsoever to justify her application. The Applicant merely submitted that the Defendant has a right of representation by an Advocate. That due to the complexity of the matter, the Defendant was unable to adequately ventilate her case.
11. The Defendant urges the court to grant her the prayers sought with strict timelines. Finally, the Defendant urges the court to accord her justice since no prejudice will be suffered by the Plaintiff/Applicant.
12. The Plaintiff on her part made reference to five (5) decided cases. The gist of the Plaintiff's submissions is that the Defendant is seeking for an opportunity to fill in gaps in evidence in her case. She seeks to have a second bite at the cherry.
13. The Plaintiff cites the case of *Odoyo-vs- Osodo* (2017) eKLR where Mutungi J stated that a court cannot allow re-opening of a case so that a party can fill gaps in his evidence.
14. The court in the case of *Samuel Kiti Lewa-vs- HFCK Ltd & another* (2015) eKLR, made a similar observation.
15. The Plaintiff sums up her submissions by stating that the Defendant had been given a chance to present her testimony which she did and closed her case. The Defendant has not demonstrated that she has come across or discovered some new and important evidence which even after exercise of due diligence would not have been known to her.



Issues for Determination

16. The court is of the view that the only issue for determination in this case is whether the Defendant has established the basis for re-opening of the case.

Determination

17. In the case of *Raindrops Ltd – vs- County Government of Kilifi* (2020) eKLR, the Court observed that both the Civil Procedure Rules and the *Evidence Act* do not have clear and express provisions on how a court should exercise the jurisdiction to re-open a case. Section 146(4) of the *Evidence Act* however allows the court to permit the recall of a witness for further cross-examination or cross-examination as the case may be. Order 18 rule 10 too grants the court powers to recall any witness who has already been examined and put such questions to him as it thinks fit.
18. The decision therefore whether to re-open a case is purely left to the discretion of the court. Judicial discretion as has been severally stated is a powerful tool that must be exercised with a lot of caution. It must be used judiciously to advance the cause of justice and not whimsically.
19. The *Raindrops Ltd* case made reference to and quoted with approval the *Canadian Encyclopedia Digest Evidence (V) 12, (a)*, which summarized the approach a Court should adopt in assessing a party's conduct as a relevant factor in the following terms:-

“Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered while some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.

(1) Whether the evidence; if it had been properly tendered would probably have altered the Judgment, and

(2) whether the evidence could have been discovered sooner had the party applied reasonable diligence. Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel.”

20. In the case of *Hannah Wairimu Ng'ethe Vs Francis Ng'anga & Another* (2016) eKLR, the court declined to allow re-opening of the case and stated that:-

“...the court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has had the advantage of counsel from the inception of this case.”



21. In *Odeyo Osodo vs Rael Obara Ojuok & 4 Others* (2017) eKLR, the Court stated that the discretion whether or not to re-open a case which the applicant had previously closed should be exercised with caution not arbitrarily whimsically and only in favour of an Applicant who has established sufficient cause.
22. Coming back to the Application before this court, I must point out that this is a case that has been pending in court for over ten (10) years now. It was filed in court in the year 2009. It has gone through all the stages including pre-trial directions before it was set down for hearing.
23. On 14th October 2021 when the Defendant's former Advocate withdrew from acting for her, the Defendant was in the virtual court. She told the court that her Advocate had explained the action to her and she had no objection to the withdrawal. It is on that day that a date was set for the hearing of the case on 24th November 2021. The Defendant had the opportunity to instruct an Advocate if she had wished to do so.
24. On the hearing date, the Defendant was present in person in open court. She cross-examined the Plaintiff after her evidence in chief. Thereafter she testified in her own case.
25. Upon completion of the hearing, the court directed both parties to file their written submissions by the 26th day of January 2022.
26. On the 26th January 2022, the Defendant requested for more time to enable her file her submissions. She was granted an additional 14 days. A judgement date was also issued by the court.
27. About 18 days to the date of the judgement, the Defendant rather than filing the submissions filed the Application before the court seeking to re-open the case.
28. Whereas it may be allowable in deserving cases to re-open a case after it has been closed, it should not and must not be allowed where it is intended to help one party to fill up gaps in evidence of his case. Re-opening a case is an extreme measure that should only be allowed sparingly and with the greatest care (Raindrops Ltd case - supra).
29. I am not persuaded by the reasons advanced by the Defendant in support of her Application. The Defendant has not established sufficient cause to warrant the re-opening of this case after all parties have had their day in Court and closed their respective cases. Her application in my view is an afterthought tactically calculated to fill up gaps in evidence. It is noteworthy that the Defendant is not even seeking to recall a witness to explain an issue that may have been left hanging or produce a document that may have been inadvertently left out. She is seeking to redo the case.
30. The Defendant has had the opportunity to present her case before the court. She chose to do so without representation. As the Court of Appeal stated in the case of Union Insurance Co. Ltd vs Ramzan Abdul Dhanji, 'the law is that parties must be given a reasonable opportunity of being heard.' That opportunity was accorded the Plaintiff in this case.
31. This court therefore declines the Defendant's prayers to re-open this case. The Application dated 11th March 2022 is hereby dismissed with costs.
32. The court will proceed to issue a date for judgement. The Defendant will be at liberty to file and serve her submissions within fourteen days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2022.

M.D. MWANGI



JUDGE

In the Virtual Presence of:-

No appearance by the parties

Court Assistant: Hilda

M.D. MWANGI

JUDGE

