



REPUBLIC OF KENYA



**KENYA LAW**  
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**Eldo Amani Self Help Group & 2 others v Wanjau & another (Environment & Land Case 51 of 2016) [2022] KEELC 4899 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4899 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 51 OF 2016  
SM KIBUNJA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**ELDO AMANI SELF HELP GROUP ..... 1<sup>ST</sup> PLAINTIFF  
SAMMY NJUGUNA WACHIRA, CHAIRMAN ..... 2<sup>ND</sup> PLAINTIFF  
STEPHEN KIRUNGA KAMAU, TREASURER ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**CHRISTOPHER WANJAU ..... 1<sup>ST</sup> DEFENDANT  
MINISTER FOR LANDS, UASIN GISHU COUNTY GOVERNMENT .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. Before me for determination is the Plaintiffs’ notice of motion dated the January 28, 2022 seeking for the following orders;
  - a. “Spent;
  - b. That the directions/orders, proceedings made herein on the 7<sup>th</sup> day of December, 2021 to close the defence case be and is hereby stayed, set aside and/or varied and forthwith the 1<sup>st</sup> Defence witness, Christopher Wanjau, be recalled to be cross examined by the plaintiffs’ counsel herein.
  - c. Costs of the Application”.

The application is grounded on the seven (7) grounds on its face and supported by the affidavit sworn by Sammy Njuguna Wachira, the chairman. The plaintiffs’ case is that when the defence hearing took place on the December 7, 2021, their advocate did not participate as he was engaged in Eldoret CMCC No. E295 of 2021. That the plaintiffs were therefore prejudiced and or disadvantaged in prosecuting



- their suit, and it is only fair and just that the defence witness be recalled for cross examination by their counsel.
2. The application is opposed by Christopher Wanjau, 1<sup>st</sup> defendant, through his replying affidavit sworn on the March 4, 2022 in which he deposes inter alia that he and one Joseph Kipkulei Busienei testified on the December 7, 2021, and were cross examined by 1<sup>st</sup> Plaintiff, Sammy Njuguna Wachira; that the hearing date of December 7, 2021 had been taken by consent by the Advocates for the parties, and thus the plaintiffs' advocate was aware of the hearing date; that the reasons advanced by the plaintiffs are insufficient and inexcusable for reason that they were aware of the hearing date and cross examined the defence witnesses; that it would be prejudicial if the witnesses were recalled for the sole reason of counsel's inexcusable mistake, and that the application is an abuse of court process thus ought to be dismissed with costs.
  3. That following the directions issued on the February 21, 2022, the learned counsel for the plaintiffs and 1<sup>st</sup> defendant filed their submissions dated the April 5, 2022 and May 4, 2022 respectively.
  4. The following are the issues for the court's determinations;
    - a. Whether the plaintiffs have satisfied the criterion to warrant reopening of the defence case and recall of the 1<sup>st</sup> Defence witness for cross examination by their counsel.
    - b. Who bears the costs of the application.
  5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, submissions filed, superior courts decisions cited thereon and come to the following determinations;
    - a. That it is noteworthy that the main suit was slated for hearing on the 7<sup>th</sup> Day of December, 2021 a fact which is not contested by either party. Both the parties were in attendance save for the Plaintiffs' counsel, who from his admission and the advocate's diary marked "SNW 1", was sufficiently aware of that date. What the parties are in dispute over is whether the plaintiffs were indeed condemned unheard by failure of the advocate to cross examine defence witnesses, who testified on that date.
    - b. The plaintiffs seek to reopen the defence case and recall only one defence witness, Christopher Wanjau, for cross-examination, for reasons that the failure of their counsel to cross examine the witness will be prejudicial to their case. That though the record confirms the 1<sup>st</sup> defendant's position that two defence witnesses testified on the December 7, 2021, the plaintiffs appear to be interested in only recalling one for cross examination, and not both. The record further confirms that when this matter was first called out on the December 7, 2021 counsel for the plaintiffs and 1<sup>st</sup> defendant were both present. That it was after counsel for the plaintiffs indicated that he was going to be available for defence hearing at noon, that the court directed the hearing to commence at midday. That when the matter was next called at 12.17pm, the 1<sup>st</sup> plaintiff informed the court that he had been told their advocate was in another court. He further told the court that he would proceed with the hearing nevertheless. Indeed, the record further shows that the 1<sup>st</sup> plaintiff cross examined the two defence witnesses who testified on that day. Thereafter the counsel for the 1<sup>st</sup> defendant closed the defence case and directions on filing and exchanging submissions were issued. That it is clear to this court that the advocate for the plaintiffs therefore failed to appear in court at the agreed time for the defence hearing out of his choice.



- c. The framework on how the jurisdiction of recalling of witnesses is to be exercised is guided by the *Civil Procedure Rules*, 2010 and the *Evidence Act* Chapter 80 of the Laws of Kenya. Section 146 (4) of the *Evidence Act* generally grants the courts powers to recall a witness 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.”

Equally, Order 18 Rule 10 of the *Civil Procedure Rules*, 2010 grants the Court powers to recall any witness who has been previously examined 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.”

From the foregoing provisions, the decision whether to stay proceedings, reopen a case and subsequently recall a witness is discretionary in nature, exercised judiciously and in the interest of justice.

- d. The plaintiffs have urged this court to be guided by principles enunciated in Article 159 *Constitution of Kenya, 2010* which states that justice shall be administered without undue regard to technicalities, and relied on the case of *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR. In reliance to the above cited authority, which is manifestly two faceted, the court while guiding itself on judicious exercise of discretion cautions itself from acting arbitrary or whimsically. Thus the discretion should not be applied in a vacuum, but in consideration of both parties’ position. The plaintiffs contend that they were not accorded any opportunity to cross examine the witness, which claim is vehemently opposed by the 1<sup>st</sup> Defendant, who deposes that the plaintiffs’ Counsel was aware of the hearing date, was subsequently informed by the court of the time the hearing would start, and after he failed to appear, the hearing proceeded with the 1<sup>st</sup> Plaintiff cross examining the defence witnesses. It is therefore not entirely true that the defence hearing took place without the plaintiffs’ representation, contribution and or cross examining the witnesses, as it is abundantly clear that the plaintiffs were afforded the opportunity, and in fact exercised it by the 1<sup>st</sup> plaintiff electing to proceed with the hearing the absence of his counsel notwithstanding, and indeed cross examining both witnesses. The position would have been different had the 1<sup>st</sup> defendant sought for adjournment that was then rejected, or declined to participate in the defence hearing without his counsel being present. What the instant application seems to seek is to give the plaintiffs a second bite at the cherry, and thereby causing delay in the finalization of this matter. That is especially so as the plaintiffs have not demonstrated to this court how the cross examination done by Sammy Njuguna Wachira, 1<sup>st</sup> plaintiff, on the December 7, 2021, was insufficient for purposes of effective determination of this suit.
- e. In the case of *Susan Wavinya Mutavi versus Isaac Njoroge & Another* [2020] eKLR the court while identifying the principles that guides exercise of discretionary jurisdiction 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 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.

Where an applicant is seeking to fill gaps in evidence adduced by recalling a witness, the court is bound to disallow such application. In the instant matter, it is obvious the plaintiffs are not just after ensuring their counsel cross examines all the defence witnesses who testified, and were cross examined in his absence. The court can only conclude that they seek to fill gaps in their case by seeking to recall only one of the two witnesses. In *Samuel Kiti Lewa v Housing Finance Company Limited & another* {2015} eKLR cited by both parties, the court made the following observation;

“..... in my view if the plaintiff was allowed to re-open his case to so prove it that a document produced by the defendant was different to the one he had would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”

- f. That further to the foregoing, an application for re-opening of a case will be rejected if there is inordinate delay which is unexplained by an applicant. The application herein though dated the January 28, 2022, was filed on the February 3, 2022, which was more than seven (7) weeks from the date of the impugned proceedings and order. There has been no attempt by the plaintiffs to explain vividly that evident delay. A period of seven weeks does not fall short of being referred as an inordinate delay. The plaintiffs only states that their counsel could not attend court at the time of the defence hearing, but have not gone further to illustrate any due diligence undertaken thereafter. In the case of *Samuel Kibutha Kamau v Catherine Chao Nyange* [2021] eKLR the court while dismissing an application to reopen a case had the following to observe:

“To stay this proceeding and or re-open the applicant's case will be a travesty of justice. It is trite that proceedings can be stayed specifically and only in circumstances that will not render the determination on substantive justice a mockery.

In view of the above finding, I do not find any merit in this application. The respondent has an opportunity to tender her evidence and thereafter counsel shall submit. On the same vein, the applicant cannot be recall to re-open his case as he was not to blame for the respondent's counsel's inexcusable mistake. Accordingly, the application is dismissed with costs to the applicant/respondent. Hearing shall proceed with the respondent's case.”

- g. That it follows that the plaintiffs are inviting this court to an expedition at the expense of its judicious discretion, to reopen the defense case. The reasons advanced are not demonstrable on how failure to grant the orders sought will be prejudicial to them. It is noteworthy that the plaintiffs were heard, and that if there's anything that they would have wished their counsel to deal with had he been present when the 1<sup>st</sup> plaintiff cross examined the defence witnesses, the



forum that available to both sides now, that will not occasion any party any prejudice or cause delay in the matter, is through the pending submissions. The 1<sup>st</sup> Defendant was not to blame for the plaintiffs' counsel court schedules or commitments and the counsel's failure to attend the defence hearing shall not be visited on him, whether in the interest of justice or connived delay. Accordingly, the plaintiffs' application dated the January 28, 2022 is without merit.

- h. That as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the events unless for other reasonable cause directed otherwise, the plaintiffs will pay the 1<sup>st</sup> defendant's costs in the application.
- 6. In view of the above findings, the court orders as follows;
  - a. The plaintiffs' application dated the January 28, 2022 be and is hereby dismissed.
  - a. That the plaintiffs shall pay the 1<sup>st</sup> defendant costs of the application.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 23<sup>rd</sup> DAY OF SEPTEMBER, 2022**

**S. M. Kibunja, J.**

**Environment & Land Court - Eldoret**

IN THE VIRTUAL PRESENCE OF;

PLAINTIFFS: Absent.....

DEFENDANTS: Absent.....

COUNSEL: Mr. Ogongo for Defendant.....

COURT ASSISTANT: ONIALA

**S.M.Kibunja,J.**

**Environment & Land Court - Eldoret**

