



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karwenju v Ngenye & another (Environment & Land Case  
413 of 2017) [2022] KEELC 3759 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3759 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 413 OF 2017**

**OA ANGOTE, J**

**JULY 21, 2022**

**BETWEEN**

**JANE WAMBUI KARWENJU ..... PLAINTIFF**

**AND**

**JOSEPH MAINA NGENYE ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH WANYOIKE THUO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the plaintiff's/applicant's notice of motion application dated March 23, 2022 brought pursuant to articles 50 and 159 of the Constitution, sections 1A, 1B, 3A & 63 of the Civil Procedure Act and order 10 rule 11 of the Civil Procedure Rules seeking for the following orders:
  - i. That leave be and is hereby granted to the plaintiff to re-open her case and call additional witnesses in terms of the witness statements annexed to this application.
  - ii. That this honourable court be pleased to set aside proceedings for the February 28, 2022 as regards the testimony of DW1 and DW2 and grant the applicant leave to have the said witnesses recalled for cross-examination by the plaintiff's advocates on record.
  - iii. That costs of this application be provided for.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Jane Wambui Karwenju, the plaintiff herein. The plaintiff deponed that her previous counsel on record, SJ Nyang and Co Advocates, filed the plaint and list of witnesses dated June 21, 2017 and that her counsel aforesaid only filed her witness statement to the exclusion of the statements by her other witnesses.



3. It was deponed that as a lay person unaware of the conduct of proceedings, she trusted the counsel who had indicated that she would prepare statements for the other witnesses; that when she testified on September 21, 2021, she was under the impression that her advocate would inform the court that there were additional witnesses to be called and that when the matter came up for further hearing on February 28, 2022, her counsel did not attend court and the matter proceeded in her absence.
4. It was the plaintiff's deposition that she has been informed by her current counsel that the previous counsel did not make any attempt to file the additional witness statements and only sought witness summons as against PW2 and that having evaluated her previous counsel's conduct, it is apparent she was not committed in the case and that she was forced to conduct the hearing on her own on February 28, 2022 despite her limited legal knowledge.
5. It is the plaintiff's case that her new counsel has taken urgent steps and recorded statements of the aforesaid crucial witnesses; that the interests of justice dictate that she is allowed to re-open her case and call the additional witnesses; that the orders to set aside the proceedings of February 28, 2022 will not prejudice or cause any hardship to the defendants; that failure to re-open the case will violate her constitutional right to be heard as protected by article 50 of the Constitution and that the application has been brought without unreasonable delay.
6. In response to the application, the 1<sup>st</sup> defendant on his own behalf and on behalf of the 2<sup>nd</sup> defendant filed a replying affidavit in which he deponed that the application is an afterthought whose intent is to steal a match from the defendants; that the application is *res judicata* because on February 28, 2022, the plaintiff made an oral application to call additional witnesses and that the said application was denied on the grounds that the said witness statements had not been filed before pre-trial.
7. It was deponed that the only avenue open to the plaintiff was an appeal against the decision of the court rejecting the calling of additional evidence; that the plaintiff's general conduct had been geared towards delaying the suit; that the defendants will be heavily prejudiced if the application is allowed as they have used a lot of funds to pay the advocate and to commute to court for the hearing and that the court had already indulged the plaintiff twice to adduce additional evidence which they failed to do.
8. The plaintiff filed a supplementary affidavit in which she deponed that she has personally taken all the appropriate steps to conclude this matter and that the delay in having the matter finalized is highly prejudicial to her as she cannot enjoy possession of her property. Both the plaintiff and the defendant filed submissions which I have considered.

### **Analysis & Determination**

The issues that arise for determination are as follows:

- i. Whether the application is *res judicata*.
- ii. Whether the plaintiff has met the threshold for the grant of the prayers of re-opening the case and receiving additional evidence?
- iii. Whether the court should set aside the proceedings of February 28, 2022 and grant the applicant leave to have the said witnesses recalled for cross-examination by the plaintiffs advocates on record.



9. The substantive law on *res judicata* is found in section 7 of the [Civil Procedure Act](#) cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

10. The Court of Appeal in the case of the [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), Nairobi CA Civil Appeal No 105 of 2017 [2017] eKLR, held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

‘The suit or issue was directly and substantially in issue in the former suit.

That former suit was between the same parties or parties under whom they or any of them claim.

Those parties were litigating under the same title.

The issue was heard and finally determined in the former suit.

The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.’

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

11. The test in determining whether a matter is *res judicata* as aforesaid was summarized in [Bernard Mugo Ndegwa v James Nderitu Githae and 2 others](#) [2010] eKLR, as follows:

- a. The matter in issue is identical in both suits;
- b. The parties in the suit are the same;
- c. Sameness of the title/claim;
- d. Concurrence of jurisdiction; and
- e. Finality of the previous decision.

12. The defendant asserts that the present application is *res judicata*. He deponed that on February 28, 2022, the plaintiff made an oral application seeking leave to call additional witnesses which was denied and that the plaintiff equally sought to adduce evidence during pre-trial.



13. The present application seeks to re-open the plaintiff's case and calling of additional witnesses; set aside proceedings of February 28, 2022 and have DW1 & 2 recalled for cross-examination. The pre-trial directions referred to by counsel is a matter of procedure and as such cannot be said to fall within the ambit of *res judicata*.
14. With respect to the contention that the matter is *res judicata* on account of the court's determination of February 28, 2022, the record shows that the hearing proceeded on February 28, 2022 where PW2 testified after which the plaintiff indicated that she had closed her case. DW1 & 2 thereafter testified. The court gave directions that further hearing be conducted on March 24, 2022. The court issued witness summons to the document examiner, Eli John Murage.
15. On September 21, 2021, counsel for the plaintiff sought for an adjournment on the grounds that witness summons should issue to an officer from Nairobi City County to attend court and testify. The court declined to grant the adjournment and directed the matters to proceed with the hearing on that day.
16. The oral application by the plaintiff was specific in that it sought for an adjournment and for the issuance of witness summons for an officer of the Nairobi City County to attend court. The issue before the court at that juncture was not the re-opening of the case, as the matter had not even began. That being the case, the issue being raised by the plaintiff in the present application is not *res judicata*.
17. Section 146 (4) of the [Evidence Act](#) grants the court powers to recall a witness. It provides as follows:

“(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.”
18. 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:

“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.”
19. The above provisions do not specifically address the issue of re-opening of cases with a view of calling additional witnesses and as such, the same is a discretionary power to be exercised by the court pursuant to the provisions of section 3A of the [Civil Procedure Act](#).
20. It is common ground that where a court is called upon to exercise discretion, the same must be exercised judiciously and in the interest of justice. This was aptly expressed by the Court of Appeal in [Patriotic Guards Ltd v James Kipchirchir Sambu](#), Nairobi CA No 20 of 2016, [2018] eKLR as follows:-

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”



21. The principles that guide the court in exercising its discretion while considering whether to re-open a case and receive new evidence were aptly and persuasively expressed by the court in *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, which stated as follows;

“Over the years, Kenya’s superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil 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 party’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 the 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.”

22. In the case of *Raila Odinga & 5 others v IEBC and 3 others* [2013] eKLR, the Supreme Court while dealing with the issue of admission of documents outside the stipulated timeliness stated that:

“The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. 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.”

23. The court will be so guided. By way of a brief background, the plaintiff instituted this suit on June 21, 2017 seeking inter alia for permanent injunctive orders against the defendants and a declaration that their encroachment onto the suit property is illegal and unlawful.
24. The plaintiff claims ownership of the suit property by virtue of having allegedly bought the same from the 1<sup>st</sup> defendant. Together with the Plaintiff, she filed a list of documents and a list of witnesses. The only witness who recorded a statement in the said list is Margaret Wakio.
25. The defendants vide their defence assert that the 1<sup>st</sup> defendant never sold the suit property to the plaintiff but sold it to the 2<sup>nd</sup> defendant who is now the legal owner and that the documents produced by the plaintiff allegedly in respect of the sale are forgeries.
26. The record indicates that the matter came up for a pre-trial conference before the Deputy Registrar on May 7, 2018, on which date there was no appearance by the parties. On October 25, 2018, counsel for the plaintiff stated that he had not complied with the provisions of the *Civil Procedure Rules* on the



- filing of witness statements and documents. He sought for more time. The court granted the plaintiff 21 days within which to file her statements and documents.
27. On May 22, 2019, counsel for the plaintiff sought for an adjournment on the grounds that he needed to adduce more documents in court. The said application was allowed. On September 21, 2021, counsel for the plaintiff sought for an adjournment and sought for the issuance of witness summons for a witness from the Nairobi City County. The said application was declined and the matter proceeded for hearing with PW1, the plaintiff, giving her testimony.
  28. On February 28, 2022, the matter came up for further hearing. Whereas the plaintiff's counsel was absent, the plaintiff indicated that she was ready to proceed. The hearing proceeded with DW1 & DW2 giving their testimony.
  29. The plaintiff is now asking this court to re-open the case and allow her to adduce additional evidence through her witnesses and to recall the defendants for cross-examination by her counsel. She asserts that her previous counsel failed to file all the relevant witness statements and further abandoned her during trial forcing her to conduct the hearing with her limited legal knowledge.
  30. The court has considered the additional witnesses and evidence sought to be adduced. It is the witness statement of John Wainaina Ndungu, Margaret Wakio and David Mwaniki Mathaiya. Their evidence is essentially that they were present when the sale agreement with respect to the suit property was signed as between the plaintiff and the 1<sup>st</sup> defendant.
  31. Indeed, their names appear as witnesses to the sale agreement adduced by the plaintiff. Further, David Mwaniki and Margaret Wakio appear as witnesses in the list of witnesses filed with the plaintiff on the June 21, 2017. The plaintiff's case has always been that the sale agreement that she entered into with the 1<sup>st</sup> defendant is valid. According to the plaintiff, she is not seeking to adduce any new evidence.
  32. While conceding that the witnesses sought to be produced now have always been within the plaintiff's knowledge, it is alleged that the failure to adduce the witness statements was due to inaction by counsel. Indeed, in view of the fact that two of the witnesses were indicated in the plaintiff's list of witnesses, the court opines that it is plausible that indeed the failure to adduce the statements was not deliberate on the part of the plaintiff, but was occasioned by a mistake of counsel.
  33. The above notwithstanding, on February 28, 2022, the plaintiff opted to proceed with her case despite her counsel's absence. After the testimony by PW2, the plaintiff stated, "I do not have any other witnesses" and the defence proceeded with its case. The plaintiff never raised the issue of any additional witnesses which is questionable in light of her assertion that she has all along intended to call the aforesaid witnesses and that the failure to do so was occasioned by counsel.
  34. Indeed, the present application does not address why the proposed witnesses did not file their statements before the trial commenced. It appears that whereas two of the witnesses were in the initial list, the plaintiff had not settled on calling them up until the defendants testified. This is tantamount to piecemeal litigation which goes contrary to the guarantee of a fair hearing as expressed by article 50 of the *Constitution*. The application to re-open the plaintiff's case is rejected.
  35. The applicant is seeking to set aside the proceedings of February 28, 2022 and have DW1 & DW2 recalled for cross-examination. It is her contention that as a lay person, her cross-examination was ineffective. Having considered the record of the proceedings of February 28, 2022, it is noted that the plaintiff, despite her counsel's absence, informed the court that she was ready to proceed with the hearing, which she did.



36. At no point during the proceedings did the plaintiff inform the court that she was incapable of conducting the hearing. A party who takes it upon herself to act in person assumes responsibility for the conduct of her case and cannot later seek refuge in the fact that they are lay people with no legal knowledge. To allow such a plea would create a dangerous precedent where litigants, having undertaken to represent themselves will later seek to have proceedings undone and give themselves a second bite at the cherry.
37. In the circumstances, the court is not convinced that it would be a proper exercise of its discretion to set aside the proceedings of February 28, 2022 and recall the defence witnesses for re cross-examination. This plea is rejected.
38. The upshot of the foregoing is that the application dated March 23, 2022 fails. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21<sup>ST</sup> DAY OF JULY, 2022**

**OA Angote**

**Judge**

**In the presence of;**

No appearance for plaintiff.

Mr Mugo for defendants.

Court Assistant - June

