



REPUBLIC OF KENYA



KENYA LAW
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**Midiwo v Onjiro & 3 others (Environment & Land Case
37 of 2021) [2022] KEELC 3212 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 37 OF 2021
AY KOROSS, J
JUNE 2, 2022
[FORMERLY KISUMU ELC E04 OF 2020]**

BETWEEN

JOACHIM RAGUMO MIDIWO PLAINTIFF

AND

CAMLUS ODANGA ONJIRO 1ST DEFENDANT

COUNTY GOVERNMENT OF SIAYA 2ND DEFENDANT

LAND REGISTRAR, SIAYA COUNTY 3RD DEFENDANT

DISTRICT LAND REGISTRAR, UGENYA 4TH DEFENDANT

RULING

1. In the instant motion, the plaintiff sought the following reliefs:
 - a) Spent.
 - b) Spent.
 - c) Spent.
 - d) That the honourable court be pleased to give an order for reopening the plaintiff's case which was closed by the honourable court suo moto on 31/01/2022 by allowing the plaintiff to call his two remaining witnesses as per his supplementary list of witnesses dated the 22/11/2022 to adduce evidence.
 - e) That the honourable court be pleased to give an order for reopening of the 1st defendant's case which proceeded ex parte on 31/01/2022 and was closed on even date for purposes of cross examination of the 1st defendant and his witnesses.



- f) That costs be provided for.
2. The motion is supported by the affidavits sworn by Mary Anyango Ragumo and Joachim Ragumo Midiwo which were based on the main grounds: (i) the plaintiff's witnesses could not attend court on the date scheduled for hearing and the court suo moto closed the plaintiff's case and they should be given a chance to call their witnesses and, (ii) they were not given a chance to cross examine 1st defendant and his witnesses who testified ex parte.

The defendants' case

3. The 1st defendant filed his replying affidavit dated 25/03/2022. In it he stated that the court exercised its discretion judiciously when it declined to grant the plaintiff's counsel an adjournment on 31/01/2022, closed the plaintiff's case and proceeded with the defence case which was closed. That though his counsel had been notified of the intended adjournment on 28/01/2022, documentary evidence to support the grounds of adjournment were not forthcoming.

The plaintiff's submissions

4. The plaintiff's submissions dated 21/04/2022 were premised on Articles 10, 25, 47, 48, 50 and 159 (2) (d) and (e) of *the Constitution*. It was his position that the right to fair trial included his right to be heard and to cross examine witnesses. He submitted that Article 159 provided that the purposes and principles of *the Constitution* should be protected which extended to adherence to Article 10 and right to fair trial as envisaged in Article 50. He submitted that under Article 25 his rights under Article 50 could not be limited. He averred that his right to a fair trial was tied up with his right to access to justice under Article 48, right to fair administrative action under Article 47 and Sections 2, 3 and 4 of the *Fair Administrative Action Act*. On right to fair trial, he placed reliance on *Ridge v Baldwin* [1964] AC 40, *David Oloo Onyango v The Honourable Attorney General* [1987] eKLR and *SM v HGE* [2019] eKLR.

The defendants' submissions

5. The 1st defendant filed his submissions dated 21/04/2022. In it, he stated that a party is called upon to expedite his suit to its conclusion as delay defeated the purpose of equity and the spirit of *the Constitution*. It was his position that the court's discretion in deciding the instant motion needed to be exercised judiciously to enable justice to both parties and not aid the plaintiff who had deliberately delayed the case. He relied on the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR which stated that the court should not assist a person who deliberately sought to obstruct or delay the cause of justice. Relying on the case of *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & Another* [2015] eKLR, he submitted that re-opening a case should not prejudice or embarrass the opposite party and that re-opening a case should not be allowed where it is intended to fill gaps in evidence. He asserted that the plaintiff did not merit the audience of the court for failing to pay court adjournment fees or witness expenses.

Analysis and determination

6. A background of the proceedings in the court record is paramount. When the plaintiff filed suit, the court on 4/02/2021 granted him injunctive orders pending the hearing and determination of the suit. Bearing in mind the provisions of Order 40 Rule 6 of the Civil Procedure Rules that such matters must be concluded within one year, a hearing date of 8/12/2021 was set in court by consent of the parties. PWI who was the plaintiff testified and he sought an adjournment because his two witnesses could not attend court. He sought for an early date. The application was allowed and he was ordered to pay court adjournment fees together with the defendant's witness expenses before the



next hearing date of 31/01/2022; which he has not complied with to date. On the 2nd hearing date, he applied for an adjournment on similar grounds but he expounded that one witness was ill while the other was in Mombasa. Neither the medical treatment notes nor the reasons why the witness in Mombasa could not attend court were not tendered. On this hearing date, the defendant had all his witnesses in court. By a ruling of even date, the court exercised its discretionary powers judiciously after considering the conduct of the parties and disallowed the application for adjournment and exercised its inherent powers and closed the plaintiff's case. After the court rendering its ruling on declining the adjournment, the plaintiff's counsel intimated to court that she did not have instructions to proceed with the hearing. The court proceeded with defence hearing.

7. The detailed background in the record shows that the plaintiff's case was not arbitrarily closed by the court. The plaintiff seemed to have acquiesced to closing his case by failing to call his witnesses who are his wives to court. As it were, the intent of Order 40 Rule 6 was to cure the mischief of a party enjoying perpetual injunctive orders at the expense of the opposing party and as such, courts are called upon to conclude such cases within a period of one year.
8. Though the plaintiff had contended that he was denied an opportunity of being heard, far from it, it was clear that an opportunity was afforded to him which he squandered. What he deemed a denial of a fair hearing, was actually a denial of his application for adjournment for him to avail witnesses who were not available in court on the hearing day. See the decision of Odunga J in [*Republic vs Chief Magistrate, Resident Magistrate's Court at Nairobi-Milimani Commercial Court Ex-parte Safaricom Limited & 2 Others*](#) [2014] eKLR.
9. The plaintiff did not seek for the orders of this court to be set aside and as it stands, the orders declining to grant him an adjournment are still in place. Therefore, the prayer for his case to be reopened and for him to call his witnesses cannot stand. Even if he were to seek for such an order, which he has not, this court would have declined to so grant for several reasons; one, the 1st defendant's witnesses have testified and he had closed his case and he would be highly prejudiced if the plaintiff's case was reopened for his witnesses to testify. Secondly, the two witnesses are his wives. The court has had a chance to look at their witness statements and they are a reiteration of the plaintiff's evidence and their importance have not been demonstrated. See [*Susan Wavinya Mutavi v Isaac Njoroge & another*](#) [2020] eKLR, [*Raindrops Limited v County Government of Kilifi*](#) [2020] eKLR and [*Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another*](#) [2015] eKLR.
10. I now proceed to address my mind on whether the court should reopen the 1st defendant's case for cross examination. The legal framework for recalling witnesses are Section 146 (4) of the [*Evidence Act*](#) and Order 18 Rule 10 of the [*Civil Procedure Rules*](#).
11. The motion was filed barely one month from the date the 1st defendant closed his case and I do not consider this to be to inordinate. In view of the nature of the dispute and purely in the interest of justice, I find this order seeking to recall and cross examine the 1st defendant and his witnesses meritorious. However, during the hearing, the plaintiffs shall cater for the 1st defendant's witness travel expenses and the 1st defendant's advocates costs for the day. Because costs follow the event and bearing in mind the nature of this motion, I award costs to the 1st defendant.
12. In upshot, I make the following disposal orders:
 - a) The order dated 31/01/2022 closing the defence case is hereby set aside.
 - b) DW-1, DW-2 and DW-3 shall be recalled purely for cross-examination and re-examination and their witness travel expenses and their advocates costs for the day shall be borne by the plaintiff.



- c) The plaintiff shall pay the outstanding court adjournment fees and outstanding witness travel expenses of Kshs. 800/=before the next hearing date.
- d) Hearing in open court on 21/09/2022.
- e) Costs of the motion shall be borne by the plaintiff.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF JUNE 2022.

HON. A. Y. KOROSS

JUDGE

2/6/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Olieti for the plaintiff

M/s Aron for the 1st respondent

Court assistant: Ishmael Orwa

