



**Amoni & 20 others v Guhad & another (Environment & Land Case  
1357 of 2014) [2022] KEELC 14462 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14462 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1357 OF 2014  
LN MBUGUA, J  
OCTOBER 27, 2022**

**BETWEEN**

**SYLVANUS MUKATSA AMONI & 20 OTHERS ..... PLAINTIFF**

**AND**

**SAID MOHAMMED GUHAD ..... 1<sup>ST</sup> DEFENDANT**

**HARRISON KABIRU MUGO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The parties herein gave their viva voce evidence and closed their respective cases and on January 28, 2022, the court directed the parties to file their written submissions. Thus the pending issue was the writing of the judgment.
2. The plaintiffs however brought an application dated April 11, 2022 seeking orders to reopen their case for purposes of adducing a Folio Registry Map (F/R Map) and the deed plan for the suit plot, LR Number 36/111/151 Eastleigh Section 3 through the surveyor.
3. The applicants aver that they had attempted to obtain the Folio Registry Map at the Department of Surveys to no success, that on December 13, 2019, they formally wrote to the Department of surveys requesting for the said document and the same was not traced until March 25, 2022 when it was retrieved a few days after the parties had closed their cases.
4. The applicants contend that the map presents a discovery of new evidence as it points to a direction that the suit land had never been allocated to anybody, thus it warrants re-opening of this case for further scrutiny.
5. The application was opposed by the 1<sup>st</sup> Defendant by way of his replying affidavit sworn on May 16, 2022. He avers that the Defendants have not established sufficient grounds to warrant re-opening of the case; pointing out that the applicants failed to file a Notice to Produce against the Department of



- Surveys requesting for the said Folio Registry Map, and they never mentioned that they were pursuing the map. He deponed that the said map is unnecessary as there is no dispute on boundaries, likewise, the registered owner of the land is not disputed.
6. In their written submissions dated June 29, 2022, the Plaintiffs urged the court to be guided by the decision of the Court of Appeal in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR to exercise its discretion to reopen this case for purposes of taking additional evidence. They also urged the Court to consider why the evidence was not called at the hearing. They relied on the case of *Samuel Kili Lewa v Housing Finance Co. Ltd & Another* [2015] eKLR.
  7. They further submitted that their letter dated December 13, 2019 & received by the surveyor's department in 2019 constitutes a proper reason why their evidence that forms the basis of their application was not produced. They also argued that the new evidence is relevant since while the Respondent claimed to be the registered proprietor of the suit land, the map sought to be introduced shows that the suit land is a block and has never been allocated to anybody. They added that the Defendants will not suffer prejudice as they will have an opportunity to cross-examine the witness.
  8. In his submissions dated July 13, 2022, the 1<sup>st</sup> Defendant argued that the map sought to be introduced is unnecessary. He pointed out that the Registrar of Lands was a witness before this court and had availed the necessary file concerning the history of the suit property going back to the 80's.
  9. It was his submission that the Applicants are bound by their own pleadings and as such, their suit is based on adverse possession, thus it is needless to try and bring a different cause of action. He relied on the case of *Stephen Ndolo Wambua v Beatrice Mbula Mutilu & 2 others* [2019] eKLR.
  10. He faulted the map sought to be produced for being an inconclusive sketch map titled "Not to scale" and for not being executed.

### **Analysis.**

11. I have considered all the arguments raised herein as well as the rival submissions. I find that the issue falling for determination is whether the Plaintiffs have provided a reasonable and justifiable basis for the court to exercise its discretion to allow them to re-open their case and produce Folio Registry Map (F/R Map) and the deed plan for plot, LR Number 36/111/151 Eastleigh Section 3.
12. The decision whether or not to re-open a case is a matter of judicial discretion. In the case of *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR, the court held that;  

“the Court’s discretion in deciding whether or not to re-open a case which the Applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.”
13. In *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, the court 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. In exercising its discretion to grant leave to adduce additional evidence, the Court will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial”.

14. The letter addressed to the Director of surveys which the plaintiffs are relying on as their evidence that they had conducted due diligence but the map was not available to them is dated December 13, 2019. By then, the plaintiffs had closed their case on December 5, 2019. The inaction of the plaintiffs during the prosecution of their case is a manifestation of lack of due diligence. It is not lost to this court that this suit was filed about 8 years ago in 2014!
15. The Applicant also did not file a Notice to produce, nor seek witness summons to invite the Director of Surveys to testify. The Court cannot therefore allow the Plaintiff to fill gaps in its evidence.
16. Thus the Plaintiffs have not given sufficient reasons to warrant the issuance of the orders sought and their application is hereby dismissed with costs to the 1<sup>st</sup> defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Ajulu holding brief for Mr. Kuria for Plaintiff Applicant

Mahamed holding brief for Abdi Aziz for the 1<sup>st</sup> Respondent

Court assistant: Eddel

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