



Muhindu & another (Suing in their Capacity as the Administrators of the Estate of Elizabeth Mumbi) v Kimani (Sued on her Capacity and her Capacity as the administrator of the Estate of Timothy Kimani Mungai) & another (Environment & Land Case 87 of 2017) [2023] KEELC 20555 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 87 OF 2017**

**JG KEMEI, J
OCTOBER 5, 2023**

BETWEEN

**ANTONY JUSTUS MUHINDU 1ST PLAINTIFF
ALICE JOYLINE THUGURI 2ND PLAINTIFF
SUING IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE
OF ELIZABETH MUMBI**

AND

**VIRGINIA WANJIKU KIMANI (SUED ON HER CAPACITY AND HER
CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF TIMOTHY
KIMANI MUNGAI) 1ST DEFENDANT
AWENDO COMPANY LIMITED 2ND DEFENDANT**

RULING

1. The 2nd Defendant/Respondent filed this application on 6/12/2022 under Article 159 of *the Constitution* of Kenya 2010, Section 1A, 1B, 3A and 5 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 18 Rule 10, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010 Section 146 (4) of the *Evidence Act* (Cap 80) Laws of Kenya and all enabling provisions of the law seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That the 2nd Defendant be granted leave to file a supplementary bundle of documents as per the draft annexed herewith marked PN-2.



- d. That the draft supplementary bundle of documents annexed hereto be deemed as properly filed and served upon payment of the requisite Court fees.
 - e. That in the result the 2nd Defendant case do proceed for hearing inter-partes de-novo and/or the same be re-opened for hearing of the 2nd Defendant's case.
 - f. That costs of this application be provided for.
2. The application is anchored on the grounds annexed thereto together with the Supporting Affidavit of Paul Njenga Munyua sworn on 2/12/2022.
 3. The deponent avers that he testified on 29/9/2022 and noticed that some of the documents he intended to rely on in support of his defence had not been filed by his previous lawyers, Oluoch-Awino & Co. Advocates. He blames them for failing to file the documents despite having submitted the said documents to them. That subsequently upon enquiry from the said law firm he was informed that the said documents had been misplaced in chambers hence the reason why they were not filed.
 4. The deponent has urged the Court not to visit the mistake of Counsel on it. In addition, that the documents are critical in putting up a good defence for the 2nd Defendant's case. He beseeched the Court for an opportunity to be heard on merit. Inter alia that the documents sought to be introduced by the 2nd Defendant are fundamental to the full and effectual determination of the suit. That the document shall demonstrate; that the 2nd Defendant lawfully purchased the suit land through several agreements dated 18/6/2008, 10/11/2010, 16/6/2011 and 5/11/2007; that Parcel No. 61/37 claimed by the Plaintiff in this suit no longer exist following the successful subdivision by the 2nd Defendant after which the resultant plots were transferred to third parties; that this evidence should be placed before the Court to avoid the risk of innocent parties being condemned unheard.
 5. It was further averred that neither the Plaintiff nor the 1st Defendant will be prejudiced if the orders sought are granted because the said parties shall be at liberty to recall their witnesses if need be.
 6. That if the orders are not granted, it shall stand to suffer as the 2nd Defendant will have lost a chance to defend itself adequately. That the application has been made without undue delay, in good faith and with full disclosure of the circumstances that necessitated this application.
 7. The application is opposed by the 1st Defendant/Respondent vide the Replying Affidavit sworn on 12/1/2023 by Virginia Wanjiku Kimani. The deponent avowed that the application is an attempt to litigate the entire suit by way of opening the hearing despite all the parties having been afforded the chance to file further and additional documents before the hearing commenced.
 8. It is further stated that the Applicant has not demonstrated that it was incapable of tendering the documents prior to the hearing and neither has it demonstrated that it made any effort to transmit the said documents to its Counsel then on record. The Court was urged that the Applicant by propagating a trial by instalments intends to seal the loopholes and gaps exposed in cross examination through the adduction of these documents.
 9. The deponent pointed out to the Court that there are no live proceedings to be stayed in this matter, all the parties having filed their respective submissions and what is pending before the Court is the Judgment of the Honourable Court. The deponent further stated that the 1st Defendant stands to be prejudiced by the delay occasioned by the Applicant in determining this suit. Further, that the supplementary bundle of documents existed as far as ten (10) years ago and the deliberate concealment if any, should not be rewarded by reopening a concluded matter. In addition, that the Applicant has not placed any evidence before this Court to show that its Counsel did not execute his instructions



- fully. That in any event, the Court allowed parties on 27/7/2022 the last chance to file additional documents including fresh trial bundles. The Applicant ignored the accommodation by the Court and in conclusion the Court was urged that this application is a dilatory tactic to delay the finalization of the suit.
10. According to the Plaintiffs'/Respondents' written submissions dated 3/3/2023 the Plaintiff avers that they filed a Replying Affidavit dated 16/1/2023 in opposition to the application. I have keenly perused the file and I am unable to sight the same.
 11. Parties elected to file written submissions which I have read and considered.
 12. The issues for determination are as follows: -
 - a. Whether orders of stay of proceedings should be granted.
 - b. Whether the Applicant is entitled to re-open the case and file additional documents whether.
 13. It is common knowledge that this suit was filed on 5/11/2009. The hearing of the case finally kicked off on 29/9/2022. The Applicant Paul Njenga testified on behalf of the 2nd Defendant after which it proceeded to close its case on the same day. Parties elected to file written submissions in respect to the suit.
 14. With respect to the 1st issue, the Applicants seek stay of proceedings in this suit. The Court finds that there are no live proceedings in this matter, the hearing of the case having been brought to conclusion. It is on record that parties have filed their written submissions with the respect to the suit before the Court. What is pending is the Judgment of this Court which Judgment has been halted by the filing of this application.
 15. The Court answers the first issue in the negative.
 16. The jurisdiction of the Court to recall new witnesses / evidence is found in Section 146(4) of the [Evidence Act](#) which states as follows:-

“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.”
 17. Order 18 rule 10 of the Civil Procedure Rules gives the Court powers to recall any witness who has been examined which provides as follows:-

“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.”
 18. Under the [Civil Procedure Act](#) and Civil Procedure Rules, 2010 parties are expected to put their whole case before the Court for determination. Every party must call all the evidence on which he proposes to rely during the hearing of the case and before closing his case. This may include the exchange of pleadings, statements of case summary, witness statement and all evidentially documents which a party seeks to rely on to prove and/or disapprove their cases. These procedural standards applicable in adversarial legal system like ours are intended to safeguard fair hearing, balance the accountabilities of the parties before the Court, the right to be heard and the larger interest of justice.
 19. It is generally commonly accepted that the adduction of additional documents and reopening of a case is a discretionary relief. The Court in exercising its discretion must consider the following; first the



jurisdiction being a discretionary one is to be exercised judiciously that is to say on sound legal basis and proposition. The Court must ensure that reopening the case does not embarrass or prejudice the opposite party. See the case of Samuel Kiti Lewa Vs. Housing Finance Co. Ltd & Ano. (2015)eKLR.

20. The second proposition is that the reopening should not aid filling gaps in the evidence of the Applicant as that would be prejudicial to the other parties.
21. Thirdly, the plea to reopen a case ought to be rejected if there is inordinate and or unexplained delay on the part of the Applicant. See the case of Hannah Wairimu Ngethe Vs. Francis Nganga (2016)eKLR.
22. Fourthly, the Applicant must demonstrate that the evidence that he seeks to introduce could not have been obtained with reasonable diligence at the time of the hearing of the case. In addition, if the evidence is admitted it would probably have an important influence on the outcome of the case, albeit, need not be decisive.
23. Lastly, the evidence must be apparently credible.
24. This Court is guided by the decision of Supreme Court in the case of Raila Odinga & 5 Others Vs. IEBC & 3 Others (2013)eKLR where the Court stated as follows:-

“The parties have a duty to ensure they comply with their respective timelines, and the Court must adhere to its own. There must be a fair level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party by the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

25. According to the record the compliance under pretrial rules was delayed for a number of reasons attributed to the parties in this suit. On application by the parties the Court directed parties to fully comply with pre-trial directions on 9/12/2021. The deadline for compliance was set on 23/12/2021. On 16/2/2022 parties including the 2nd Defendant sought more time to conclude negotiations out of Court that were said to have commenced. Parties agreed to mention the matter on 6/4/2022 for purposes of recording a consent. It would appear from the record that nothing came out of the said negotiations seeing that on 27/7/2022 the 1st Defendant sought leave of the Court to amend her defence. Mr. Owino acting for the 2nd Defendant did not object to the application save that he should be allowed to amend his defence as well. The Court granted the parties request and directed that alongside the pleadings to be filed all parties to file bundles and comply with pretrial directions in preparation for the hearing of the suit.
26. During the hearing of the case, Paul Njenga produced documents on page 6 and 7 of his trial bundle dated 23/9/2022 to wit; copy of title for the suit land and acknowledgement of purchase price by one Timothy Kimani Muigai. Paul Njenga informed the Court that he had agreements of sale but had not placed them before the Court. At no time did the witness inform the Court that he had supplied his lawyer with the said documents for purposes of filing them in Court and that the said Counsel had



failed to implement his instructions. The witness who is also a deponent in this application has not placed before the Court evidence of correspondences forwarding the said documents to his lawyer. It has not also been explained by the lawyer by way of an affidavit evidence that indeed he received the documents from the deponent, took instructions on the same and failed to include them in the pretrial bundle for the 2nd Defendant. It is instructive to note that even in Court the witness never at any one time inform the Court that he wished to produce the documents albeit with the leave of the Court.

27. As earlier alluded in this Ruling, the hearing of this case has been concluded with all the parties having placed their evidence before the Court. Allowing this application, in the considered view of the Court at this stage, will not only embarrass the parties to this suit but will also prejudice them given that they have closed their cases. Allowing the documents also has the effect of changing the 2nd Defendant's evidence and thereby putting in disarray the evidence of the other parties.
28. The Applicant has not demonstrated that the documents it wishes to introduce could not be obtained with reasonable diligence at the time of the hearing of the case. Indeed the witness stated in cross examination that he had the documents in his possession but elected not to present them before the Court. The question before this Court is why the change of mind. More importantly the Applicant has not demonstrated whether if these documents are admitted the outcome of the case will change nor that the evidence is credible.
29. Having considered the application, the affidavit evidence, the written submissions and all the materials placed before this Court, the irresistible conclusion is that these documents are intended to plug in the gaps or loopholes in the evidence of the 2nd Defendant.
30. In the end the application is found to be unmeritorious and it is dismissed with costs payable by the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT 'THIKA THIS 5TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kimani for Plaintiff

Mathenge HB Tumu for 1st Defendant

Githinji for 2nd Defendant

Court Assistants – Phyllis & Lilian

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