



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO E003 OF 2021

TERESIAH WANGARI GACHOKA SUING AS THE ADMINISTRATOR OF
THE ESTATE OF GACHOKA KAHAWA (DECEASED)PLAINTIFF

VERSUS

SAMUEL NDUNGU NDUTA..... 1ST DEFENDANT

WILSON MWATHI NJOROGE.....2ND DEFENDANT

RULING

Application

1. The applicant moved the court through notice of motion dated 02/02/2021 brought under Sections 1A, 1B, 3A of the Civil Procedure Act, seeking the following orders:

1. ...Spent

2. That the plaintiff's case be reopened and the plaintiff be allowed to be recalled to produce the judgment in Nakuru ELC Case No 22 Of 2014 filed in the further list of documents filed in court on 14th September 2021 and death certificate of Gachoka Kahawa (deceased)

3. That the defendant be at liberty to cross examine the plaintiff's witnesses on the additional evidence.

4. That costs be in the cause.

2. The application is supported by the affidavit sworn on the same date by the plaintiff where she deposes that during the hearing of the suit and in particular as she was testifying, she forgot to produce the documents mentioned in the application. She avers that the documents are crucial and that they would not prejudice the defendants if produced and that she has come to court expeditiously on this application. She states that at the time that she filed the suit she was acting in person and therefore she forgot to give the judgment to her advocate on record.

Response

3. The respondents filed a replying affidavit dated 14/2/2022 sworn by their counsel in which he deposed that he has the conduct of the suit on their behalf and that the plaintiff had closed her case. Further he stated that she had been represented by the firm of Frank Mwangi & Co Advocates who filed the case on her behalf. He dismisses the claim by the plaintiff that he could not have obtained the judgment as she was acting in person as untrue, and avers that the plaintiff never intended to rely on the said judgment and so she had failed to avail it to her counsel. The deponent further states that the parties had been accorded time to comply with Order 11 of the Civil Procedure Rules and that the applicant had not demonstrated the sort of prejudice she stood to suffer if the judgment was not produced. He also states that the application is not made in good faith since the applicant has sought in her application to have the judgment produced but has brought in the issue of production of a death certificate, therefore giving a clear signal that she intends to seal the loopholes in her case. The respondents urge that the application be dismissed with costs.

Submissions

4. Upon perusal of the file, I have found that no party filed their submissions as ordered by the court. Nevertheless, this court will proceed to

delve into the merits of the application.

Determination

5. The issue that arises for determination in the instant motion is whether the court ought to order that the applicant be recalled to produce the documents in question.

6. A copy of the list of documents filed on **12/9/2021**, judgment dated **22/5/2019** (in **Nakuru ELC Case No 22 Of 2014 – Teresiah Wangari Gachoka and Sammy Mwangi Gachoka Vs Florence Nduta and Florence Wambui**) and of the death certificate of one **Gachoka Kahawa** are attached to the affidavit in support of the application.

7. The judgment proposed to be produced touches on the suit land. The death certificate has the name of the deceased that resembles that of the plaintiff's late husband. It has not been denied that the plaintiff's husband is deceased. There is no doubt that the documents have some correlation to the instant case. the list that accompanies the documents appears to have been filed before the hearing of the instant suit commenced.

8. Contrary to what the respondents have stated in their replying affidavit the applicant has sought leave regarding both documents in her application, whether or not the death certificate had been mentioned earlier.

9. I also note that it is true that at one point on the **25th August 2021** the applicant filed a notice of intention to act in person just before her further list and bundle in question were filed. I find it plausible that some mishap involving her layperson's abilities may have interfered with the issue of her drawing the attention of her advocate to the documents in question.

10. I have considered that the plaintiff's case having been closed, orders reopening it would have to be made and that as the defendant's case has not commenced, it would occasion them insignificant or no prejudice at all in my view if that case were re-opened as sought for the admission of the said documents subject of course to the rules on production of evidence. Besides it is the duty of this court in so far as it is practicable. to hear and determine cases on their merits

11. Consequently, I allow the application dated **2/2/2022** in terms of prayer **Nos 2, 3 and 4** thereof.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 1ST DAY OF MARCH, 2022

MWANGI NJOROGI

JUDGE, ELC, NAKURU