



**Mbaabu (The duly appointed Attorney of Gerald Kithinji Mwiricha)  
v Abdulrahim & 4 others (Environment & Land Case 319 of 2021)  
[2024] KEELC 6080 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6080 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 319 OF 2021  
AE DENA, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**ARNOLD MBAABU (THE DULY APPOINTED ATTORNEY OF GERALD  
KITHINJI MWIRICHA) ..... PLAINTIFF**

**AND**

**MAHMOUD ABDULRAHIM ..... 1<sup>ST</sup> DEFENDANT  
GUY SPENCER ELMS AND NILESHKUMAR SHAH (BEING EXECUTORS OF  
THE ESTATE OF PRITAM SINGH PANESAR - DECEASED) ... 2<sup>ND</sup> DEFENDANT  
DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER  
KWALE ..... 3<sup>RD</sup> DEFENDANT  
THE LAND REGISTRAR KWALE ..... 4<sup>TH</sup> DEFENDANT  
THE NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

- 1 This matter is partly heard and was scheduled for further hearing on 16/05/24 for cross examination of PW3. However on the material day, Mr. Namada informed the court that he was coming on record for the Plaintiff and intimated that having perused the file it was necessary to amend the Plaintiff's present application. The court adjourned the matter to pave way for the hearing of the application.
- 2 The application the subject of this ruling is dated 15<sup>th</sup> May 2024. The Plaintiff seeks the following orders:-



1. Leave be granted to the Plaintiff to amend the Plaint herein in terms of the draft Further and Further Amended Plaint attached hereto.
  2. Pending the further hearing and determination of this case an interim injunction or preservative order do issue to restrain the 2<sup>nd</sup> and 4<sup>th</sup> Defendants whether acting by themselves or through their agents, servants, and or anybody acting through them from selling, transferring or in any way dealing with property LR No. Kwale/Shimoni/758 as to change its current registration status and ground establishment status to the detriment of the Plaintiff.
  3. Leave be granted upon the amendment herein to recall the Plaintiff to give further evidence as relates to the amended facts and prayers
  4. Costs herein be in the cause
- 3 The application is supported by the affidavit of Arnold Mbaabu and the grounds on its face. The depositions and the grounds necessitating the amendments as well as the intended amendments will become apparent in my discussions herein.
- 4 The application came up for directions on its disposal on 13<sup>th</sup> June 2024. Counsels for the respondents were agreed on the proposed amendments. Mr. Litoro counsel for the 2<sup>nd</sup> defendant took the view that there was nothing new being introduced and therefore no need to recall the Plaintiff. That all that was required was for the Respondents to respond to the amended Plaint. That the status quo be maintained as the 2<sup>nd</sup> Defendant was in possession. Mr. Namada intimated that he was more concerned with the titles and not the ground.
- 5 With the above understanding the court encouraged parties to enter into negotiations with a view to compromising the application on agreed terms. On 3/7/24 a consent was read out and adopted as the orders of the court. However parties did not agree on the prayer for recalling the Plaintiff. The court issued directions for parties to respond to the application in terms of the prayer for the said recalling (see prayer No. 3 hereinabove) and file and exchange submissions within 14 days.
- 6 The 2<sup>nd</sup> Defendant opposed the grant of prayer 3 of the application through the Replying affidavit of Guy Elms Spencer sworn on 11/7/24. It is averred that the application is an afterthought and meant to fill in gaps in the plaintiff's case. That it will be prejudicial to the 2<sup>nd</sup> defendants to give evidence twice on matters he has already been cross examined on giving undue advantage to the Plaintiff. That there are no new or important matters, additional cause of action or new facts or which were not pleaded in the amended plaint dated 21/11/22 that have not been led in evidence by the Plaintiff. That the crux of the amendment was the consolidation of Kwale/Shimoni Adj/412 and resulting into Kwale/Shimoni Adj/758. That the new reliefs in the further and further amended plaint are not based on new cause of action or material facts but on facts which were already pleaded. The there is inordinate delay.

### **Submissions**

- 7 The Applicants submissions were not on record as at the time of preparing this ruling.
- 8 The 2<sup>nd</sup> defendant filed their submissions dated 30<sup>th</sup> July 2024. Reiterating the grounds upon which the 2<sup>nd</sup> defendants opposes the application the court is referred to number of decided cases. Susan Wavinya Mutavi Vs. Isaac Njoroge Vs. Ano. (2020)eKLR on criteria to reopen case and receive additional evidence which it is submitted has not been satisfied by the applicant. Raindrops Limited Vs. County Government of Kilifi (2020) eKLR to where the court held that following case management a party is expected to anticipate the evidence they will require at the hearing and proceed on that basis. That the court will interrogate accountability for the decision of counsel in the prosecution of their cases. It is



submitted that counsel was reckless for failure to adduce the intended additional evidence. Evidence. *Argan Wekesa Vs. Dima College Limited & 2 Others*(2015) on inordinate delay in making the request. On undue advantage and miscarriage of justice ,*Hanna Wairimu Ngethe Vs. Francis Ng'ang'a & Another* (2016)eKLR. It is further submitted that the court should not exercise its discretion in favor of the Plaintiff.

### Determination

9 The main issue for determination is whether the Plaintiff should be recalled to give further evidence as relates to the amended facts and prayers.

10 The application is brought under the provisions of Order 1 Rule 10(2)(4), Order 8 Rules 3 and 5, Order 40 Rules 1,3 & 3 of the Civil Procedure Rules as read with Sections 1A & B, 3A of the *Civil Procedure Act*. None of these provisions speak to recalling of the Plaintiff. I say so because the only provisions under the Civil procedure that the court would fall to is Order 18 Rule 10 but my interpretation of the same is that it only extends to the court recalling a witness suo motto and not by application of the parties.

11 Section 146 of the *Evidence Act* Chapter 80 of the Laws of Kenya is on Order and direction on examinations. Section 146(4) offers some guidance thus; -

The court may in all cases permit a witness to be recalled either for further examination in chief or further cross examination and re-examination respectively.

12 The court therefore has the jurisdiction to recall a witness and which power is discretionary. So how or under what circumstances is the discretion to be exercised? The court was referred to principles set out in *Susan Wavinya Mutavi Vs. Isaac Njoroge Vs. An.* (2020)eKLR cited by the 2<sup>nd</sup> Defendant. The undernoted dictum is relevant;-

10. Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See (i) *Mohamed Abdi Mohamad v Ahmed Abdullahi Mohamad & others* (2018) eKLR; (ii) *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR; (iii) *Ladd v Mashall* (1954) 3 All ER 745; (iv) *Reid v Brett* [2005] VSC 18; (v) *Smith v New South Wales Bar Association* (1992) 176 CLR 256; and (vi) *EB v CT* (No 2) [2008] QSC 306.

I also took time to read the ruling of Kasanga J in *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR;

13 I will based on the above provisions of law and section 3A of the *Civil Procedure Act* on the inherent powers of the court proceed to discuss the main issue.



- 14 According to grounds in support of the application the amendments were to correctly bring before court the correct title number being litigated upon following consolidation of the original Kwale/Shimoni/406 with Kwale/Shimoni/412 and resulting into Kwale/Shimoni/758 rendering title 406 non-existent. That continuing to litigate over title 406 will lead to an ambiguous ending rendering the proceedings herein academic. That prayers respecting title 758 were not made out. The Plaintiff attributes this omission to an oversight or omission which is definitely on the part of counsel. Of importance to note is that the amendments were already allowed by consent of the parties.
- 15 The main question should be whether the same warrant the recalling of the Plaintiff who has already testified in the matter. Firstly I would lay emphasis on the reason why the recalling was desired. Paragraph 7 of the supporting affidavit brings out the purpose of the recall and it is deponed thus;-
- I'm further advised by my advocate on record that this plea for amendment is allowed in law at this stage to enable effective and meaningful justice to be done in the case and no prejudice will be suffered by the Defendants as the principal witness, seeks to come back and give further evidence and can be cross examined on any issues being added. The case is still at the Plaintiffs case hearing stage.
- 16 It is clear from the application and its supporting affidavit that the recalling is pegged to the amendments that have already been introduced. I have already stated hereinbefore the reason why the amendments were being brought in. The court has had occasion to peruse the Further and Further Amended Plaint. I note that the clarity has been brought to the pleadings as explained clarifying the coming in of title 758. I have also reviewed what is introduced in the prayers and other than emphasizing on the nonexistence of title 406 which goes without say, the rest of the amendments in the prayers are just but mere semantics and issues of procedure at enforcing the judgement of the court in the event the same turns out to be in the plaintiffs favor. Again, the delinking of title 412 is in my view to the advantage of the 2<sup>nd</sup> Respondent as it is not part of the disputed property. I will add that my review of the Further and Further Amended Plaint dated 15<sup>th</sup> May 2024 reveals that the consolidation was largely pleaded at paragraph 13 – 16 at inception of this suit and there is nothing new that would be of material significance to warrant the recalling of the plaintiff based on the amendments introduced.
- 17 I note what the applicant has stated. He wants to come and give further evidence and add issues. The deponent does not state clearly or disclose what the further evidence is if any and the Respondent is left to speculate. The Plaintiff cannot just quietly come in to fill in gaps in the guise of clarifying amendments whose purpose had already been stated and which in this courts view do not warrant a recall because there is nothing new the same have introduced. The amendments have served their purpose and that stands at that.
- 18 The upshot of the foregoing is that I find the prayer to recall the Plaintiff to give further evidence unmerited. The application is hereby dismissed in terms of prayer No. 3. Costs shall abide the outcome of this suit.

**RULING DATED SIGNED AND DELIVERED THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2024.**

.....  
**A.E DENA**

**JUDGE**

Mr. Emirundu Holding Brief for Mr. Namwada for Plaintiff

No appearance for 1<sup>st</sup> Defendant



Mr. Kinyanjui Holding for Litoro for 2<sup>nd</sup> Defendant

Mr. Mwanjeje for the 3<sup>rd</sup> & 4<sup>th</sup> Defendant

Mr. Daniel Disii – Court Assistant

