



Oludhe & 2 others (All Suing as the Administrators of The Estate of Jackson Oludhe Aloo - Deceased) v Benken Enterprises Limited & another; Benken Enterprises Limited (Plaintiff); Oludhe & 3 others (Defendant) (Environment & Land Case 228 of 2018) [2023] KEELC 17947 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17947 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 228 OF 2018**

**LN MBUGUA, J
JUNE 8, 2023**

BETWEEN

**SAMWEL ODHIAMBO OLUDHE 1ST PLAINTIFF
DAVID ODUOR OLUDHE 2ND PLAINTIFF
DAVID OWUOR OLUDHE 3RD PLAINTIFF
ALL SUING AS THE ADMINISTRATORS OF THE ESTATE OF JACKSON
OLUDHE ALOO - DECEASED**

AND

**BENKEN ENTERPRISES LIMITED 1ST DEFENDANT
THE GOVERNMENT LAND REGISTRAR 2ND DEFENDANT**

AND

BENKEN ENTERPRISES LIMITED PLAINTIFF

AND

**SAMWEL ODHIAMBO OLUDHE DEFENDANT
DAVID ODUOR OLUDHE DEFENDANT
DAVID ODUOR OLUDHE DEFENDANT
THE GOVERNMENT LAND REGISTRAR DEFENDANT**



RULING

1. The hearing of this matter is underway of which the plaintiff's case was closed on July 18, 2022. The 1st defendant has filed an application dated January 17, 2023 seeking orders to have the case of the plaintiff re-opened to be heard on the documents earlier produced on pages 28-57 of the plaintiff's consolidated bundle. To this end, the 1st defendant desires that the 1st plaintiff who testified as Pw1 be recalled for further cross examination and Re-Examination.
2. The application is premised on the grounds set out on the face of the application and the supporting affidavit of one Isaiah Kandie Kangogo who has introduced himself as a director of the 1st defendant. He contends that plaintiff's case was closed on July 18, 2022 without giving Mr. Osundwa who has personal conduct of the matter a chance to cross-examine pw1. It is averred that Mr. Ashioya had no instructions from the 1st defendant or Mr. Osundwa to proceed with the matter.
3. The plaintiffs have opposed the application vide the Replying Affidavit sworn on February 10, 2023 by the 1st plaintiff (pw1). The deponent has generally rehashed the litigation history as from the time the hearing commenced on January 19, 2022. In particular, the deponent has stated that the date of July 18, 2022 was given way back on January 19, 2022, hence Mr Osundwa had sufficient time to prepare for the trial, and that Mr, Ashioya who was present did not indicate that Mr. Osundwa was ailing and unable to proceed with the matter.
4. Mr Kamau for the Attorney General indicated that they did not file any Replying Affidavit or submissions to the application.
5. I have duly considered all the arguments advanced herein including the rival submissions of the parties; that is those of the 1st defendant dated February 23, 2023 with authorities and those of the plaintiffs dated February 27, 2023.
6. The issue falling for determination is whether this court should allow the recalling of plaintiff's case for purposes of cross examination and reexamination.
7. The provisions of Section 146 (4) of the *Evidence Act* provides:

“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”.
8. The question of re-opening a case is one where courts exercise their judicial discretion on the interest of justice based on the merits of a case. It is not a purely yes or no answer as bolstered by the Supreme Court in the case of *Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR where it was stated that;

“... we are of the view that the Court can only exercise its powers and/or discretion to allow further affidavits or additional evidence if it is specifically applied for, and may allow or refuse such an application. It is not a matter of right...”
9. The records of the court are clear. Pw1 gave his testimony on January 19, 2022 and was cross -examined at length by Mr Osundwa for the 1st defendant. However, the witness was eventually stood down in order to avail a certain original document. Thus the hearing was rescheduled to July 8, 2022. on the said



date, the 1st defendant was represented by Mr Ashioya holding brief for Mr Osundwa. No information was advanced that Mr Osundwa was sick, Instead, what Mr. Ashioya stated in rejoinder to the objection raised by counsel for the plaintiff on adjournment of defence case is that;

“I am shocked that they will object to our adjournment. Mr. Osundwa was served with some documents very late and so he prioritized to go to another court in Kakamega!”

10. The above statement was made in the context of the application for adjournment to avail the defence witness who were absent. The court granted the defence a last adjournment and gave a hearing date on July 13, 2023. It follows that the application is meant to scuttle and distort the proceedings of July 8, 2022, particularly in relation to the order of a Last Adjournment made thereon.

11. This court has a constitutional mandate to ensure that cases are heard expeditiously. This is in tandem with the provisions of Art. 159 (2) (b) of the Constitution, and Section 1A (3) of the Civil Procedure Act which provides that;

“(1) (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

12. Further, the provisions of Section 1B thereof stipulates that;

“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the Court;

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) The use of suitable technology.”

13. Guided by the above provisions of law, I find that the application is not merited, the same is hereby dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

M/s Chite holding brief for Osundwa for 1st Defendant

Kamotho for Plaintiff - Respondents

A.G Kamau for 2nd Defendant Respondent

