



**Opat v Odha (Environment & Land Case 256 of 2018)  
[2022] KEELC 13731 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13731 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 256 OF 2018  
JO MBOYA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**HASSAN OPAT ..... PLAINTIFF**

**AND**

**WAKO GALGAL ODHA ..... DEFENDANT**

**RULING**

1. Vide the notice of motion application dated the May 23, 2022, the plaintiff herein has approached the court seeking for the following reliefs;
  - a. ....spent
  - b. This Honourable Court be pleased to grant Leave to the Plaintiff to Re-open the Plaintiff's case limited to production of Ministry of Lands and Physical Planning Official Records and Confirmation of the registered owner of L.R No. 209/11208/3, I.R 74239-Nairobi.
  - c. This honorable court be pleased to issue Summons of Court attendance to land registrar, namely, Mr. S. C Njoroge to attend Court during the hearing of the suit on May 26, 2022 or such other date for purposes of;
    - I. Examination on oath of the authenticity and veracity of the letters dated the May 30, 2018 and May 16, 2022.
    - II. Production of official records and confirmation of the registered owner of L.R No. 209/11208/3, I.R 74239-Nairobi.
  - d. Costs of this application be provided for.
2. The subject application is anchored on the various, albeit numerous grounds enumerated in the body thereof and same is further supported by the affidavit of the plaintiff sworn on even date.



3. Upon being served with the application herein, the defendant/respondent swore and filed a replying affidavit sworn/dated the June 3, 2022.

### **DEPOSITION BY THE PARTIES:**

#### **PLAINTIFF'S/APPLICANT'S CASE:**

4. Vide Supporting affidavit sworn on the May 23, 2022, it has been averred that the Plaintiff/Applicant herein availed to court various letters, namely, letters dated the October 29, 2018, April 8, 2019, 3<sup>rd</sup> May 2019, 13<sup>th</sup> May 2019, 29<sup>th</sup> May 2019 and 11<sup>th</sup> October 2019, respectively which were authored by a land registrar, namely, E Wafula.
5. Further, it has been averred that pursuant to the forecited letters, the Ministry of Lands and Physical Planning confirmed that the plaintiff herein was/is the registered proprietor of L.R No. 209/11208/3, I.R 74239-Nairobi.
6. However, the deponent has added that on the February 21, 2022, the Court ordered and directed a land registrar, namely, Ms. Gildine Karani to file certified land documents obtaining from the land registry, prior to and or before her testimony.
7. Nevertheless, the deponent has averred that despite the order by the court, directed and or addressed to Ms. Gildine Karani, Land Registrar, it is evident that the Land Registrar herein has never authored any document pertaining to and or concerning the suit property.
8. Contrarily, the deponent added that the Land Registrar, namely, Mr. SC Njoroge, has authored two letters, namely, the Letter dated the May 30, 2018 and May 16, 2022, respectively, pertaining to and or concerning the suit property and in respect of both letters, it was confirmed that the plaintiff/applicant is the registered proprietor in respect of the suit property.
9. Be that as it may, the deponent has added that premised on the copies of the documents presented by the different Parties before the court, it would be appropriate and/or imperative for the court to issue summons to and indeed summon land registrar, Mr. SC Njoroge, to attend court and confirm the veracity of the two letters authored by himself.
10. In any event, the deponent has further averred that the issuance of summons to the said witness and the re-opening of the Plaintiff's case, shall not prejudice the defendant/respondent.
11. On the other hand, it was averred that the attendance of the said Land Registrar and the production of official records relating to and or concerning the ownership of the suit property, shall assist the Honourable court in arriving at a just conclusion and/or determination.
12. Premised on the foregoing, the deponent implored the Honourable court to allow the application and to issue the witness summons.

#### **RESPONSE BY THE DEFENDANT/RESPONDENT**

13. Vide Replying affidavit sworn on the June 3, 2022, the Defendant/Respondent herein has averred that the subject application by and/or on behalf of the Plaintiff/Applicant is not only misconceived but otherwise amounts to an abuse of the due process of the court.
14. Further, the deponent has added that all the documents which the Plaintiff had availed to the court, including the letters enumerated in terms of ground one of the application were admitted and marked as exhibits in the matter.



15. Consequently, the deponent has averred that all the documents having been duly produced and admitted in evidence, it would be nonsensical to summon the land registrar, namely, Mr. S.C Njoroge, to come and be examined on the veracity of the letter dated May 30, 2018, yet the said letter has already been produced and marked as an exhibit on the part of the Plaintiff.
16. Contrarily, the deponent added that as concerns the letter dated the May 16, 2022, same was neither referred to nor identified by the Plaintiff during his evidence in chief and neither was same cross examined on the basis of the said documents.
17. Finally, the deponent has averred that the subject application and the intended documents, are afterthoughts, which the plaintiff/applicant is keen to bring forth to plug the gaps that became apparent during the cross examination of the Plaintiff/Applicant.
18. In the premises, the Defendant/Respondent has implored the court to decline the request at the foot of the application and to dismiss same.

### **SUBMISSIONS BY THE PARTIES:**

#### **PLAINTIFF'S/APPLICANT'S SUBMISSIONS:**

19. The Plaintiff/Applicant herein filed written submissions dated the July 6, 2022 and same has raised two pertinent issues for consideration.
20. First and foremost, counsel for the Plaintiff/Applicant has submitted that the Land registrar, namely, SC Njoroge is privy to and/or knowledgeable of the facts to and or concerning the suit property. For clarity, it was added that the said Land registrar had previously authored two letters, which confirms that the suit property belonged to and was registered in the name of the Plaintiff.
21. Consequently, it was contended that by virtue of being conversant with the documents and ownership status of the suit property, it would be appropriate to summon the said land registrar to attend court and to be examined on the veracity of the two named letters, authored by same.
22. Other than the foregoing, counsel also added that it would also be important for the said witness to be summoned before the Honourable court and order to produce to the court details pertaining to the suit property.
23. Secondly, counsel for the plaintiff/applicant submitted that the failure to call this particular witness, was not a deliberate in action. In fact, counsel added that the record of court would show that the Plaintiff/Applicant had previously sought to summon and or call a Land registrar by the name E. Wafula, but the plaintiff/applicants efforts were futile.
24. Nevertheless, counsel for the plaintiff has added that the attendance of the said land registrar would be appropriate and necessary, insofar as the land registrar who is being called by the defendant/respondent has never dealt with the matter and is not conversant with the details pertaining to the suit property.
25. In this regard, counsel for the plaintiff has added that the said land registrar, namely, S. C Njoroge, would help the Honourable court to understand the issue surrounding the ownership of the suit property and therefore arrived at a just conclusion.
26. On the other hand, counsel submitted that the subject application is not an afterthought nor is same geared towards plugging gaps allegedly exposed during cross examination on the plaintiff/applicant, in the manner contended by the defendant.



27. In support of the submissions made, counsel for the plaintiff/applicant has cited and relied on various decisions *inter-alia* [Joseph Ndungu Kamau v John Njihia](#) (2017)eKLR, [Charles Antony Ondiek & 3 others v Thomas Odhiambo Nyonje & 6 others](#) and [Baruthi Budni v Domtila Obala Ouma & 2 others](#) (2022)eKLR.

SUBPARA b.

### **SUBMISSIONS BY THE DEFENDANT/RESPONDENT**

28. On his part, counsel for the defendant/respondent has made a two-pronged response. First, counsel has submitted that the letter dated the May 30, 2018, has already been produced and marked as an exhibit on the part of the plaintiff/applicant.
29. In this regard, there cannot be any further examination as pertains to the said letter at the instance of the said plaintiff, unless the plaintiff/applicant is doubtful of the contents of his own documentary evidence.
30. Secondly, counsel for the defendant/respondent has submitted that the records pertaining to and/or concerning the suit property are kept by the Chief Land Registrar, who is the custodian of the said records.
31. Further, counsel added that to the extent that such records are kept by the chief land registrar, same is at liberty to designate a specific/particular land registrar to attend court and produce certified copies of the records held by his/her office.
32. As pertains to the subject matter, counsel added that already a land registrar has been designed to attend court and produce certified copies of the records pertaining to and concerning the ownership status of the suit Property.
33. Consequently, it has been submitted that it would be futile and an abuse of the due process of the court to summon yet another land registrar, from the same chief land registrar's to come to court and to produce *inter-alia*, records which have already been produced by another designated land registrar.
34. At any rate, counsel for the defendant/respondent added that whatever documents that the plaintiff has, or possesses can be used for the purposes of the cross examining the designated land registrar, who has partially testified as DW2 and was stood down for further examination in chief and thereafter cross examination, where appropriate.
35. In view of the foregoing, learned counsel for the defendant/ respondent has submitted that the current application is not meritorious and same is merely intended to delay the expeditious hearing and determination of the suit.

### **ISSUES FOR DETERMINATION**

36. Having reviewed the application dated the May 23, 2022, the supporting affidavit thereto and the response filed by the defendant/respondent and having similarly considered the written submissions filed by the Parties, there is only one issue that arises for determination, namely;
- I. Whether the application is merited and thus ought to be granted



## Analysis and Determination

### Issue Number 1 Whether the application is merited and thus ought to be granted

37. At the onset, it is appropriate to supply the background facts pertaining to and concerning the subject matter. In this regard, certain salient aspects of the evidence that was tendered by the plaintiff/applicant becomes imperative to highlight.
38. First, it is common ground to state and underscore that the Plaintiff herein had filed assorted documents at the foot of lists of documents dated the May 31, 2018, October 15, 2018, November 22, 2018 and September 17, 2020. For clarity, all the said documents which have been alluded to were produced and marked as exhibits before the court.
39. Having produced all the documents which were filed at the foot of the various Lists of documents, details which I have referred to in the preceding paragraph, the plaintiff/applicant herein proceeded to and explained the contents of the said documents, including *inter-alia*, the transfer documents leading to the registration of the suit property in his name.
40. In the course of his testimony, the plaintiff herein stated as hereunder;

“The transfer to Hassan Opat (myself) was registered before the one from Manjit Garial to Kays Ltd. the transfer was registered on the June 9, 2009. I am certain of the veracity of my title documents. I do not need any other person to come and confirm the veracity of my title documents)
41. From the foregoing excerpt, which is a re-production in part of the plaintiff's/applicant's testimony, it is apparent that the plaintiff/applicant contended that the title document and thus the records pertaining the ownership of the suit property produced by same were authentic and valid.
42. Further, what I hear the plaintiff to be stating is that on the basis of the documents produced by same, coupled with his testimony, same would require no other witness to attend court and confirm the veracity of his title documents.
43. Notwithstanding the foregoing testimony, the plaintiff/applicant has now filed the subject application and same is seeking *inter-alia*, an order to summon a specific land registrar, identified as S. C Njoroge to attend court and confirm the veracity of some two letters, one of which was admitted as exhibit P24 at the instance of the plaintiff/applicant.
44. Secondly, the plaintiff/applicant is now seeking that other than the said land registrar being examined on the veracity of the two named letters, one of which was never discovered and does not form part of any documents filed, same also requires that the witness produces further records from the land registry.
45. To my mind, the request, at the foot of the current application are at variance with and contradictory to the very explicit position hitherto taken and maintained by the plaintiff/applicant.
46. Based on the foregoing, one wonders, what has since changed in the mind, body and heart of the plaintiff/applicant, to warrant calling for further documents, which were hitherto deemed unnecessary and inappropriate.
47. To my mind, the complaint by the defendant/respondent that the current application is informed by mala fides and an afterthought, holds sway. Clearly, the plaintiff/applicant is approbating and reprobating at the same time.



48. On the other hand, it also appropriate to recall that the letter dated the May 30, 2018 upon which the plaintiff/applicant requires the particular Land Registrar to attend court and be examined on, is already produced as exhibit by the plaintiff/applicant.
49. In this regard, what then shall be the purpose of the land registrar attending court at the instance of the same plaintiff to be examined on the basis of the document, already produced, as an exhibit by the same plaintiff.
50. The question that arises is whether vide the subject application, the plaintiff is seeking to summon the specific land registrar and thereafter to cross examine same (plaintiff's own witness) on a piece of evidence produced by the same plaintiff.
51. Surely, the law does not fathom, conceive of and or countenance the scenario being advocated for by the Plaintiff herein.
52. Notwithstanding the foregoing, the letter dated the 30<sup>th</sup> May 2018 is already an exhibit at the instance of the Plaintiff and what remains in due course would be the assessment of the probative value and credit worthiness of the said exhibits, to be determined at the appropriate time.
53. In respect of the letter dated the 16<sup>th</sup> May 2022 and the unnamed official records from the Ministry of Land and Physical Planning, all I wish to state is that same were never filed as part of the Bundle of documents on behalf of the Plaintiff in line with Order 3 Rule 2 of the Civil Procedure Rules 2010.
54. Having not been so filed and there being no prayer in the body of the current application for leave to file Further Supplementary List and bundle of Documents, I do not see how the documents which shall not have been discovered, in accordance with the Provisions of the Civil Procedure Rules, can be the basis of production before a court of law.
55. It is imperative to underscore that discoveries and interrogatories (which entail filing and exchange of documents and witness statement), was meant to avert and/or abate litigation by ambush.
56. Contrarily, same was also calculated to enable the Honourable court and the adverse party to appreciate the nature of evidence and the issues that same are going to confront, encounter or be confronted with.
57. Owing to the role and importance of discoveries and interrogatories, which I have alluded to hereinbefore, the question then is; can the plaintiff/applicant be allowed to bring forth documents which were never discovered and seek to produce them at this late stage.
58. Respectfully and in my humble view, to allow the Plaintiff to do what is proposed *vide* the subject application would be tantamount to pouring cold water on established and hackneyed principles of fair hearing, fair play and natural justice.
59. At any rate, I wish to add that the rules of procedure were never made in vain. Same were made and designed to facilitate orderly proceedings, with a view to achieving and/or attaining just determination of disputes.
60. Consequently and in the premises, parties and their legal counsel are not at liberty to disregard the rules of procedure with abandon.
61. To underscore the observation that Rules of Procedure suffice for purposes of just determination of disputes, it is appropriate to adopt the succinct words of the Court of Appeal vide the case of [Mumo](#)



Matemu v Trusted Society of Human Rights Alliance & 5 others Civil Appeal No 290 of 2012 (2013) eKLR, where the court stated and observed as follows;

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also a handmaiden of just determination of cases.”

62. Before winding up on the discourse herein, there is yet another matter that requires to be mentioned. This relates, to the request by counsel for the Plaintiff that the court does issue witness summons in respect of the designated Land Registrar.

63. In respect of the mandate and jurisdiction of the court to issue witness summonses, it is appropriate to take cognizance of the provision of order 16 rule 1 of the Civil Procedure Rules.

64. Given the importance of the said provisions as pertains to issuance of witness summons, it is appropriate to reproduce same.

65. Consequently, the said provisions are reproduced as hereunder;

Summons to attend to give evidence or produce documents [order 16, rule 1.]

At any time before the trial conference under order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

66. The foregoing provision clearly stipulates and circumscribes the timeline within which an application for issuance of witness summons ought and should be made. The timeline for doing so is well delineated.

67. In respect of the subject matter, it is common ground that the plaintiff's case was heard and closed on the October 27, 2021, yet the application for witness summons is now being made *ex-post-facto*.

68. Yet again, the request for issuance of witness summons is informed by an afterthought and in any event, same is misconceived and legally untenable.

69. Finally, the plaintiff has sought for an order directing of the reopening of the plaintiff's case, with a view to producing the named documents, which I have alluded to. However, it is worthy to observe that the said documents which now the Plaintiff wishes to produce were actually within his knowledge and were hitherto deemed inappropriate nay irrelevant.

70. To the extent that the said documents were within the plaintiff's knowledge, but were deemed inappropriate at that time, the plaintiff was called upon to explain why then such documents are now deemed necessary.

71. Clearly, the discretion of this court cannot be exercised where no explanation has been offered and secondly where the intended reopening is calculated to enable the applicant to fill gaps in the evidence hitherto tendered.

72. In this respect, I adopt and endorse the holding of the Court *vide* the case of Joseph Ndungu Kamau v John Njibia [2017] eKLR, where the honourable court stated and observed as hereunder;

“The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being



closed. Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in *Samuel Kiti Lewa v Housing Finance Co Of Kenya Ltd & another* [2015] eKLR Kasango J. stated:

17. Uganda High Court, Commercial Division in the case *Simba Telecom v Karubanga & Anor* (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an *Australian case Smith v New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case *Simba Telecom* (supra) held thus:

“I agree with the holding in the case of *Smith v South Wales Bar Association* (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.” .....

20. 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. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.
73. On account of the various reasons that have been highlighted, amplified and discussed herein before, I come to the conclusion that the application herein is not only misconceived, but same is similarly, misadvised and legally untenable.

#### **FINAL DISPOSITION:**

74. Having analyzed the relevant and pertinent issues, details which have been highlighted in the body of the Ruling, I come to the conclusion that the application is not meritorious.
75. In a nutshell, the application dated May 23, 2022 be and is hereby Dismissed with costs to the defendant/respondent.
76. It so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> \_\_\_\_\_ DAY OF SEPTEMBER 2022.

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant**

**N/A for the Plaintiff/ Applicant.**

**N/A for the Defendant/ Respondent.**

13| Page

