



**Mutwota (Suing on behalf of Benjamin Jackson Mutwota Muia) & another v Mulala & 31 others
(Environment & Land Case 20 of 2019) [2022] KEELC 2760 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 20 OF 2019**

TW MURIGI, J

JULY 13, 2022

BETWEEN

**PHILIP MUNYAO MUTWOTA (SUING ON BEHALF OF BENJAMIN JACKSON
MUTWOTA MUIA) 1ST PLAINTIFF**

**NDAVI WAMBUA (SUING AS THE ADMINISTRATOR AND PERSONAL
REPRESENTATIVE OF WAMBUA MAKAU NDUNGU) 2ND PLAINTIFF**

AND

ELIJAH MULALA & 31 OTHERS DEFENDANT

RULING

1. Before this Court for determination is a Notice of Motion application dated 11th November, 2021 brought pursuant to the provisions of Article 159(2)(d) of *the Constitution*, Sections 3, 3A and 63(e) of the *Civil Procedure Act*, Section 146(4) of the *Evidence Act* and Order 18 Rule 10 of the Civil Procedure Rules 2010, where the Defendants/Applicants are seeking for the following orders: -
 - 1) Spent.
 - 2) THAT the orders issued herein on 4th October, 2021 requiring the Plaintiffs to file their submissions and any other subsequent orders be vacated.
 - 3) THAT this Honourable Court be pleased to order that the Plaintiffs' case be reopened and the Plaintiffs who gave evidence be recalled for the purposes of cross-examination by Counsel for the Defendants/Applicants.
 - 4) THAT this Honourable Court be pleased to grant leave to the Defendants to give their evidence in chief and be cross-examined by Counsel for the Plaintiffs.
 - 5) THAT leave be granted to the Defendant/Applicants to file a further witness statement and/or the witness statement filed herewith be deemed to be duly and properly filed.



- 6) THAT the costs of this application be in the cause.
2. The application is supported by the affidavit of Maingi Kamau Advocate sworn on 11th November, 2021. A summary of the grounds and the averments is that the Defendant/Applicants' Advocate was unable to attend Court on 4th of October 2021 for the hearing of the main suit since his motor vehicle developed mechanical problems at Katumani area on the material date.
 3. Counsel averred that the Defendants conveyed this information to the Plaintiffs Advocates. That the Court proceeded to hear and close the case despite been informed of the incident by the Defendants who were present in Court. The Applicant averred that the Defendants were not accorded a chance to cross-examine the Plaintiffs, while at the same time, they were denied a chance to adduce their evidence. The Applicant urged the Court to allow the application.
 4. Opposing the application, the Defendants vide the Replying affidavit sworn on 29th November, 2021 by Christine Mwendu Mwanja Advocate averred that on the material date, the Defendants were present in Court but none of them informed the Court or the Plaintiffs' Advocate of their Advocate's whereabouts. That it was only after the matter was closed and directions given when some of the Defendants approached the Plaintiffs' Advocate and informed her of their Advocate's car troubles.
 5. The Respondent further averred that the Defendants' Advocate neither called the Plaintiffs' Advocates' office to seek indulgence nor did he instruct an Advocate who was present in Court to hold brief for him. The Respondent contends that no evidence has been placed before the Court to demonstrate that the Defendants' Advocate motor vehicle had mechanical problems. The Respondent argued that the Applicant had not demonstrated the manner in which the Defendants would suffer a miscarriage of justice if the application is disallowed.
 6. The application was canvassed by way of written submissions.

The Applicants Submissions

7. The Applicants submissions were filed on 21st of January 2022. Learned Counsel for the Applicant submitted that the law allows a witness to be recalled for further examination in chief or further cross examination. To buttress his submissions Counsel relied on the law as laid down in Section 146(4) of the *Evidence Act* and Order 18 Rule 10 of the Civil Procedure Rules. Counsel went on to submit that the Respondents would not suffer any prejudice if the orders sought are granted.

The Respondents' Submissions

8. The Respondent's submissions were filed on 8th of February 2022. Counsel for the Respondent submitted that the Applicants had not demonstrated how the alleged denial to cross examine the Plaintiff amounts to a miscarriage of justice nor had they established sufficient cause to warrant the grant of the orders sought. Counsel contends that if the proceedings are set aside, the Plaintiff stands to suffer prejudice as it will cause further delay to the conclusion of this matter. To buttress his submissions Counsel placed reliance on the following authorities: -

- i) *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR.
- ii) *Rainsdrop Limited V County Government of Kilifi* (2020) eKLR.

Analysis and Determination

9. Having considered the application, affidavits and the rival submissions, I find that the issue for determination is whether the Applicant is entitled to the orders sought.



10. The Applicant is seeking to have the orders issued on 4th of October 2021 requiring the Plaintiff to file their submissions vacated and for the Plaintiff to be recalled for cross examination amongst other orders.
11. Section 146 (4) of the *Evidence Act* generally grants the Court powers to recall a witness. It provides 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.”
12. Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the Court powers to recall a witness. It 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.”
13. The decision whether or not to re-open an ongoing case is purely left to the realm of judicial discretion which should be exercised judiciously and in the interest of justice.
14. In *Odoyo Osodo V Rael Obara Ojuok & 4 Others* [2017] eKLR J.M. Mutungi J. outlined the basis upon which the Court could exercise its discretion to reopen a case. The Court held as follows:-

“The discretion of the court cannot be exercised whimsically but ought only to be exercised judicially and judiciously. A basis for the exercise of discretion has to be laid by the party inviting the court to exercise its discretion.”
15. The record shows that the hearing date was taken in Court on 29th of June 2021 in the presence of Ms. Christine Mwanja, learned Counsel for the Plaintiff and Maingi Kamau learned Counsel for the 1st to 29th and 32nd Defendants. The Court directed Counsel for the Plaintiff to effect service upon the 30th and 31st Defendants. When this matter came up for hearing on 4th of October 2021, Maingi Kamau Learned Counsel for the Defendants was absent. The Court was satisfied that the 30th and 31st Defendants had been duly served and directed the suit to proceed for hearing.
16. Upon close of the Plaintiffs case, the matter was fixed for mention on 15th of November 2021 to confirm filing of submissions. The Court directed the Plaintiff to serve the Defendants with the mention notice. When the matter came up for mention both Counsels were present in Court. The Court proceeded to give directions on the present application.
17. The issue in dispute is whether the Defendants informed the Court or Counsel for the Plaintiff the predicament that their Counsel was facing. As correctly put by learned Counsel for the Plaintiff, at no time did the Defendants inform the Court the challenges that were hindering their Counsel in attending court. Moreover, the Defendants did not respond when the file was called out. It was therefore difficult for the Court to ascertain whether they were present in Court.
18. From the application and the reply, it is evident that the Defendants were present in Court when the matter proceeded and closed.
19. The Applicant has in my view offered a candid explanation as to why he did not attend Court. Be that as it may, the rules of natural justice demand that a party should be heard on his claim. It would be



unjust and indeed a miscarriage of justice to deny the Defendants an opportunity to cross examine the Plaintiff and present their Defence.

20. The Applicant sought for leave to file a further witness statement and/or the witness statement filed be deemed as duly filed. I find that allowing the Applicant to introduce a new statement will prejudice the Plaintiffs since the Plaintiffs will not have an opportunity to address the issues raised therein.
21. In the end, I find that the application dated 11th of November 2021 is merited and the same is allowed in terms of prayers 2, 3 and 4 of the application.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 13th DAY OF JULY, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Ngumbau holding brief for Kamau for the Defendants/Applicants

Ms Rotich for the Plaintiff/Respondent

