



Maina & 3 others v Land Registrar, Mbeere District & another (Environmental and Land Originating Summons E012 of 2020) [2025] KEELC 5911 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2020**

**AK BOR, J
JULY 3, 2025**

BETWEEN

**JAMES MWANGI MAINA 1ST PLAINTIFF
JOHN MUIRU MWANGI 2ND PLAINTIFF
STANLEY KIMANI MWANGI 3RD PLAINTIFF
SOLOMON MAINA MWANGI 4TH PLAINTIFF**

AND

**LAND REGISTRAR, MBEERE DISTRICT 1ST DEFENDANT
NJUKI MARINGA (ADMINISTRATOR OF THE ESTATE OF MARINGA
KIBISHO) 2ND DEFENDANT**

RULING

1. Through the application dated 1/12/2024, the 2nd Defendant sought to have the Plaintiffs' case re-opened and heard in his presence. He sought to have the Plaintiffs give evidence by way of examination in chief and to undergo cross-examination for purposes of adducing crucial evidence that can help the court make a just finding.
2. The application was made on the grounds that the Plaintiffs initiated this suit through the originating summons dated 2/12/2020. That despite having instructed Nzilu Nzioka & Co. Advocates to act for him in the matter, the 2nd Defendant had never physically met his advocates except occasionally on a telephone call. The 2nd defendant claimed that his advocates did not update him on the status of the case and that he was surprised when a court order was served upon him requiring him to attend the survey exercise by the government land valuer. He instructed Nicholus Mogaka & Associates Advocates on 1/10/2024 who upon perusing the court file, noted that his previous advocate had not been appearing as instructed despite having been given full instructions. That it was the new advocate who discovered



that the court had awarded the Plaintiffs and the 1st Defendant's Advocate adjournment costs assessed at Kshs. 20,000/= and Kshs. 3,000/= respectively and he was advised that the amounts were to be paid before the next hearing date otherwise he would be denied audience. The 2nd Defendant had to pay a total of Kshs 23,000/= for what he termed as the wrongdoing of his advocate. He averred that the hearing of the Plaintiffs' case proceeded without him being accorded an opportunity to cross-examine the Plaintiffs, which will jeopardise his case and is contrary to the rules of natural justice and fair hearing.

3. The 2nd Defendant swore the supporting affidavit and deponed that sometime in mid- 2021, his advocates contacted him and informed him that he needed to sign an affidavit in support of an application to amend a preliminary objection to the suit. Later a court order was served on him requiring him to attend the survey to be conducted by the Government land valuer.
4. James Mwangi Maina, the 1st Plaintiff swore the replying affidavit in opposition to the application. He deponed that he had the consent of the 3rd Plaintiff and Rosaline Mbiri, the Administrator of the Estate of the 4th Plaintiff, to swear affidavit on their behalf. Mr. Maina averred that he was a senior citizen and had been following up on his case and praying for an expeditious determination of the case during his lifetime. He lost his second born son, who was the 4th Plaintiff in the course of the proceedings of this case.
5. He deponed that it was over 4 years since he filed the case and the case was yet to be concluded. He urged that the 2nd Defendant's application should be disallowed for having been brought after unexplained and inordinate delay, which would further delay the expeditious hearing of his case. He averred that the 2nd Defendant was indolent and had neither explained to the court nor provided any evidence to show the steps he took to follow up on the case from February 2022 to May 2023 when the Plaintiffs' case was heard.
6. He was emphatic that the 2nd Defendant's advocate was duly served with all court hearing dates, mention dates and that affidavits of service were duly filed in court, showing that the 2nd Defendant was duly informed of the court dates. He added that there was no evidence to show that the 2nd Defendant had had challenges reaching his former advocate.
7. Mr. Maina deponed that he was informed by his advocate that the 2nd Defendant attended court in person on 14/5/2024 with a letter from his former advocate with instructions to seek an adjournment. The letter was shared with the court and the other advocates in the case. According to him, the letter demonstrated that the 2nd Defendant had all along been in communication with his former advocate and was using his former advocate as an excuse to benefit from his indolence for failing to attend court.
8. Mr. Maina urged that it was almost two years since they testified and that it would be unjust to have the Plaintiffs' case re-opened in light of the 2nd Defendant's unexplained inordinate delay. He added that granting the prayers sought in the 2nd Defendant's application would cause them a lot of pain, suffering, prejudice and great inconvenience considering that currently he is not able to travel regularly as he used to do due to old age, sickness and blindness.
9. He explained that his memory was fading and was not the way it was when he testified. Further, that the 2nd Plaintiff relocated and no longer communicated with them and will not be available to attend court. That this will detrimentally affect the Plaintiffs' case if the case were to be heard afresh. He added that the 3rd Plaintiff had resumed his studies abroad and may not manage to attend court.
10. Mr. Maina averred that he would be prejudiced economically as he was not in a position to pay for court transport expenses and those of their advocate since he no longer did farming due to ill health.



11. He implored the court to disallow the application so that the hearing of the Defendants' cases can be fast tracked for the case to be determined expeditiously during his lifetime. He reiterated that when the matter came up for hearing on 14/5/2024, the 2nd Defendant attended court in person and sought an adjournment which was granted on condition that he paid the adjournment fees. He added that the 2nd Defendant attended previous court proceedings in 2024.
12. The court directed parties to file and exchange written submissions, which it has considered. The 1st Defendant informed the court that they were not opposing the present application.
13. The 2nd Defendant submitted that his advocate actively participated in defending him by filing a preliminary objection which was canvassed through written submissions. The objection was dismissed. That the matter took a dramatic twist when the suit was set down for hearing and his advocate failed to comply with Order 11 of the Civil Procedure Rules. The advocate neither filed the trial bundle nor did he appear in court during the hearing of the Plaintiffs' case. The 2nd Defendant claimed that his advocate stopped answering his calls and failed to give him an update on the progress of the case until when he was served a court order requiring him to attend the survey of the suit land. That is when he decided to change advocates and appointed Nicholas Mogaka & Associates who perused the file and realised that court adjournment fees were supposed to be paid before the hearing date. On the hearing date, the advocate applied for reopening of the Plaintiff's case but was told to do a formal application which led to the current application.
14. The 2nd Defendant relied on Section 146(4) of the Evidence Act which generally grants the court powers to recall a witness. It stipulates that 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.
15. He also cited Order 18 Rule 10 of the Civil Procedure Rules which provides that the court may at any stage of the suit recall any witness who has been examined, and may, subject to the applicable law of evidence, put such questions to him as the court thinks fit.
16. The 2nd Defendant submitted that the decision whether or not to re-open an on-going case is purely a judicial discretion to be exercised judiciously and in the interest of justice. He adverted to Article 50(1) of the Constitution which guarantees every person the right to access a court of law for determination of a dispute and Article 159(2) of the Constitution which enjoins courts to administer justice without undue regard to procedural technicalities.
17. The 2nd Defendant relied on Raindrops Limited v County Government of Kilifi (2020) eKLR which prescribes the criteria that a court is to consider in allowing an application to re-open a case which had been closed by a party. The 2nd Defendant urged that from the proceedings, it was clear that when the hearing of the Plaintiffs' case began, he did not participate in the hearing, which he attributed to the conduct of his former advocate who failed to perform his obligations as an advocate of the High Court. He submitted that as the client, he should not be denied a fair hearing or punished for the mistake of his advocate.
18. He explained that his presence in court on 14/5/2024 was after he had been served with the court order requiring him to attend the survey of the disputed land. That that was when he got to know the hearing date and when he tried to reach his advocate, he was sent the letter. The 2nd Defendant urged the court to allow the application and added that the Plaintiffs will not suffer any prejudice that cannot be ameliorated by an award of costs if the application is allowed.



19. The Plaintiffs submitted that the 2nd Defendant had not provided evidence to show the steps he took to follow up on the case from February 2022 to May 2023 when the 1st to 4th Plaintiffs case was heard, which case he seeks to re-open. He added that the 2nd Defendant's counsel was duly served with all court dates and there was no evidence that the 2nd Defendant had challenges with his former advocate. That the 2nd Defendant attended court in person on 14/5/2024 with a letter from his former advocate demonstrating that he had all along been in communication with his former advocate.
20. The Plaintiffs submitted that the application would cause them prejudice and great inconvenience since the 1st Plaintiff is not able to travel regularly due to old age, sickness, blindness and memory loss. Additionally, that the 2nd Plaintiff relocated and no longer communicates with the other Plaintiffs and will not attend court which will detrimentally affect the Plaintiffs' case. The other ground was that the 3rd Plaintiff had resumed his studies abroad and would not attend court and lastly, that the 1st Plaintiff cannot afford transport expenses for travel to attend court and payment of his advocate's fees.
21. In *Susan Wavinya Mutavi v Isaac Njoroge & Another* (2020) eKLR, the court set out the principles to guide the re-opening of a case and receipt of additional evidence in a civil trial. The jurisdiction is discretionary and the court must ensure that the proposed re-opening of the party's case does not embarrass or prejudice the opposite party. The proposed re-opening should not be for purposes of filling gaps in the evidence of the applicant and the application for re-opening of a case should be made without inordinate and unexplained delay.
22. The Plaintiffs submitted that the 2nd Defendant's application was made with inordinate and unexplained delay, in that it was filed 18 months after the Plaintiffs had testified in May 2023. Further, that the 2nd Defendant had not explained why it took him more than 2 years and 9 months to change his advocates if he had challenges with his previous advocate since February 2022.
23. The Plaintiffs submitted that the 2nd Defendant's application would greatly prejudice them as it would be difficult for the Plaintiffs to attend court to testify if the case is reopened.
24. The Plaintiffs submitted that the 2nd Defendant had not demonstrated the steps he took to follow up on his former counsel or the court regarding the hearing of the matter in May 2023. That it was not enough to simply accuse the former advocate, the client had a duty to demonstrate that they pursued their advocate to know the status of their case. They relied on *Emmanuel Satia v Yohana Kemboi & Another* (2023) KEELC 18903 (KLR) where the court stated that it was the duty of a client to demonstrate that they were diligent in following up their advocates before the material date and that their lawyers failed them.
25. Further, in *Obare Majiwa v Ooko Otieno* (2023) KECA 92 (KLR) the court emphasised the need for a client to show interest in his case. The court stated that it was not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. That courts have always emphasized that parties have a responsibility to show interest and follow up on their cases even when they are represented by counsel.
26. The issue for determination is whether the court should allow the application dated 1/12/2024 and re-open the case for the Plaintiffs to give evidence and be cross-examined in the 2nd Defendant's presence. The 2nd Defendant attributes his failure to attend court when the matter came up for hearing on his previous advocate.
27. The hearing of this case proceeded on 27/2/2023 when the 1st, 2nd, 3rd and 4th Defendants gave evidence and were cross examined by the 1st Defendant's advocate. The 1st Plaintiff attended court again on 15/3/2023 and gave further evidence following which the Plaintiffs closed their case.



28. An application dated 18/9/2023 was filed by the Plaintiffs and from the court record, it was compromised on 23/11/2023 along the terms that the 1st Defendant would bring a Government valuer's report for the suit land. The case was set down for further hearing on 14/5/2024. On that day, the court noted that a letter had been received from the 2nd Defendant's counsel asking for an adjournment. The 2nd Defendant attended court on that day and presented his advocate's letter seeking an adjournment to court. The case was put off to 14/10/2024. The hearing proceeded on 14/10/2024 when Bethuel Oyoo, a land valuer gave evidence as the Plaintiffs' 5th witness. The proceedings in the court file show that Mr. Mogaka appeared for the 2nd Defendant and cross examined Mr. Oyoo. The Plaintiffs' closed their case.
29. Looking at the facts of this case, the court agrees with the Plaintiffs' contention that there was delay in bringing the application seeking to have the case heard afresh. Contrary to the 2nd Defendant's contention that the Plaintiffs will not suffer any prejudice that cannot be ameliorated by an award of costs if the application is allowed, the averments in the affidavit of the 1st Plaintiff demonstrate that the Plaintiffs will suffer prejudice.
30. Mr. Maina averred that he was a senior citizen and was desirous of an expeditious determination of the case during his lifetime. He explained that he was not in very good health and that his memory was fading and was not the way it was when he testified. He also mentioned that due to sickness, he was economically challenged in terms of the cost of travelling to court and paying his advocate's fees. He stated that the 2nd Plaintiff relocated and that will not be available to attend court to give evidence. The court notes that the 2nd Plaintiff had already testified and his testimony is on record.
31. The court is satisfied that allowing the application for the hearing of the case to start afresh will detrimentally affect the Plaintiffs' case. The prejudice which the Plaintiffs stand to suffer cannot be ameliorated by an award of costs. It is in the interest of justice to fast track the determination of this dispute after the defence hearing is concluded.
32. The court declines to grant the orders sought in the application dated 1/12/2024. The Plaintiffs are awarded the costs of that application.

DELIVERED VIRTUALLY AT EMBU THIS 3RD DAY OF JULY 2025.

K. BOR

JUDGE

In the presence of: -

Ms. Emily Osiemo for the Plaintiffs

Ms. L. Chege holding brief for Mr. J. Kiongo for the 1st Defendant

Mr. Nicholus Mogaka for the 2nd Defendant

