



**Nyakundi & 2 others v National Social Security Fund & another (Environment & Land Case 74 of 2018) [2022] KEELC 14996 (KLR) (15 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14996 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 74 OF 2018  
MD MWANGI, J  
NOVEMBER 15, 2022**

**BETWEEN**

**FELIX MECHA NYAKUNDI ..... 1<sup>ST</sup> PLAINTIFF**

**STELLA NYABOKE OTWORI ..... 2<sup>ND</sup> PLAINTIFF**

**FESTEMAGRA INVESTMENT LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NATIONAL SOCIAL SECURITY FUND ..... 1<sup>ST</sup> DEFENDANT**

**MORARA NGISA & CO. ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

*(Formerly HCC 288/2016)*

**RULING**

1. Before this court is the plaintiffs/applicants' notice of motion application dated October 14, 2022. In the application, the plaintiffs seek leave of the court to file the supplementary list and bundle of documents attached to the application and that once leave is granted the list and bundle be deemed as duly filed and served.
2. The plaintiffs' 1<sup>st</sup> witness in this case has already testified and had been partially cross-examined by the Advocate for the 1<sup>st</sup> defendant. He was however stood down awaiting further cross-examination at a later date.
3. Interestingly, as the plaintiffs' advocate was leading the said witness in evidence- in- chief, he requested to remove some documents from the plaintiffs' list and bundle of documents on the false assumption that they were 'duplications' only to later realize that the removed documents were not 'duplications' as he had thought.



4. Upon realizing the error made during the hearing, the plaintiffs' advocate filed the current application under certificate of urgency. The application was filed before the date scheduled for further hearing.
5. The application is opposed by the 1<sup>st</sup> defendant who filed a replying affidavit sworn by one Caroline Esendi Rakama on October 26, 2022. The deponent states that the 1<sup>st</sup> plaintiff/applicant having given his evidence in chief is seeking to unprocedurally 'reopen' the plaintiffs' case which amounts to an abuse of the court process.
6. The deponent further deposes that the matter had severally come up for pre-trial conferencing and case management when all the parties therefore had ample opportunity to comply with the pre-trial directions and file all their necessary documents. It is the deponent's contention that the plaintiffs' have no justification whatsoever to seek to re-open the case. She terms the plaintiffs' application an attempt to patch up gaps in evidence.
7. Finally, the deponent deposes that introducing new evidence at this point in time is prejudicial to the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> respondent as well as the 5<sup>th</sup> and 6<sup>th</sup> respondents did not oppose the application.

### **Court's Directions**

8. The court directed parties to file written submissions. The plaintiffs and the 1<sup>st</sup> defendant have filed their submissions. The court has had occasion to read the submissions by the plaintiffs and the 1<sup>st</sup> defendant.

### **Issues for Determination.**

9. In the court's opinion, the only matter for determination is whether the plaintiff's application is meritorious.

### **Analysis and Determination.**

10. Taking into consideration that this matter is partially heard, I will be frugal with my words in order not to embarrass or prejudice the hearing in any way.
11. As I had pointed out earlier, the plaintiffs' advocate while leading his witness in evidence in chief made a request to remove some documents from the plaintiff's bundle of documents in the belief that they were a duplication hence not necessary. He states that he however realized later on that he was mistaken and thereby moved this court under certificate of urgency. The documents removed forms part of the plaintiffs' evidence in this case hence are necessary.
12. For the reasons pointed out, I will not go into the contents of the documents nor their likely bearing on the plaintiff's case. The issue that I will consider is whether the defendants and more particularly the 1<sup>st</sup> defendant will suffer any prejudice if the application by the plaintiffs is allowed.
13. The 1<sup>st</sup> plaintiff who is the plaintiff's witness in this case is still 'on the dock'. He was only stood down awaiting further cross-examination. Allowing the application will mean that the witness will have to re-open his evidence in chief for purposes of producing the additional documents only then the defendants will as had been scheduled earlier, proceed to cross-examine him.
14. What prejudice will the defendant's suffer?



15. The principles to be considered in determining the plaintiffs' application must be different from those applicable in applications seeking to re-open a case after all the parties have testified. The circumstances here are different.
16. I consider the action of the plaintiffs' advocate during the hearing to be an inadvertent error which does not warrant the closing of the door of justice as against the plaintiffs at this stage of the proceedings.
17. Apoloo JA (as he then was) in the case of *Philip Chemwolo & another v Augustine Kubede* [1982-88] KLR 803 succinctly captured the considerations that should guide the courts in exercising their discretion in matters of this nature when he stated that:

“blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”
18. Considering further that the plaintiffs' moved with haste upon realizing the blunder made, this court is inclined to exercise its discretion in their favour and allow their application as prayed.
19. The costs of the application shall be in the cause.
20. The plaintiffs are therefore granted leave to file and serve the supplementary list of documents attached to the application dated October 14, 2022. The same shall be deemed as served but upon payment of the requisite court filing fees.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF NOVEMBER 2022**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Mr. Ayora for the Plaintiffs/Applicant.**

**Mr. Muuo holding brief for Mrs Mbaabu for the 1<sup>st</sup> Defendant.**

**No appearance for the 2<sup>nd</sup> Defendant & other Defendants.**

**Court Assistant: Hilda.**

**M.D. MWANGI**

**JUDGE**

<i>ELC CASE NO 74 OF 2018 RULING</i>
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