



REPUBLIC OF KENYA



**KENYA LAW**  
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**Paan v Kariuki & 16 others (Environment & Land Case  
80 of 2019) [2024] KEELC 5337 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 80 OF 2019  
LC KOMINGOI, J  
JULY 11, 2024**

**BETWEEN**

**RAKOI OLE MONIREI PAAN ..... PLAINTIFF**

**AND**

**GEORGE NGURE KARIUKI ..... 1<sup>ST</sup> DEFENDANT**  
**JANE NJOKI KARIUKI ..... 2<sup>ND</sup> DEFENDANT**  
**JOSEPH MATHIA MUIGAI ..... 3<sup>RD</sup> DEFENDANT**  
**MUMBI MUIGAI ..... 4<sup>TH</sup> DEFENDANT**  
**BEN NYOIKE MATHU ..... 5<sup>TH</sup> DEFENDANT**  
**WAMBUI WA MATHU ..... 6<sup>TH</sup> DEFENDANT**  
**GEORGE MBUTHIA WARUI ..... 7<sup>TH</sup> DEFENDANT**  
**WANJIRU WATUI ..... 8<sup>TH</sup> DEFENDANT**  
**PETER NDUNG’U KANARI ..... 9<sup>TH</sup> DEFENDANT**  
**DAVID THIRA KIHUMBA ..... 10<sup>TH</sup> DEFENDANT**  
**SIMON JOHN KAMPA LUGABA ..... 11<sup>TH</sup> DEFENDANT**  
**PAULINE WAKONYO LUGABA ..... 12<sup>TH</sup> DEFENDANT**  
**JOSEPH MUNORO MUTURI ..... 13<sup>TH</sup> DEFENDANT**  
**JOSEPH GICHANGA KIMANI ..... 14<sup>TH</sup> DEFENDANT**  
**LAND REGISTRAR KAJIADO ..... 15<sup>TH</sup> DEFENDANT**  
**LAND SURVEYOR, KAJIADO ..... 16<sup>TH</sup> DEFENDANT**  
**HON. ATTORNEY GENERAL ..... 17<sup>TH</sup> DEFENDANT**



## RULING

1. This is the Notice of Motion dated 6<sup>th</sup> September 2023, brought under: Article 50(1) and 159 (2)(d) of *the Constitution*, Section 3A of the *Civil Procedure Act*, Order 51 (1) of the *Civil Procedure Rules* and all other enabling provisions of Law seeks:
2. It seeks orders;
  - i. That the Plaintiff's case be reopened and the Plaintiff be allowed to file a witness statement of Muyia Ene Rakoi and to call her as a witness.
  - ii. That the Defendant be at liberty to cross examine the witness on the additional evidence adduced.
  - iii. That the costs of this application be in the cause.
3. This application supported by the sworn Affidavit of the applicant Rakoi Ole Monirei Paan is on the grounds that the intended witness is crucial in this case because she is his wife and understands the nature of the dispute. That, she is the one who put a caution against the suit land which was irregularly withdrawn by the 10<sup>th</sup> Defendant's advocate. He claims that she is listed as one of the witnesses in the list of witnesses dated 4<sup>th</sup> September 2019 but does not know why his previous advocates did not call her to testify. His case was heard and closed on 24<sup>th</sup> October 2022. It is after changing his advocates on 6<sup>th</sup> July 2023 to the Advocate currently on record that he was informed that the said witness statement was not on record. This mistake which was occasioned by his previous advocates should not be visited upon him and is excusable in the interest of justice. It is also his case that reopening of the case will not prejudice the Defendant's because they will have a chance to cross examine the witness.
4. The 10<sup>th</sup> Defendant David Thiru Kihumbu, in his replying Affidavit sought for dismissal of the application with costs on grounds that it was an abuse of the Court process. This is because the Plaintiff testified in presence of his wife and the case was closed on 24<sup>th</sup> October 2022. If counsel for the Plaintiff intended to call other witnesses they would have done so because the Defendants' case was fixed for hearing on January 2023. Nonetheless, this case having been filed in 2019, the Applicant has had enough time to file the Witness Statement. The defendant also argued that allowing the Plaintiff to reopen their case would be prejudicial as the 1<sup>st</sup> and the 10<sup>th</sup> Defendant have already testified. Additionally, the 10<sup>th</sup> Defendant only has one more witness to call who is elderly and should be allowed to testify at the earliest opportunity. It is his case that this application is intended to delay the hearing and should not be allowed.
5. This application was canvassed by way of written submissions.

### **The Plaintiff/ Applicant's Submissions.**

6. On whether the application is merited, counsel submitted that the intended witness, Muyia Ene Rakoi, who was unintentionally left out was crucial to the Applicant's case and the Respondents would suffer no prejudice if the case is reopened because their case was yet to be heard. As such, the right to be heard was a Constitutional right and the court should grant the sought orders in line with Article 159(2)(d) of *the Constitution* as well as Section 3A of the *Civil Procedure Act*. To support this, reference was made to the cases *Techbiz Ltd vs Royal Media Services Ltd* [2021] eKLR and *kiu & another v Khaemba & 3 others* [2021] KECA 318 (KLR).



## The 10<sup>th</sup> Defendant/Respondent's Submissions

7. Counsel submitted that parties should be bound by rules of procedure as espoused under Section 19(2) of the *Environment and Land Court Act*, Order 3 Rule 2(c); Order 17 Rule 4 and Order 18 of the *Civil Procedure Rules*. Therefore, not having filed the witness statement or called the intended witness from the inception of this suit until the Plaintiff's case was closed, was an abuse of the court process shunned by Section 3A of the *Civil procedure Act* and should not be excused. Reference was made to the Court of Appeal case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commissions & 6 others* [2013] eKLR where the court held: ... rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed..."
8. Counsel submitted that reopening of the Plaintiff's case was meant to fill evidence gaps and should not be allowed. This is on the ground that, the intended witness draft statement which made reference to the Defendants' witness statement of Kenneth N. Mungai who was yet to testify came after the 1<sup>st</sup> and 10<sup>th</sup> Defendants had testified and was aimed at filling gaps in the Plaintiff's case. Counsel argued that the Plaintiff had been in possession of the Defendants' documents for over a year and should have sought to file any new documents within that period. The re-opening should thus be denied because no new evidence had been discovered and it was only meant to fill gaps citing *Susan Wavinya Mutavi vs Isaac Njoroge & another* [2021] eKLR and *Hannah Wairimu Ngethe vs Francis Mungai Ng'ang'a & another* [2016] eKLR.
9. On the issue that the previous advocates' mistake should not be visited on the Plaintiff, counsel submitted that the mistake of the counsel should not be used as an excuse to allow violation of the law as was held in *Rupa Savings & Credit Cooperative Society v Violet Shidogo* [2022] eKLR. Counsel also submitted that this application had been inordinately delayed and should be disallowed with costs to the Defendants.

## Analysis and determination

10. I have considered the Notice of Motion, the Affidavit in support, the response thereto, and the authorities cited. The issues for determination are:
  - i. Whether the application dated 6<sup>th</sup> September 2023 to reopen the Plaintiff's case is merited;
  - ii. Who should bear the costs of this application?
11. It is common practice that courts have discretion to reopen cases but while the principle of a fair trial is a Constitutional right under Article 50 of *the Constitution*, this discretion must be exercised judiciously and in a manner that upholds the integrity of the judicial process.
12. Courts have held that for a case to be reopened, the applicant must show that there has been new evidence which could not be obtained earlier and that the evidence is crucial to the case's determination. It is also imperative that reopening would not be prejudicial to any party; that reopening is not intended to fill evidential gaps; and the application has not been made inordinately late see *Susan Wavinya Mutavi vs Isaac Njoroge & another* [2020] eKLR as held by Ebozo J. The rule of thumb is that the court must be satisfied that re-opening the case is necessary to ensure that justice is done.
13. The applicant claims that his case was closed before his wife's testimony was taken, a mistake he attributes on his previous advocate. He now seeks to re-open the case to incorporate her testimony, emphasizing its significance. It is his case, the wife is prepared to testify regarding the caution she placed on the suit property, which she discovered from Kenneth N. Mungai's witness statement that it was



removed without her knowledge and/ or consent. This assertion is supported by her draft witness statement.

14. The central issue for determination is whether the purported evidence qualifies as new evidence that could not have been procured earlier with due diligence and whether it meets the threshold for re-opening of cases. The court must assess if the circumstances warrant the exceptional step of re-opening the case to admit additional testimony.
15. I find that the Plaintiff's wife discovery of the removal of the caution from the witness statement of Kenneth N. Mungai does not constitute new evidence. This information was accessible and could have been obtained earlier through reasonable inquiry and preparation. Furthermore, the record reflects that PW1 already testified extensively on this issue of caution by asserting that the caution placed by his wife was fraudulently removed by the advocates involved. Consequently, the proposed testimony of the wife regarding the issue of removal of the caution would offer no fresh insights or material facts that have not been already scrutinized and addressed during PW1's testimony.
16. In any case, Counsel for the Plaintiff will have an opportunity to cross examine Kenneth N. Mungai on the issue of removal of the caution which is indicated in his witness statement. This procedural safeguard will ensure that the Plaintiff's position on the contested removal of the caution is adequately represented and interrogated within the existing trial framework.
17. In light of these considerations, I find that the application to re-open the case lacks merit and is hereby dismissed. Costs of this application shall be in the course.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11<sup>TH</sup> DAY OF JULY 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

N/A for the Plaintiff.

Mr. Wambui for Mrs. G. Wainaina for the Defendant.

Mr. Kiiru for Mr. Njeru Nyaga for 11<sup>th</sup>, 12<sup>th</sup> Defendants.

N/A for the 1<sup>st</sup>, 9<sup>th</sup>, 13<sup>th</sup> Defendants.

N/A for the 15<sup>th</sup>, 17<sup>th</sup>, Defendants.

Court Assistant – Mutisya.

