



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO. 1066 OF 2013**

**JOHN KARUGA WAHINYA.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, THIKA.....3<sup>RD</sup> DEFENDANT**

**ECOSE SAVINGS AND CREDIT**

**CO-OPERATIVE SOCIETY LTD.....4<sup>TH</sup> DEFENDANT**

**RUTH WANGARI MACHARIA.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 26<sup>th</sup> August 2019 brought under section 1A, 1B (a) and (b), 3A, 23, 6, 3e of the Civil Procedure Act Cap 21, Order 51 Rule 1 and Rule 10 (2) and all enabling provisions of the law.

2. It seeks orders:-

*(a) Spent.*

*(b) That the honourable court be pleased to re-open the plaintiff's case and to take evidence of the Land Registrar who executed the certificate title for LR No. Ruiru/Ruiru East Block 3/1643 and Ruiru/Ruiru East 3/1647 together with its green card.*

*(c) That the honourable court be pleased to allow the plaintiff to summon the Land Registrar who executed the certificate of title for Ruiru/Ruiru East Block 3/1643 and Ruiru/Ruiru East Block 3/1647 and its Green Card.*

*(d) In the alternative, the honourable court be pleased to take the evidence of document examiner to certify the validity or otherwise of the two signatures on certificate of titles No. Ruiru/Ruiru East Block 3/1643 and Ruiru/Ruiru East Block 3/1647 and the Green Card.*

*(e) That costs of the application be in the cause.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 6.

4. The application is supported by the affidavit of John Karuga Wahinya the plaintiff/applicant herein sworn on the 26<sup>th</sup> August 2019 and a further affidavit of David Mukii Mereka, Advocate of the plaintiff sworn on the 29<sup>th</sup> November 2019.

5. The application is opposed, there is a replying affidavit sworn by George Okenyo Omwansa, advocate for the 4<sup>th</sup> and 5<sup>th</sup> defendants sworn on the 20<sup>th</sup> November 2019.

6. The application was canvassed by oral submissions on 10<sup>th</sup> December 2019.

7. It is the plaintiff's/applicant's submissions that Section 3 and 3A of the Civil Procedure Act gives the court inherent power to ensure justice is done. Order 51 rule 10(2) of the Civil Procedure Rules provides that no application shall be defeated on technicality. Article 159 (2) (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities.

8. I have considered the notice of motion, the affidavits in support, the replying affidavits, the oral submissions of counsel and the authorities cited. The issue is whether the application is merited.

9. The plaintiff's application seeks that the case be reopened for them to call the land registrar whose signature is on the two titles. There is no indication of who it is. In the alternative the plaintiff/applicant seeks that the document examiner be allowed to testify to confirm the authenticity of the two signatures. I find that this is too late in the day. I find that the facts in the case of **Joseph Ndungu Kamau vs John Njihia [2017] eKLR** are distinguishable from the facts in this case. In that case the plaintiff had earlier sought an adjournment to produce a court file which was difficult to retrieve in view of its age. Later the court was told it was now available. He plaintiff herein seeks to call witnesses who had not testified before. No reasonable explanation has been given. I also find that the defendant will be prejudiced if the case is reopened. In the case of **Samuel Kiti Lewa vs Housing Finance Corporation of Kenya [2015] eKLR**, Kasango J stated;

***“Uganda High Court, Commercial Division in the case of Simba Telecom vs Karuhanga & another [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 vs 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 situation 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”***

The Ugandan Court in the case of **Simba Telecom (Supra)** held thus;

***“I agree with the holding case 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.”***

Kasango J also observed,

***“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 reopening of the case will be defeated by inordinate and unexplained delay.***

I am guided by the above authority.

10. I find that no justifiable reasons have been given to warrant this court to exercise its discretion in favour of the plaintiff/applicant. I find no merit in this application and the same is dismissed with costs to the defendants/respondents.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 5<sup>TH</sup> day of MAY 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant