



**Baraka & 4 others v Sabwa & 3 others (Environment & Land Case
125 of 2019) [2022] KEELC 15052 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15052 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 125 OF 2019
A NYUKURI, J
NOVEMBER 23, 2022**

BETWEEN

**MOHAMMED BARAKA 1ST PLAINTIFF
FRANCIS SABWA 2ND PLAINTIFF
SIMON MBOGO MUCHIRI 3RD PLAINTIFF
WANJIRU NDEIRU 4TH PLAINTIFF
LUCY MWAURA 5TH PLAINTIFF**

AND

**JOHN NGIARA SABWA 1ST DEFENDANT
NATIONAL BANK OF KENYA LLMTIED 2ND DEFENDANT
IGAINYA LIMITED 3RD DEFENDANT
CHIEF LAND REGISTRAR, NAIROBI 4TH DEFENDANT**

RULING

1. Before court is a notice of motion dated May 16, 2022 filed by the 2nd defendant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That the 2nd defendant/applicant be granted leave to reopen his case solely for the purpose of producing the 2nd defendant's list of documents and bundle of documents dated January 18, 2013 and filed on March 12, 2013.



- d. That the cost of this application be in the cause.
2. The application is supported by the affidavit of Mr Nyamwaya Innocent Mogaka, counsel for the 2nd defendant. The applicant's case is that they filed their documents on March 12, 2013 and served the same on the other parties. That on the hearing date of May 13, 2022, counsel perused the court file and noted that the said documents were missing on the court file, although he had indicated to court his readiness to proceed on the presumption that the documents were on the court file.
 3. The applicant further stated that at hearing, the 2nd defendant's witness was not able to produce his documents as they were in possession of his former advocate. His position was that filing of the said documents will not prejudice the plaintiffs as the said documents were served on the plaintiffs on March 14, 2013. He maintained that the 2nd defendant stands to suffer irreparable harm if his documents are not produced and that the documents do not seek to introduce new evidence.
 4. The application was opposed. Grace Wangui Koech Advocate for the plaintiffs filed a replying affidavit sworn on September 15, 2022. The plaintiff/respondent's case is that on June 17, 2021 when this matter came up for hearing, the 2nd defendant sought for adjournment and they were given time to file their documents. Further that on November 17, 2021 when the matter came up for hearing the plaintiff testified, but later on passed away before the defence case was heard.
 5. Counsel for the respondent stated that she wrote a letter dated February 1, 2022 requesting to be served with the 2nd defendant's documents, but she received no response. She further averred that on the hearing of the defence case, counsel for the second defendant sought for an adjournment to enable him file his documents. That the court noted that the 2nd defendant had only filed a list of documents without the accompanying documents, hence the application for adjournment was declined and the defendants ordered to proceed, which they did and closed their case.
 6. It was the respondent's contention that the 2nd defendant's advocates came on record on July 20, 2020 and had two years to file their documents and prepare for trial and therefore that his application ought to be dismissed.
 7. The application was canvassed by written submissions. On record are the 2nd defendants' submissions filed on October 11, 2022 and the plaintiff's submission filed on September 30, 2022.

Submissions

8. Counsel for the 2nd defendant submitted that production of the 2nd defendant's list of documents and bundle of documents dated January 18, 2013 and filed on March 12, 2013 will not in any way prejudice the plaintiffs as the said documents were served on them on March 14, 2013, which fact was not disclosed during trial. Reliance was placed on the case of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* (2018)eKLR for the proposition that a party ought to be allowed to produce additional evidence in the interest of substantive justice.
9. It was further argued for the 2nd defendant that the 2nd defendant advocates had indicated during virtual mention of the matter before time allocation for hearing that he was ready to proceed only to note that crucial documents in supporting the 2nd defendant's case were missing in the court file. According to counsel, the 2nd defendant's documents do not introduce any new evidence outside the issues to be determined and that the said documents have great influence on the results of the trial as they will assist the court to arrive at a just decision. His view was that the production of the 2nd defendant's documents will not prejudice the plaintiffs in any manner.



10. On the other hand, counsel for the plaintiff/respondent submitted that although the court has discretion to determine whether or not to reopen a case, the said discretion ought to be exercised judiciously. Reliance was placed on the cases of *Samuel Kiti Lewa v Housing Finance Company of Kenya Ltd and another* (2015)eKLR and *Susan Wavinya Mutari v Isaac Njoroge & another* (2020)eKLR for the proposition that the court in considering whether to grant an order of re-opening a case, ought to consider whether such reopening will embarrass or prejudice the opposite party and that reopening of a case should not be allowed where it is intended to fill gaps in evidence or where the case will be defeated by inordinate and unexplained delay. In that regard counsel argued that the 2nd defendant's application failed to meet the threshold set above.
11. According to the plaintiffs' counsel, allowing the 2nd defendant's case to be reopened will prejudice the plaintiffs' case because the plaintiffs' witness is now deceased and cannot be recalled to testify and that the plaintiffs' evidence on record lacks the benefit of the evidence sought to be introduced by the 2nd defendant. Counsel contended further that the 2nd defendant's delay in filing its documents was inordinate and this court being a court of equity aids the vigilant and not the indolent. Counsel also argued that a party seeking to reopen a case to produce evidence must show that the evidence it seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case; and pointed out that the 2nd defendant had not met this threshold.
12. It was counsel's position that this matter having been filed in 1998 has been pending for over 24 years and justice demands that the same be heard and concluded without further delay.

Analysis and Determination

13. I have carefully considered the application, the supporting affidavit, annexures thereto, the replying affidavit, submissions and the entire court record. The issue that falls for determination is whether the 2nd defendant has demonstrated justification for the court to exercise its discretion to reopen the 2nd defendant's case to produce documents. This court has discretion to grant the orders sought. The discretion of the court ought not be exercised capriciously or whimsically but only judiciously and judicially upon consideration of the basis for the application.
14. In the case of *Samuel Kiti Lewa v Housing Finance Company of Kenya Ltd and another* (2015)eKLR, the court held as follows;

The court retains discretion to allow reopening of a case. The discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such reopening does not embarrass or prejudice the opposite party. In that regard reopening of a case should not be allowed where it is intended to fill gaps in evidence.
15. Similarly in the case of *Odoyo Osodo v Rael obura Ojuok and 4 others* (2017)eKLR, the court stated as follows;

The court's discretion in deciding whether or not to reopen 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.
16. In the instant application, the defendant states that he filed the list of documents and bundle of documents on March 12, 2013 and served the same on the plaintiff's advocate on March 14, 2013. According to the counsel for the 2nd defendant, when the matter came up for hearing on May 13, 2022, counsel realised that the 2nd defendant's documents were missing on the court file, when he perused



- the file just before the matter proceeded. The reason given why the 2nd defendant did not produce his documents on the hearing date, is that the same were in possession of his previous advocate. The 2nd defendant attached a copy of list of documents dated January 18, 2013. That list of documents bears a receiving stamp of the court dated March 12, 2013. It also has a copy of receiving stamps by Guserwa & Co Advocates, state law office and Kariuki & Co Advocates dated March 14, 2013 and March 15, 2013 respectively. However, none of the attached documents bears the court's receiving stamps, or the advocates stamps.
17. The plaintiff's counsel Ms Koech from the firm of Nyina, Mukoma & Co Advocates in her response maintains that the applicant had been given time to file his documents but failed to comply. She annexed a letter to that effect which was served on February 2, 2022. The issue that arises is whether the documents intended to be produced by the second defendant were duly filed and served.
 18. I have perused the record and no such documents were on the record. What is on record is a list of the 2nd defendants list of documents dated October 15, 2001 with no documents attached.
 19. The record shows that this suit was filed at the High Court in 1998. There were several applications heard and on May 10, 2018, the court ordered the 2nd defendant to file witness statements within 21 days and in default the 2nd defendant will not adduce evidence. On that date the court fixed the matter for hearing of the main suit on September 28, 2018. Thereafter, this matter was adjourned and subsequently came up for hearing on November 29, 2018 when counsel for the 2nd defendant sought adjournment for not having his witness. Mr Nyiha Advocate representing the plaintiffs informed court that he had no record of any documents filed by the 2nd defendants. The court noted that exchange of documents had only been done between the plaintiffs and 1st and 3rd defendants. The court then ordered the 2nd defendant to serve its documents and statements on all the parties within 14 days. Thereafter the matter was transferred to the ELC court in Nairobi and subsequently to the ELC at Machakos.
 20. On June 16, 2021, when this matter came up for hearing, Mr Nyamweya, Counsel for the 2nd defendant sought for adjournment on ground that he had filed an application for amendment of the defence. He stated that he came on record on July 20, 2020. The application was allowed and the suit fixed for hearing on November 17, 2021. On November 17, 2021, Mr Nyamweya informed court that he was ready to proceed. The matter proceeded whereof the plaintiff's witness testified and was stood down for re-examination due to time constraints.
 21. On May 12, 2022 when the matter came up for hearing, Mr Nyamweya indicated that he was ready to proceed. Ms Koech advocate for the plaintiff closed the plaintiff's case and the defendants were ordered to proceed. It is at that point the Mr Nyamweya sought for leave to file documents as they appear on the list of documents. He stated that if he is not allowed to file his documents his clients will be condemned unheard as the documents were critical to the 2nd defendant's case. He stated that the documents were not on record. The application was opposed by the plaintiff who stated that justice should not be delayed and that already two plaintiffs had already passed on. Her position was that allowing the 2nd defendant to file documents would be prejudicial to the plaintiff as the documents will have come after the plaintiff's testimony. She insisted that the 2nd defendant had had over two decades to file their documents, but failed to do so. The 3rd defendant supported the 2nd defendant's applications.
 22. Upon consideration of the 2nd defendant's application to file documents, this court noted that the 2nd defendant had had over 24 years to file their documents but failed to do so and that their matter being an old matter where already three parties to the suit had passed on. The court was of the view that justice cannot delay beyond this point. Therefore, the court dismissed the application by the 2nd



- defendant to file the documents referred to. Therefore, the matter proceeded and the 2nd defendant's witness testified and closed his case. Thereafter the 3rd defendant's witness testified and closed their case. The 2nd defendant filed their instant application as the matter was pending hearing the 3rd defence case.
23. I have taken time to restate what is on record for purposes of contextualising the 2nd defendant's application. Counsel for the applicant states that on May 22, 2022 he realised that the 2nd defendant's documents were not in the court file although the same had been filed. As stated above no such information was availed to this court indicating that the 2nd defendant had filed documents in 2013. As the record bears witness, on May 12, 2022, Counsel for the 2nd defendant informed court that there was a list of documents but the documents were not on record and he therefore sought for leave to file the documents.
24. I have perused the documents the 2nd defendant has attached to his application which he says were filed in 2013. None of them bears a court receipt stamp to show they were filed. The 2nd defendant's counsel informed court on May 12, 2022 that his documents were not on record. It is therefore dishonest for him to turn around and state that the documents were filed in 2013. In addition, on May 12, 2022, he did not mention to court that he had perused the court record and noted that documents filed by the 2nd defendant were missing. The ruling made on that date was based on the fact that the 2nd defendant had never filed his documents in court. Suffice to state that a list of documents, without the documents has no probative value.
25. It is also clear from the proceedings of November 29, 2018 and the letter done by Ms Koech to the 2nd defendant's counsel asking for their documents, that the plaintiffs had not been served with any documents from the 2nd defendant and were under the impression that the 2nd defendant would not be relying on any documents.
26. In allowing reopening of a case the court ought to be satisfied that no prejudice will be suffered by the opposite party and that the same is not sought to fill gaps in the applicant's case. In the instant application, the plaintiffs have stated that their witness already testified and closed their case. In addition, that witness is already dead. I agree with the plaintiff that allowing the defendant to produce the documents herein will prejudice the plaintiffs who have closed their case and their witness is no longer available to refer to the documents. The reason given by counsel for the applicant that the previous counsel of the 2nd defendant was the one with the documents is baseless as Mr Nyamweya's firm came on record in July 2020 and therefore had had two years to look for the 2nd defendant's documents wherever they were. It was the responsibility of counsel to prepare for trial upon coming on record by ensuring and confirming that all his client's pleadings, witness statements and documents are on record and duly served. Counsel did not respond to the plaintiff's counsel's letter in February 2022 when the latter sought to be served with the 2nd defendant's documents. That shows a casual attitude with which the 2nd defendant handled this matter.
27. While the 2nd defendant relies on article 159 (2)(d) of the constitution to urge this court to ensure substantive justice as opposed to technical justice, the same article 159 (2)(b) states that justice shall not be delayed. This court has a duty to balance the interests of both parties. This suit has been pending for 24 years. Mr Nyamweya came on record on 20th July 2020. As at May 12, 2022, he was aware that his clients had not filed the documents he was relying upon. Between July 2020 and May 16, 2022, Mr Nyamweya did not bother to find out whether the 2nd defendant had filed and served his documents. Even the promptings by the plaintiff in February 2022 did not jolt him to action. Considering that the plaintiff witness has already testified and closed the plaintiffs' case and that the 2nd defendant was all along aware that they had documents they intended to rely upon but failed to file the same in court within 24 years as the suit was pending, I find that reopening the suit will greatly prejudice the plaintiffs



who have waited for justice for 24 years and whose witness is now deceased. In my considered view, there is no justification given as to why the 2nd defendant was not able to produce the documents when this matter was heard on May 12, 2022.

28. In the premises, I find no merit in the application dated May 16, 2022 and the same is hereby dismissed with costs to the plaintiffs.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of:

Ms Mabele holding brief for Ms Koech for the plaintiff.

Mr. Mindo for the 3rd defendant.

No appearance for 2nd defendant.

Court Assistant – Josephine

