Ziro v Mutei & another (Environment & Land Case 374 of 2016)
[2022] KEELC 2747 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2747 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 374 OF 2016

LL NAIKUNI, J

JULY 12, 2022

BETWEEN

JOHN NGOWA ZIRO ..... PLAINTIFF

AND

FELIX MUTEI ..... 1ST RESPONDENT

BONIFACE ONYANGO ..... 2ND RESPONDENT

RULING

I. Preliminaries

1. What is before this Honorable Court for its determination is a Notice of Motion application dated November 29, 2021. The application was filed on the November 30, 2021 by the 1st and 2nd Defendants/Applicants under a Certificate of urgency. The application was brought under the provisions of Article 50 and 159 of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act*, Cap. 21 and Order 12 Rule 7, Order 18 Rule 10 & Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.

Ii. The Defendants/applicants' Case

2. The Defendants/Applicants herein sought for the following orders:-

    a) Spent

    b) That the Honorable Court be pleased to stay any further proceedings herein pending the hearing and determination of this application.

    c) That the proceedings of 8th November, 2021 be set aside together with any consequential orders made herein.

d) That the Plaintiff's/Respondent's suit be re-opened for either fresh hearing or cross - examination of the Plaintiff/Respondent and for Defence hearing.

e. That the costs of this application be provided for.

3. The Application is founded on the grounds, testimony and averments in the 10th Paragraphed Supporting Affidavit of Boniface Onyango, the 2nd Defendant/ Applicant, sworn and dated November 29, 2021 and the Two (2) annextures marked as "BO - 1 and 2" stating that he had authority from the 1st Defendant/Applicant to swear the affidavit on his behalf. He deponed that the Plaintiff/Respondent filed the suit on December 2, 2016 vide a plaint of similar date. Upon service, they entered appearance in the matter and filed their joint Defence on March 10, 2017. He stated averred that after the pre-trials, the matter came up for hearing for the first time on July 22, 2021 but because the Plaintiff's/ Respondent's Advocates had not served their then Advocates on record with a hearing notice, the matter was adjourned. The other reason the matter was adjourned was because the trial court was going on transfer. He made reference he proceedings of July 22, 2021.

4. He stated that on November 8, 2021, this matter came up again for hearing but their then advocates sought for an adjournment and leave of the court to file an application to cease from acting as he had no further instruction in the matter but the Court proceeded to hear the Plaintiff's/ Respondent's case in their absence and subsequently closed their defence case for non-attendance and want of prosecution and thereafter made an order for filing of written submissions and fixed the matter for mention on December 14, 2021to take a judgment date. This is supported by certified copies of the proceedings marked as 'BO – 2'.

5. He averred that they were now likely to be condemned unheard, yet their then advocates had a genuine reason for the adjournment of the matter and since justice demands for a fair trial and adherence to the rules of natural justice, further proceedings herein ought to be stayed and the proceedings ofNovember 8, 2021be set aside as well as the order closing their defence case so that the suit either starts afresh (re-opened) or the Plaintiff/Respondent be summoned for cross-examination and thereafter be allowed to adduce evidence in support of their defence case.

6. He further deponed that there shall be no prejudice suffered by the Plaintiff/Respondent if the orders sought for are granted but on their part, they shall suffer irreparable loss and damages and greatly be prejudiced if the said orders are denied.

Iii. The Plaintiff/respondent's Case

7. The application was opposed by the Plaintiff/Respondent through a 22 Paragraphed Replying Affidavit dated December 14, 2021 sworn by G.N. Mulongoan advocate of the High Court of Kenya, averred that the matter was slated for hearing on the July 22, 2021 where he stated that he appeared virtually on the Microsoft Teams Platform and Mr. Kenga the then Advocate on record appearing for the 1st and 2nd Defendants was present. That the matter never proceeded as the Presiding Judge Hon. Justice Yano had been on transfer and thus allocated the matter another hearing date the November 8, 2021 in the presence of both advocates.

8. He averred that the Defendants/Applicants' advocate was in court and he confirmed the hearing date given by the court was convenient to him for the availability of his clients to attend the hearing. That he was stationed at Kericho and had travelled all the way to Mombasa ready for the hearing and by the time the matter was being called for out virtually at about 9 am or thereabout, the Plaintiff/Respondent was in his advocate's office. He stated that the hearing date was given in court by consent of both Advocates, the then Defendants/Applicants' advocate informed the court that he was not ready to proceed with

the matter and thus directed that the matter be mentioned later on to enable him file an application to cease acting for the Defendants/Applicant.

9. He stated that he opposed the Application for adjournment for the reasons that this is an old matter that had never kicked off for hearing of the main suit ever since it was filed in the year 2016, that the hearing date of the November 8, 2021was given in court by consent, that the Plaintiff was desirous to prosecute this matter and had travelled all the way from Kericho in good time for the matter, the Plaintiff had incurred expenses to attend the hearing and that the Defendants' advocate had all the time to file his application prior to the hearing date and thus the adjournment was akin to frustrate the Plaintiff.

10. The Plaintiff/ Respondent averred that the trial court after taking into consideration his submissions by both counsels, directed that the matter should proceed for hearing. However, the court directed that if the adjournment was to be allowed, then the Defendants/Applicants' advocate was to cater for the Plaintiff/Respondent's expenses of a sum Kenya Shillings Five Thousand (Kshs. 25,000/-). The advocate declined to cater for those expenses. The matter proceeded at noon as per the presiding judge's directions and just before they signed off the Microsoft Teams Platforms, the Defendants/Applicants' advocate indicated that it should be on record that he will not be coming to Court to proceed with the hearing and thereafter left the virtual platform.

11. The Plaintiff/Respondent stated that the Defendants/Advocate had more than 4 months to put in any application he would have wished to but not to adjourn an old matter on the morning of the hearing without any sufficient cause. He stated that the Plaintiff/Respondent has been in perpetual anxiety as he has been desirous to have the matter concluded as it is evident that the Defendants' conduct in this matter is mischievous as they tend to dictate what the court should do. He stated that the particular application in question lacks merit and should be dismissed.

VI. Submissions

12. On December 14, 2021, while in the presence of all the parties herein, the Honorable Court directed that the application be disposed by way of written submissions. All parties fully complied a ruling dated was reserved thereof.

A. The Defendants/Applicants' Written submissions

13. OnFebruary 7, 2022, the Learned Counsel for the Defendants/Applicants the law firm of Messrs. Mwaka Karisa & Company Advocates filed their written submissions in support of the application. The Learned Counsel submitted that the Applicants summarized the background of the case stating that the Plaintiff/Respondent filed the suit on 2nd December, 2016 vide a Plaint of even date against the Defendants/Applicants for vacant possession and/or eviction orders in respect to suit premises, being Plot No. 6325/II/MN, CR No. 55381/2 (original No. 390/II/MN), situated at Utange-Bamburi within Mombasa County. Upon service the Defendants/Applicants filed their responses together with all the pretrial documents for the hearing of the matter which was scheduled for the first time on July 22, 2021 but since the judge was on transfer, the suit could not proceed on that day and the matter was adjourned to November 8, 2021.

14. On November 8, 2021, the advocate for the Defendants/Applicant sought out an adjournment to file an application to cease from acting as they had no further instructions in the matter but the suit proceeded for hearing, leading to the closure of both the Plaintiff/Respondent's and the Defendants/Applicants' cases and further directions made for the filing for written submissions with a mention

date of December 14, 2021to confirm compliance. Being dissatisfied and/or aggrieved with the said directions, the Defendants/Applicants hired another advocate who filed the present.

15. The Learned Counsel submitted that the application was premised on the provision of Articles 50 and 159 of *the Constitution* of Kenya, 2010 as well as Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* as read with Orders 12 of the *Civil Procedure Rules* which provide for access to justice and the procedures on how to access such justice in the circumstances.

16. The Learned Counsel submitted that reopening of a case was always at the discretion of the court and that such discretion should not be applied or exercised to embarrass or prejudice the opposite party reference being made to the cases of "*Raindrops Limited v County Government of Kilifi* [2020] eKLR, *Techbiz Limited v Royal Services Limited* [2021] eKLR, and *Ngugi Kagia v Buci Rotuba Limited* [2019] eKLR.

17. It was the Defendants/Applicants' submission that they never participated in the hearing of the Plaintiff/Respondent's case and that the reopening of the suit is for purposes of recalling the Plaintiff/Respondent for cross examination, which can be done virtually without the necessity of his physical presence in court. The purpose being adducing evidence for the Defendants/Applicants in support of their defence case, otherwise they will be condemned unheard.

18. The Learned Counsel for the Applicants concluded the Defendants/Applicants' submissions by stating that the guided by the documentary evidence, provisions of law tendered herein they pray for the court to grant their application.

B. The Plaintiff/Respondent's written submissions__**

19. On March 16, 2022 the Learned Counsel for the Plaintiff/Respondent, the Law firm of Messrs. the law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written submissions in opposition of the application. Mr. Gakuo the Learned Counsel submitted that it was trite that the Court reserved the discretion on whether or not to grant an adjournment and in the case herein, the Court was justified in declining the adjournment sought as Mr. Kenga the Defendants/Applicants' former advocate claimed to lack instructions on the hearing date.

20. It was the submission of the Learned Counsel that the Defendants/Applicants' application was an afterthought and should be dismissed forthwith as it was the duty of litigants as well as their advocates to ensure that matters are heard expeditiously. The Defendants/Applicants were duly accorded an opportunity to be heard. However they chose to abuse that opportunity at the expense of the Plaintiff/Respondent who was awaiting the orders of this court to enable him utilize his own property

21. The Learned Counsel directed the court and submitted that the courts have jurisdiction to re-open a case. But, the discretion should be exercised in a manner that would not cause injustice to the opposite party. On this issue of purely applying the discretion of the court, the Counsel relied on the case of "*Shah v Mbogo & Another* [1967] EA 1116, the court noted as follows regarding exercise of discretion:

> " the discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice.'

22. The Learned Counsel stated that the Plaintiff/Respondent aligned himself to the sentiments of Justice Onyiego in the case of "*Samuel Kibutha Kamau – Versus - Catherine Chao Nyange* [2021] eKLR whereby the Learned Judge noted as follows:-

> "an advocate is deemed to be fully and duly instructed upon taking a brief from his client. The lawyer had been on record since the interception of the case. He cannot claim lack of sufficient instruction. It is trite that where an advocate refuses to render his professional services at will, the court cannot be accused at any misdeed for properly and judicially exercising its discretion. Further, it is trite that the question whether to grant or not to grant an adjournment is a discretion bestowed upon the presiding judge or court to ensure orderliness, certainty and predictability in the management of court business...to claim lack of instructions is to say the least lack of seriousness and was out of disrespect to court's discretion or management of court affairs. I do not find any reasonable excuse in counsel's refusal to cross examine the Applicant/respondent. I must add that counsel had a chance but he opted for the riskiest option. To stay these proceedings and or re-open the applicant's case will be a travesty of justice. It is trite that proceedings can be stayed specifically and only in circumstances that will not render the determination on substantive justice a mockery. In view of the above finding, I do not find any merit in this application. The Respondent has an opportunity to tender her evidence and thereafter counsel shall submit. On the same vein, the applicant cannot be recalled to re-open his case as he was not to blame for the Respondent's counsel's inexcusable mistake."

23. The Learned Counsel submitted that the Plaintiff/Respondent would be greatly prejudiced if the prayers sought in the application herein by the Defendant/Applicant was allowed as the Plaintiff/Respondent had been desirous to have the matter heard and determined expeditiously. To support its position it made reference to the authority of "*Mbithuka Titus – Versus - Jackline Mutindi* [2020] eKLR. The Learned Counsel concluded by submitting that the application be disallowed with costs to the Plaintiff.

Analysis and Determination

24. I have read and considered the application herein, the affidavit in support and the responses thereto, the written submission of both parties and the relevant provision of *the Constitution* of Kenya and other legal statutory standings. In order to arrive at a just, reasonable, fair and an informed decision, the Honorable court has farmed the following four (4) issues for its determination. These are:-

    a. Whether the decision by the Advocates for the Defendant/Applicant to orally seek for leave to apply to cease acting for the Defendant/Applicant on the material date fixed for hearing on November 8, 2021 was justifiable to have warranted an adjournment.

    b. Whether the proceedings held on November 8, 2021 conducted ex - parte in the absence of the Advocates for the Defendant/Applicant and the Defendant who on the material day fixed for hearing orally sought leave to apply to cease acting for the Defendant/Applicant should be expunged , set aside from the court records?

    c. Whether the court should re - open the case to allow the Defendant/Applicants to cross examine the Plaintiff/Applicant.

    d. Who will meet the costs of this application.

Issue a). Whether the decision by the Advocates for the Defendant/Applicant to orally seek for leave to apply to cease acting for the Defendant/Applicant on the material date fixed for hearing on November 8, 2021 was justifiable to have warranted an adjournment.

25. The right and principles on rendering legal representation are well founded under the Provision of Articles 50 (2) (g) of *the Constitution* of Kenya to wit:

> "(2) (g) Every Person has a right to a fair trial which includes to choose and be represented by, an Advocate and to be informed of this right promptly"

Further, according to the provision of Order 9 Rules 13 of the *Civil Procedure Rules*, 2010 an Advocate may chose to cease from acting for a client by filing a formal in Court and hence such an order with whatever other directions by Court. Until and unless that has happened the Advocate is deemed to be properly on record.

In the instant case, from the Notice of Change dated May 22, 2019the Law firm of Messrs. Kenga & Associates had always been on record for the 1st and 2nd Defendants herein having taken up the matter from the previous Advocates the Law firm of Messrs. Angelo Owino. It was only until the 30th November, 2021 that the incoming Advocates for the 1st and 2nd Defendants, the Law firm of Messrs. Mwaka, Karisa & Company Advocates came formally on record."

26. From the records, on July 22, 2021this matter was fixed for hearing but unfortunately it could not proceed as the then Presiding Judge, Hon. Yano was on transfer but all parties agreed by consensus to fix it for hearing on November 8, 2021. On the November 8, 2021, during the virtual call over, the court indulged Mr. Kenga by rescheduling the hearing period to enable him seek the instruction of his clients and preparing for the hearing at 12.45pm. Unfortunately, when the matter came up he only indicated that he wanted the matter adjourned because he wanted to file an application to withdraw from acting as the Defendants' advocate stating that he had not received any instructions from his clients. The Honorable Court has stated adequately on the position that an advocate is deemed to be duly and fully instructed upon taking a brief from his client.

27. Based on the facts herein, and particularly the conduct by the Advocate, the Honorable Court finds it an acceptable. On this issue, the Court cannot agree more on the decision of "*Samwuel Kibutha Kamau* (*Supra*) cited by the Learned Counsel for the Plaintiff/Respondent. /Ideally, at least the Advocate should have formally moved court through a Chamber Summons application under Order 9 Rule 13 (1) (a), (b) and (c) of the *Civil Procedure*, 2020 with adequate notice to the Plaintiff/ Respondent herein rather waiting until the last date when the matter was ripe for hearing. It is evident that the Plaintiff had to travel all the way from Kericho for this matter a situation would have been averted. For this reason, the Advocate here is to blame. This reason would not warrant for an adjournment at all.

Issue b). Whether the proceedings held on November 8, 2021 conducted ex - parte in the absence of the Advocates for the Defendant/Applicant and the Defendant who on the material day fixed for hearing orally sought leave to apply to cease acting for the Defendant/Applicant should be expunged , set aside from the court records?

28. The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening would not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a

similar application in "*Samuel Kiti Lewa - versus - Housing Finance Co. of Kenya Ltd & another* [2015] eKLR Kasango J. stated:

> 17. Uganda High Court, Commercial Division in the case Simba Telecom v Karuhanga & Anor [2014] UGHC 98 had occasion to consider an application to re - open the case for purpose of submitting fresh evidence. That court referred to an Australian case Smith v New South Wales [1992] HCA 36; [1992] 176 CLR 256 where it was held:
>
> > "If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."
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> 18. The Ugandan Court in the case "Simba Telecom (supra) held thus:
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> > " I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not." .....
>
> 20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay."

29. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay.

30. A perusal of the record, clearly indicates that the hearing date for November 8, 2021was fixed by consent by both parties after they found out the trial judge had been transferred to another station and matters were taken off the causelist with instructions that fresh hearing dates be taken.

Issue c). Whether the court should re - open the case to allow the Defendant/Applicants to cross examine the Plaintiff/Applicant.

31. It is also clear that the court from theNovember 8, 2021, the court indulged Mr. Kenga by rescheduling the hearing period to enable him seek the instruction of his clients and preparing for the hearing. When the matter came up he only indicted that he wants the matter adjourned because he wanted to file an application to withdraw from acting as the Defendants' advocate stating that he had not receive any instructions from his clients. An advocate sis deemed to be duly and fully instructed upon taking a brief from his client.

32. The Honorable Court is alive to the fact that not all counsel's mistakes are excusable or condoned in the pretext or cover of client's interest. The interest of justice is achieved where it is well taken care of and balanced against both parties. The Plaintiff/Respondent equally has a right to have the matter determined expeditiously. An advocate should not deliberately expose his clients to foreseeable risks, such advocate should be fully responsible indemnifying his client where applicable.

33. There is no doubt that the court has discretion to allow re-opening of a case in appropriate circumstances. Needless to state, such discretion must be exercised judiciously and with a view to doing justice between the parties. The court must also be careful not to allow abuse of its processes. Re-opening of a case is an equitable remedy. Therefore, he who seeks this remedy must act equitably and must approach the court with clean hands.

Issue No. d). Who will meet the costs of this application.

34. It is now established principle of law that the issue of Costs is a discretion of court. Costs means the out come of any legal action or proceedings of a litigation process whereon the party is awarded.

    The proviso of the provision of Section 27 (1) of the *Civil procedure Act*, cap. 21 holds that Costs follow events. In this aspect, the event mean the result of the action or proceedings in any litigation process.

    In the instant case, although the Notice of Motion application is partially allowed but the Defendants herein should bear the costa of this application. They should also pay some thrown away costs for the inconveniences caused to the Plaintiff who has had to travel all the way from Kericho.

Iv. Conclusion and Disposition*

35. By and large, the Honorable Court holds that it retains discretion to allow re-opening of a case. It is reiterated that the said discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case would be defeated by inordinate and unexplained delay.

36. Nonetheless, although there was no justifiable and/or good reason why the previous Advocate had to wait that long to have indicated his desires to orally cease acting and other reasons adduced in this ruling, in the interest of natural Justice, Equity and Conscience and in invoking the legal authority founded under Articles 159 (1) and (2) of *the Constitution* of Kenya, the overriding (Oxygen) principles to facilitate the just, expeditious, proportionate and accessible resolution of dispute without regard to technicalities, this being a land matter, founded under the provisions of Sections 3, 13 and 19 of the *Environment & Land Court Act*, No. 19 of 2011, Section 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012 and for avoidance of any doubt, I proceed to make the following directions/Orders.

1. That the Notice of Motion application dated November 29, 2021 be and is hereby conditionally allowed only to the extent of permitting the Defendant to recall the Plaintiff Witness (PW – 1) who testified on November 8, 2021, "Ex Parte" under the provision of Order 18 Rules 10 of the *Civil Procedure Rules*, 2020 exclusively for Cross Examination and Re – examination and thereafter for the Defence hearing and further directions.

2. That the proceedings of this Court taken and recorded on November 8, 2021 remain intact and not to be interfered with at all by any party herein.

3. That both the Plaintiff, 1st and 2nd Defendants herein be and is hereby granted leave within the next 14 days to file and exchange any further documents and statements and/or summon any witness they so wish to counter the Defendant's case.

4. That for expediency sake, this matter to be fixed for hearing and final determination within the next One Hundred and Eighty (180) days from this date. There should be a mention date on September 22, 2022 for compliance of the conditions herein and fixing a hearing date.

5. That the Costs of this application to be borne by the Defendant/Applicant and a sum of Kenya Shillings Twenty five Thousand (Kshs. 25, 000.00) payable to the Plaintiff as thrown away Costs before the next mention date.

6. That failure to comply to any of these conditions herein the Notice of Motion application dated November 29, 2021 shall stand automatically dismissed.

37. It is orderedAccordingly.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2022.

HON. JUSTICE (MR) L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of: -

a. M/s. Yumnah Hassan, the Court Assistant.

b. M/s. Mulongo Advocate holding brief for Mr. Gakuo Advocate for the Plaintiff.

c. M/s. Chengo Advocate for the 1st and 2nd Defendants