



Mutua & 13 others v Attorney General & 2 others (Environment & Land Case 275 of 2018) [2024] KEELC 5181 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 275 OF 2018**

**JG KEMEI, J
JULY 4, 2024**

BETWEEN

- DANIEL GATUMA MUTUA 1ST PLAINTIFF**
- ELIAS KIRIMI ANDREW RIUNDU & PAMELA KAWIRA
NJIRU 2ND PLAINTIFF**
- PETER WAITHAKA MWANGI 3RD PLAINTIFF**
- FRANCIS MURIITHI KAMAU & MARGARET WANJIRU
GAKURU 4TH PLAINTIFF**
- CHRISTOPHER MWANGI MUCHOKI & AGNES MUTHONI
NGORU 5TH PLAINTIFF**
- KENNETH MUGWE WAHOME 6TH PLAINTIFF**
- JOHN GITHAIGA WANJIRU 7TH PLAINTIFF**
- JOSEPH KIMANI GAITHO 8TH PLAINTIFF**
- LUCIA NJERI MAINA 9TH PLAINTIFF**
- JOSEPH KANG’ETHE NDUNGU 10TH PLAINTIFF**
- FRANCIS M. R WACHORI & ZIPPORAH MBARI WACHORI 11TH PLAINTIFF**
- JACKSON WACHIRA WANGONDU T/A MWAMUKI INVESTMENT
(SUING ON HIS OWN BEHALF AND ON BEHALF OF 41 PLOT
OWNERS) 12TH PLAINTIFF**
- JOSEPH WANJOHI MBURU T/A MBURU MWENDIA INVESTMENT
SUING ON HIS OWN BEHALF & ON BEHALF OF 26 PLOT
OWNERS) 13TH PLAINTIFF**



**WILLIAM NJURUMBA MUHIA T/A MBURU MWENDIA INVESTMENT
(SUING ON HIS OWN BEHALF AND ON BEHALF OF 26 PLOT
OWNERS) 14TH PLAINTIFF**

AND

HON ATTORNEY GENERAL 1ST DEFENDANT

LAND REGISTRAR, THIKA 2ND DEFENDANT

T MASHAERI MAKORI 3RD DEFENDANT

RULING

1. Before Court is the 3rd Defendant/Applicant's Notice of Motion application expressed under Order 40 Rules 1 & 2 of the Civil Procedure Rules and Sections 3, 3A of the *Civil Procedure Act* seeking in the main an Order that this Court be pleased to review and set aside its orders made on 9/10/2023 closing the Plaintiff/Respondent's case and allowing the Applicant an opportunity to cross examine the Plaintiff's witnesses. The application is based on the grounds that the Applicant's Counsel erroneously recorded the hearing of the suit as 9/11/2023 instead of 9/10/2023. That accordingly he wishes to cross examine the Plaintiff's witness who testified on 9/10/2023.
2. The application is further supported by the Affidavits of T Mishael Makori, the Applicant and that of his Counsel Justin Nyaberi. Reiterating the above grounds, the Applicant deposed that he has diligently been following up on the progress of his case and he urged the Court to allow him to test the veracity of the Plaintiffs' evidence touching on the suit land.
3. On his part, Advocate Nyaberi annexed copy of his diary as JN – 1(a) and (b) to demonstrate that he erroneously entered the hearing of the suit as 9/11/2023 instead of 9/10/2023. That on 26/4/2023 he duly appeared in Court and sought time to file the Applicant's bundle of documents which he filed and served forthwith upon the Plaintiffs and 1st & 2nd Defendants. That the Applicant applied for interlocutory Judgment on his counterclaim – see JN-2 which is pending directions.
4. The Application is vehemently opposed by the Plaintiffs/Respondents only.
5. The Respondents filed detailed Grounds of Opposition dated 14/3/2024 and a Replying Affidavit of even date sworn by Daniel Gatuma Mutua, the 1st Respondent. The Respondents contended that the Applicant has no right of audience having failed to comply with this Court's Order made on 10/12/2021 requiring him to pay Kshs. 30,000/- as throw away costs. That the Applicant has no legal right to file the Request for interlocutory Judgment and counterclaim dated 27/10/2023 in light of the Court's order made on 26/4/2023 barring filing of documents after 10/5/2023. That the service of the Applicant's bundle of documents upon the Respondents was done way out of the time allowed by the Hon Deputy Registrar and the continued disregard of timelines bespeak of impunity and defiance of timelines set by the Court and the Court should not entertain the same. That Advocate Nyaberi's Affidavit contains falsehoods concerning the e-filing portal showing hearing date as 13/11/2023 because the hearing date of 9/10/2023 was taken by consent in the presence of all parties' Counsel on 26/4/2023. In the end the Court was urged to find the Application unmerited, an abuse of Court process and dismiss it with costs.
6. Despite the Applicant's Counsel undertaking to file a Further Affidavit, he failed to do so.



7. On 20/3/2023 directions were taken and parties elected to canvass the Application by way of written submissions.
8. The Respondents through the firm of Gitau J.H Mwara & Co. Advocates filed submissions dated 16/4/2024. Rehashing the averments in their Grounds of Opposition and Replying Affidavit, the Respondents accused the Applicant together with the 1st and 2nd Defendants for displaying a bad track record of impunity and disregard of Court orders in the manner of prosecuting the instant case at the expense of the Plaintiffs who represent 5000 residents and public investments worth Kshs. 55M. That the public interest lie in allowing the case to proceed to filing of final submissions. The Respondents further posited that the Applicant's conduct runs afoul the provision of Article 47 of the Constitution of Kenya and relied on the Supreme Court decision in Republic Vs. Ahmad Abolfathi Mohammed & Another [2018] eKLR on the necessity to punish for contempt of Court orders.
9. The Applicant did not file any submissions.
10. Having considered the application, the objections and written submissions, I find that the germane issue for determination is whether the Applicant is entitled to the orders sought.
11. The Applicant beseeches this Court to vacate the Orders issued on 9/10/2023 closing the Respondents' case and allow him to cross examine the Respondents' witnesses thereto. The respondents strenuously oppose the application and outline the lackluster conduct of the Applicant's and his Counsel in these proceedings.
12. Section 146 (4) of the Evidence Act generally grants the Court powers to recall a witness. It states: -

“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.”
13. Additionally, Order 18 Rule 10 of the Civil Procedure Rules grants the Court powers to recall a witness in the forgoing terms;

“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.”
14. From the foregoing statutory provisions, it is evident that the decision whether or not to re-open an ongoing case is purely left to the realm of judicial discretion which should be exercised judiciously and in the interest of justice.
15. The Court in *Odoyo Osodo Vs. Rael Obara Ojuok & 4 Others* [2017] eKLR outlined the basis upon which the Court could exercise its discretion to reopen a case. The Court held as follows: -

“The discretion of the Court cannot be exercised whimsically but ought only to be exercised judicially and judiciously. A basis for the exercise of discretion has to be laid by the party inviting the Court to exercise its discretion.”
16. A glean of the Court record shows that this suit was filed over five and a half years ago on 12/11/2018 and Judgment was entered on 15/7/2021 in favor of the Respondents. A month later, the Applicant vide an application dated 24/8/2021 asked the Court to set aside its Judgment and decree on grounds that he was never served with pleadings save for the Plaint and summons to enter appearance. On 10/12/2021, the Court allowed the Applicant's application and ordered him to pay the Respondents



throw away costs in the sum of Kshs. 30,000/- within 30 days. Thereafter the Respondents through their motion dated 15/3/2022 asked this Court to allow them to amend their Plaint which application was allowed on 16/3/2023.

17. Fast-forward on 26/4/2023, parties appeared before the Hon Deputy Registrar of this Court to finalize Pre-trial Conference. Present in Court were Mr. Gitau for the Respondents and Mr. Nyaberi for the Applicant. The record is clear that Mr. Nyaberi prayed for 14 days to file his trial bundle which the Court graciously acceded to and set the deadline for filing all documents on 10/5/2023. The Court was explicit that any documents filed thereafter would be deemed to be improperly on record and hearing of the suit was set for 9/10/2023.
18. On 9/10/2023 the Respondents and 1st & 2nd Defendants' Counsel were present for the hearing which proceeded in earnest. Neither the Applicant nor his Counsel was present in Court. The next date was a mention slated for 13/11/2023. However, that date was declared a holiday and the Court issued notice for matters coming up on that day to be mentioned on 9/11/2023. That notice was duly sent to parties and in particular the Applicant's Counsel via omwoyedwin56@gmail.com. On 9/11/2023 only the Respondent's Counsel appeared before Court when a further mention date was issued for 21/2/2024. On 21/2/2024 all parties were present when the AG appearing on behalf of the 1st and 2nd Defendants sought time to file an application to file documents out of time. Thereafter the Applicant then filed the instant motion that was set for hearing on 20/3/2024
19. I have detailed in great length the background of this matter leading to the filing of this motion. Being a discretionary order, the Applicant must lay a cogent basis for the Court to consider whether or not to grant the Application. The Applicants Counsel avowed that the reason he failed to attend Court on 9/10/2023 was because he mistakenly diarized the hearing for 9/11/2023. I have looked at annexure JN1a & b which show that this suit was indeed diarized for Thursday 9/11/2023 instead of Monday 9/10/2023. I am persuaded that this is a mistake that can be excused guided by the Court of Appeal decision in Tana and Athi Rivers Development Authority Vs. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR where the Court stated that it is without doubt that Courts will readily excuse a mistake of Counsel if it affords a justiciable, expeditious and holistic disposal of a matter.
20. The second issue to point out is the delay in filing the Application on 28/2/2024, over four months after the impugned hearing date. The Applicant's Counsel deponed that he only came to learn of the exparte hearing on 21/2/2024 since 13/11/2023 was declared a public holiday. As already stated the Applicant's Learned Counsel himself stated that he mis-diarized the hearing for 9/11/2024 and there is no evidence of this attendance in Court or any steps he took after 9/11/2023 or 13/11/2023 in following up for the case.
21. Last but not least, the Respondents decried the Applicant's wanton disregard of Court orders to pay the throw away costs as ordered on 10/12/2021, over two and half years ago. The Applicants have not refuted the accusation. In fact, the Applicant's advocate undertook to pay the throw away costs of 30k in 15 days' time on 23/4/2024. No explanation was tabled as to why the throw away costs were not paid as directed. Further no evidence has been placed before the Court to prove if the costs have been paid. It is trite that Court orders are not made in vain.
22. The Applicant relied on Order 40 rules 1 and 2 of the Civil Procedure Rules. A reading of Order 40 of the Civil Procedure Rules deals with temporary injunction which does not avail in the present circumstances. Section 3 and 3A of the Civil Procedure Act were also cited. They state;

“

“ 3. Saving of special jurisdiction and powers



In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

3A. Saving of inherent powers of Court.

Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

23. Under Section 3A of the *Civil Procedure Act* this Court enjoys inherent power to make such orders as may be necessary for the ends of justice. Inter alia the overriding objective of the Court under Section 1A (3) the Court is enjoined to ensure the just determination of the proceedings. That said, this is a Court of justice for all parties who seek its audience. Article 48 of *the Constitution* of Kenya guarantees access to justice for all persons. *The Constitution* of Kenya further provides for the right to a fair hearing under Article 50 of *the Constitution* of Kenya and in particular the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court of law.
24. Bearing in mind the chronology of this case and purely to accord all parties a fair hearing, I am persuaded to grant the Application in the following terms;
25. Final orders for disposal; -
 - a. The Application dated 27.2.2024 is allowed – to the extent that the Plaintiff’s case shall be reopened for purposes of cross examination only.
 - b. The Applicant to pay the Plaintiffs a sum of Kshs. 30,000/- throw away costs ordered on 10/12/2021.
 - c. Further the Applicant to pay the Plaintiff costs for the instant Application in the sum of Kshs. 20,000/-.
 - d. For avoidance of doubt a total sum of Kshs. 50,000/- be paid to the Plaintiffs within the next 7 days, failure to which the Orders herein to automatically lapse.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 4TH DAY OF JULY, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Gitau for the Plaintiffs

Ms. Ndundu for 1st and 2nd Defendants

Nyaberi for 3rd Defendant

Court Assistant - Phyllis

