



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muturi & another v Kibicho & another (Environment & Land Case  
1263 of 2015) [2022] KEELC 15091 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15091 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1263 OF 2015  
EK WABWOTO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**EUNICE WAIRIMU MUTURI ..... 1<sup>ST</sup> PLAINTIFF**

**WASHINGTON MUCHIRI MUTURI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DANIEL MWANGI KIBICHO ..... 1<sup>ST</sup> DEFENDANT**

**ANDREW KEITH SAVAGE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for consideration, is the Application dated 9<sup>th</sup> June 2022 accompanied by the Supporting Affidavit sworn by Washington Muchiri Muturi. The Applicants sought the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That the Honourable Court be pleased to review its directions made on 25<sup>th</sup> May 2022.
  - iv. That the Honourable Court be pleased to order for re-opening of the Plaintiffs' case and/or the proceedings herein.
  - v. That the Plaintiffs be allowed to adduce additional and/or new evidence in the suit herein.
  - vi. That the Plaintiffs' witness Washington Muchiri Muturibe recalled to give further examination in chief.
  - vii. That the costs of this application be in the cause.
2. The suit came up for hearing on 25<sup>th</sup> October 2021 where the Court directed the parties to file supplementary list of witnesses within 7 days. On 19<sup>th</sup> November 2021, the Plaintiffs' witnesses



testified and consequently closed their case. The defence hearing proceeded on 3<sup>rd</sup> May 2022 and 25<sup>th</sup> May 2022 after which parties were granted 14 days each to file written submissions. Before the same could be done, the Plaintiffs filed the instant Application which is the subject of this Ruling.

3. In submissions dated 4<sup>th</sup> August 2022 and 26<sup>th</sup> September 2022 the Plaintiff submitted that the proposed evidence would offer significant clarification on the issue of ownership of the suit property. Relying on several cases including the case of *Raindrops Limited Vs. County Government of Kilifi* [2020] eKLR it was submitted that the Court was ought to consider the Application and grant the prayers sought.
4. The Application was opposed vide grounds of opposition dated 14<sup>th</sup> July 2022 and a replying affidavit sworn by Daniel Mwangi Kibicho dated 18<sup>th</sup> July 2022. In submissions dated 17<sup>th</sup> September 2022, the Defendants relied on several cases including the cases of *Okiya Omtatah Okiiti v Director of Public Prosecutions; Inspector General of National Police Service & another* (Interested Parties); *International Commission of Jurists (Kenya Section) (Amicus Curiae)* [2021] and *Odoyo Osodo vs Rael Obara Ojuok & 4 others* (2017) where they submitted that the court would not permit a party trying to amend and make improvements to his case by seeking to introduce new and fresh evidence by introducing documents which he had knowledge of but failed to produce at trial.
5. Having considered the Application together with the written submissions of the parties, the sole issue for determination before this Court is whether the Plaintiffs has proven sufficient grounds to re-open their case for purposes of adducing additional evidence and recalling a witness for further examination.
6. Order 18, Rule 1 of the *Civil Procedure Rules*, dictates that the plaintiff shall have the right to begin unless the court otherwise orders. In this case, the Plaintiffs' witnesses gave evidence, were cross-examined and re-examined accordingly. Additionally, Order 18, Rule 10, outlines the circumstances under which a witness may be recalled:

“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.”

7. This Court must consider the balance of fairness for all Parties as outlined in Section 146 (4) of the *Evidence Act*:

“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.”

8. In Halsbury's Laws of England Volume 13 on discovery, it is stated that:

“The function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to sit before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.” [Emphasis Mine]



9. I align myself with the sentiments of the learned judge, in *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* (2019) eKLR

“...There is no greater duty for the court than to deliver substantive justice as provided for under Article 159 2(d) at the end of it all. While the wording of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence...”

10. The threshold to re-open a case is set out in several instances. First, The Court of Appeal in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR highlighted that the Court exercises discretionary powers when determining to re-open a case. In *Samuel Kiti Lewa v Housing Finance Company & Another* [2015]eKLR, the Court would not grant the plea if it is intended to fill gaps in the evidence. Lastly, the plea cannot be granted if there is inordinate and unexplained delay on part of the Applicant.
11. My perusal of PW2 (Washington Muchiri Muturi) witness statement dated 10<sup>th</sup> December 2015 which was consequently adopted as evidence in chief alludes to the admission of sufficient evidence being in possession of the Plaintiffs under Paragraph 2 as follows:

“...The records in our possession reveals that Plot No A78-2-umoja Innercorewas allocated to the late Gerald Muturi Mainaon or before 1997...”

12. Additionally, this Court recognizes that the letter of enquiry to the Nairobi City County was filed on 23<sup>rd</sup> November 2021 which was merely a few days after closing their case at hearing. Keeping in mind that this suit is approximately over seven (7) years old, it is my position that the Plaintiffs had sufficient time to retrieve the evidence and present it before Court, therefore, the delay is a grievous error on the Plaintiffs. Hence therefore, allowing the Plaintiffs to re-open their case at this stage would be accommodating counsels’ laxity and aiding to gap fill their evidence.
13. In view of the foregoing, the Court finds that the orders sought in the Application dated 9<sup>th</sup> June 2022 are not for granting. The Application is unmerited and is hereby dismissed in its entirety with costs to the Defendants.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

Mr. Manyara h/b for Mr. Oyugi for the Plaintiffs/Applicants

Mr. Kariuki for the Defendants/Respondents.

Court Assistant; Caroline Nafuna.

**E. K. WABWOTO**



**JUDGE**

