



**Tari v Elections Co-ordinator, IEBC Isiolo North Constituency Office & 2 others (Environment & Land Case 012 of 2021) [2022] KEELC 14722 (KLR) (14 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14722 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE 012 OF 2021  
PM NJOROGE, J  
NOVEMBER 14, 2022**

**BETWEEN**

**ABDI ABKULLA TARI ..... APPLICANT**

**AND**

**ELECTIONS CO-ORDINATOR, IEBC ISIOLO NORTH CONSTITUENCY  
OFFICE ..... 1<sup>ST</sup> RESPONDENT**

**ELECTIONS COORDINATOR, IEBC ISIOLO COUNTY OFFICE .... 2<sup>ND</sup>  
RESPONDENT**

**CHAIRMAN, IEBC ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This application was brought to court by way of a notice of motion dated April 4, 2022. The notice of motion is in the following format;

"Notice of motion

Take notice that the honourable court will be moved on .....day of 2022 at 9.00 o'clock in the forenoon or so soon thereafter as counsel for the defendants/applicants may be heard in an application for orders;

1. That the honourable court be pleased to review, vary and/or set aside the proceedings had and taken on March 21, 2022 when the plaintiff's case was heard and closed.
2. That the defendant's application dated March 17, 2022 be set down for hearing and determination on merits and /or that directions be issued with respect to the said application.



3. That further and in the alternative and without prejudice to the foregoing, the plaintiff's case be re-opened, the plaintiff and his witness be recalled for cross-examination.
  4. That the costs of this application be in the cause."
2. The application is supported by the affidavit of Charles Benedict Mwangela sworn on April 4, 2022 and has the following grounds;
  - a) On March 7, 2022 the honourable court granted the defendants the last adjournment but counsel holding brief on that date redacted information to the defendants' principal advocate.
  - b) On March 21, 2022, the honourable court proceeded with hearing and closure of the plaintiff's case and directed that the matter proceeds for defence hearing on June 13, 2022 despite the pendency of the defendants' application dated March 17, 2022, filed and served on March 18, 2022 which fact of filing and service of application may not have been properly brought to the honourable court's attention. Ruling delivered on March 21, 2022 rejecting the adjournment request partly reads that counsel holding brief for the defendants told court that "...Mr Mwangela was seeking adjournment because he intended to file a counterclaim", which is patently incorrect.
  - c) Overlooking of the said defendants' application whereupon the plaintiff's case was heard and closed constitutes an error apparent on the face of the record and sufficient reason necessitating review, variation and/or setting aside of the proceedings had and taken (*sic*) March 21, 2022.
  - d) Counsel holding brief for the defendants' advocate on March 21, 2022 was compelled to conduct hearing without her file thereby impeding and completely curtailing the defendants' right to cross-examine the plaintiff/respondent and his witness.
  - e) Overlooking of the application seeking amendments and introduction of a counterclaim has greatly prejudiced the defendants' primary claim and prayers in the suit.
  - f) The application had been preferred without undue delay, within fourteen (14) days of the orders/proceedings sought to be varied and /or set aside and more than two (2) months before the date given for defence hearing on June 13, 2022.
3. The application was canvassed by way of written submissions which I have carefully considered.
4. This is a case which was filed way back in 2018, 4 years ago. Justice delayed is just denied. article 159 2(a) of the Constitution decrees that justice shall be done to all irrespective of status. I note that the defendants have in the past, for whatever reasons, delayed the hearing and determination of this suit. This court will not countenance further delay.
5. Article 159 (2) (b) of the Constitution decrees that "justice shall not be delayed". The use of the word "shall" connotes mandatoriness. Article 2(1) of the Constitution decrees that the "Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.
6. On March 7, 2022, Advocate Caroline Wambui, who held brief for CB Mwangela, the defendant's advocate, asked the court for an adjournment for the reason that advocate Mwangela was bereaved. She told the court that advocate Mwangela was ready to have the suit heard. She asked that the matter be heard at the earliest possible date. The court gave the 21<sup>st</sup> day of March, 2022 as the new hearing date.
7. On March 21, 2022 the suit was heard. Mr Mwangela was represented in court by an advocate called Miss Wangui. The representatives of the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not present in court. The



3<sup>rd</sup> defendant was also not present in court. This being the case, the court could have invoked the provisions of order 12, *Civil Procedure Rules*, and dismissed the suit, as defendants were aware of the apposite hearing date.

8. PW1, the plaintiff and PW2, his witness relied solely on their witness statements. Advocate Wangui, who as I have already said was representing advocate Mwangela, declined to cross-examine the witnesses. The plaintiff's advocate closed the plaintiff's case and all that remained was the defence hearing. Before the defence case was heard, this application was filed.
9. I am not persuaded by the defendant's advocate's explanation that this court should set aside the proceedings held on March 21, 2022 and hear the case a fresh. I, therefore, dismiss grounds 1 and 2 in the application.
10. Regarding ground 3 that the plaintiff and his witness be recalled for cross-examination, I do not find any compelling reason for this to be done. However, in the greater interest of justice, this court will very reluctantly order that the plaintiff and his witness be recalled for cross-examination by the defendants' advocate. The main reason I have done so is that the witnesses only relied on their witness statements which are fully in the knowledge of the defendants' advocate.
11. In the circumstances, the following orders are issued;
  - a) Grounds 1 and 2 in the application are dismissed.
  - b) The plaintiff's witnesses will be recalled for cross-examination by the defendants' advocate on February 13, 2022.
  - c) Costs for this application are awarded to the plaintiff.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2022 IN THE PRESENCE OF:**

**Court assistant: Balozi**

**Miss Olive Wanjiru for the defendants.**

**Miss Wangechi Gikaara holding brief for Mwangela for the defendants.**

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

