



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYERI**

**ELC CASE NO. 230 OF 2016**

**ABID MOHAMOOD BUTT.....PLAINTIFF**

**-VERSUS-**

**FRANCIS MACHARIA WACHIRA.....1<sup>ST</sup> DEFENDANT**

**ROSE NJOKI MUCHEMI.....2<sup>ND</sup> DEFENDANT**

**NICHOLAS WACHIRA MAINA.....3<sup>RD</sup> DEFENDANT**

**CHARLES LOMBO M'MWONYO.....4<sup>TH</sup> DEFENDANT**

**SAMUEL MWINGIRWA MUNYI.....5<sup>TH</sup> DEFENDANT**

**FRANCIS MURIUNGI MWENDA.....6<sup>TH</sup> DEFENDANT**

**JOSEPH M'LIMBERE M'ETARIKA.....7<sup>TH</sup> DEFENDANT**

**FATUMA BASHIR DABASO.....8<sup>TH</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. By a notice of motion dated 30<sup>th</sup> January, 2020 expressed to be grounded upon **Article 159** of the **Constitution of Kenya 2010**, **Sections 1A, 1B and 3A** of the **Civil Procedure Act (Cap. 21)**, **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** and **all enabling provisions of the law**, the 1<sup>st</sup> – 3<sup>rd</sup> and 5<sup>th</sup> – 9<sup>th</sup> Defendants (*the Defendants*) sought to be allowed to re-open their defence case to enable them testify personally before delivery of judgement.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 3<sup>rd</sup> Defendant, Rose Njoki Muchemi, on 30<sup>th</sup> January, 2020. The gist of the Defendants' application was that their former advocates, M/s Nderi and Kiingati Advocates, had erroneously closed their case after calling the 4<sup>th</sup> Defendant as the sole witness for the defence. It was contended that the said advocates did so without the Defendants' authority hence they considered that they had been denied a chance of being heard in the suit in violation of the law.

3. The Defendants also filed two supplementary affidavits sworn by Rose Njoki Muchemi and Samuel Macharia Warui on 9<sup>th</sup> October, 2020 in support of their application. The contents of both affidavits were strikingly similar. It was contended that all the Defendants were former employees of the late Ms Livia Le Poer Trench (*the deceased*) and that prior to her death her wish was to give a portion of the suit property to settle the Defendants thereon in appreciation of their loyal service.

4. The Defendants contended that the executors of the will of the deceased were wrong in selling the suit property to the Plaintiff in violation of the wishes of the deceased and the Defendants' legitimate expectations that they would be settled on part of the suit property. They further contended that they had an overriding interest on the suit property and that should they be evicted they would be rendered homeless and destitute.

5. Finally, the Defendants contended that the 4<sup>th</sup> Defendants had no authority to testify on their behalf and that his evidence was not representative of the rest of the Defendants hence they wished to testify individually before delivery of judgement.

## **B. THE PLAINTIFF'S RESPONSE**

6. The Plaintiff filed a replying affidavit sworn by his advocate, Mwangi Kariuki, on 18<sup>th</sup> February, 2020 in opposition to the application. It was disputed that the Defendants were denied a chance of testifying at the trial. The Plaintiff stated that the Defendants were at all material times present in court including the date of hearing when their advocate presented one witness before closing the defence case. It was further contended that the instant application was filed merely to delay the expeditious conclusion of the suit and that it would be prejudicial to the plaintiff to re-open the defence case.

7. The Plaintiff also filed a further replying affidavit sworn by Mwangi Kariuki on 14<sup>th</sup> January, 2021 in response to the Defendants' further affidavits. It was contended that the Defendants had not demonstrated that they had any new evidence to tender and that they had not annexed any proposed witness statements to demonstrate what additional evidence, if any, they had apart from what the 4<sup>th</sup> Defendant tendered on their behalf.

8. The Plaintiff further contended that if the Defendants had any legitimate claim against the suit property they ought to have directed the same to the executors of the estate of the deceased during the conduct of succession proceedings. It was pointed out that the certificate of confirmation of grant issued in 2013 vested the estate of the deceased upon George Odinga Oraro and Dr. David Morton Silverstein hence the Defendants could not rely on a gratuitous promise by the deceased to claim any portion of the suit property.

## **C. DIRECTIONS ON SUBMISSIONS**

9. When the said application was listed for directions on 1<sup>st</sup> July, 2020 it was directed that the same shall be canvassed through written submissions and the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Defendants filed their submissions on 2<sup>nd</sup> March, 2021 whereas the Plaintiff filed his on 8<sup>th</sup> July, 2020.

## **D. THE ISSUES FOR DETERMINATION**

10. The court has considered the Defendants' notice of motion dated 30<sup>th</sup> January, 2020, the further affidavits in support thereof, the Plaintiff's replying affidavit and further replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

*(a) Whether the Defendants have made out a case for re-opening of the defence case.*

*(b) Who shall bear costs of the application.*

## **E. ANALYSIS AND DETERMINATION**

### **(a) Whether the Defendants have made out a case for re-opening of the defence case**

11. The Defendants submitted that they did not follow the proceedings at the trial hence they did not appreciate the import of closure of the defence case after only one witness had testified. They contended that their former advocates were wrong in failing to allow all of them to testify individually and that the evidence of the 4<sup>th</sup> Defendant alone did not sufficiently cover the individual aspects of their respective circumstances. The evidence of the 4<sup>th</sup> Defendant was said to have covered only his individual circumstances.

12. The Defendants relied upon the case of **SM V HGE [2019] eKLR** in support of their submission that they had been denied a fair hearing by the actions of their former advocates. It was their submission that the deceased had promised to bequeath them some portions of the suit property in lieu of payment of retirement benefits. They consequently urged the court to allow the application to enable them to testify individually on their own behalf.

13. The Plaintiff on the other hand, submitted that the Defendants had not made out a case to warrant the granting of the orders sought. It was submitted that the Defendants had all the time since 2016 to file their individual witness statements but they never did. It was pointed out that they also delayed for about 6 months after the conclusion of the trial to file the instant application. The Plaintiff considered that the Defendants were merely out to delay the conclusion of the suit.

14. The Plaintiff further contended that the Defendants were all along represented by advocates and that they were legally bound by the actions and professional decisions taken by their legal advisors. The Plaintiff cited the case of **Ukwala Supermarkets Company Limited v Ezekiel Muogo Ndubi [2013] eKLR** for the proposition that a duly appointed advocate is deemed to have full instructions whilst conducting a matter on behalf of his client. The Plaintiff also cited the cases of **David Kipkosgei Kimeli v Titus Barmassai [2017] eKLR**, **Samuel Kiti Lewa v Housing Finance Company of Kenya Ltd [2015] eKLR** and **Odoyo Osodo v Ragi Obara Ojuok and 4 Others [2017] eKLR** in opposition to the said application.

15. The court has fully considered the material on record and the parties' submissions on the issue at hand. The court has noted that the Defendants were at all material times represented by an advocate. The material on record also shows that none of the Defendants save the 4<sup>th</sup> Defendant filed a witness statement. The record further shows that the Defendants filed a joint statement of defence raising issues which applied to them generally as former employees of the deceased.

16. The Defendants' former advocates as their legal experts had the lee-way to devise the best strategy of defending the suit. They were entitled to determine whether to file joint or separate defences in the matter. They were also entitled to determine how many witnesses were to be called. Those were professional decisions to be taken by the advocates then on record. The court is of the opinion that it is not open to litigants to apply to re-open a case every time they disagree with the professional judgment of their advocates. There would be no end to litigation if such a practice were to be encouraged.

17. In the case of Susan Wavinya Mutavi v Isaac Njoroge and Another [2020] eKLR the Hon. Justice B. M. Eboso summarized the factors to be considered in an application to re-open a case and tender additional evidence as follows:

**“Over the years, Kenya’s superior courts and courts in the commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial. First, the jurisdiction is a discretionary one and it is to be exercised judiciously. In exercising that discretion, the court is duty bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, evidence must be such that, if admitted, it would probably have an important influence on the result of the case, although it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. See (i) Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamud and Others [2018] eKLR; (ii) Samuel Kiti Lewa v Housing Finance Company of Kenya Ltd [2015] eKLR. (iii) Ladd v Marshall [1954] 3 ALL 745; Reid v Brett [2005] VCS 18; (v) Smith v New South Wales Bar Association (1992) 176 CLR 256; and EB v CT (No. 2) [2008 QSC 306”.**

18. It is well settled that judicial discretion has to be exercised upon reason and sufficient ground. It should not be exercised arbitrarily, or capriciously, or upon sympathy. It is the duty of the applicant to provide sufficient reason to enable the court to exercise judicial discretion in his favour. The court is far from satisfied that the Defendants have demonstrated sufficient reason in the instant application. The mere fact that they disagreed with their previous advocates' professional judgment on the strategy of defending the suit is not sufficient reason in the opinion of the court.

19. The court is not satisfied on the basis of the material on record that the previous advocates committed any error or mistake in devising the Defendants' defence strategy. The mere fact that they decided to call one defence witness as opposed to 9 defence witnesses is not necessarily evidence of a professional error, mistake or negligence. Even if there was an error of judgment in crafting the defence strategy that would not necessarily be sufficient reason to re-open the defence case for the purpose of adducing additional evidence. As was held in the case of Ukwala Supermarkets Company Ltd v Ezekiel Maugo Ndubi (supra) a party is bound by the decisions and acts of professional judgment of his appointed advocate.

20. The court has also considered whether re-opening the case would prejudice the Plaintiff. The material on record shows that the suit was fully heard on 31<sup>st</sup> July, 2019 when the parties closed their respective cases. The parties thereafter filed and exchanged their respective submissions in the same year. It was whilst the suit was pending judgment that the Defendants filed the instant application. Since we are now in 2021 it means that the suit has been pending judgment for about 2 years. Re-opening the case would obviously occasion further delay and prejudice to the Plaintiff.

21. The court has noted that the Defendants have carefully avoided disclosing the new or additional evidence which they wish to tender in their defence. They have glossed over the issue by reiterating the same evidence which the 4<sup>th</sup> Defendant tendered at the trial. The issue of the Defendants having been long time employees of the deceased and the gratuitous promise of gifting them portions of the suit property was canvassed at the trial.

22. In the premises, the court is unable to assess whether or not the proposed additional evidence would have an important influence on the result of the case and whether the same is credible evidence worthy of consideration. The court is of the opinion that it was the duty of the Defendants to persuade the court that their intended evidence meets those qualities but they have failed to do so by failing to make the appropriate disclosures. It may well be the case that the Defendants discovered some gaps in their case after conclusion of the trial and are now out to fill the perceived gaps.

23. The court has further considered the period of delay by the Defendants in filing the instant application. The record shows that although the trial was concluded on 31<sup>st</sup> July, 2019 the Defendants did not file the instant application until 30<sup>th</sup> January, 2020. The delay of about 6 months was not adequately explained. The Defendants were very economical with information on when they sought the second legal opinion from their current advocates and the action they took upon receiving such advice. The material on record shows that the Defendants' current advocates perused the court file on 4<sup>th</sup> December, 2019. That means there was a further unexplained delay of about 2 months until the instant application was filed on 30<sup>th</sup> January, 2020. In the premises, the court finds and holds that there was unreasonable delay on the part of the Defendants in filing the instant application.

24. The Defendants placed reliance upon **Article 50** of the **Constitution** and contended that they had been denied a chance of being heard in the suit. The court has fully considered the material on record and the court is not satisfied that the Defendants' contention is well founded. The obtaining legal position is not that every litigant must testify in every suit. The correct position is that every litigant should be accorded a reasonable opportunity of being heard. Where the litigant is accorded such an opportunity and fails to utilize it then the only question which shall arise is why he did not make of the opportunity. The record of proceedings shows that the concerned parties were accorded opportunity of being heard by the court on 31<sup>st</sup> July, 2019. They opted to call one witness each and close their respective cases.

25. The mere fact that the Defendants did not like the defence strategy of their former advocates does not necessarily mean that they were not accorded a chance of being heard. The mere fact that their former advocates called one (1) instead of nine (9) witnesses does not necessarily

mean that the Defendants were not accorded a chance of being heard. The record simply shows that their previous advocates decided to call one defence witness to testify on behalf of all the Defendants. In the law of evidence, a higher number of witnesses does not necessarily mean that their evidence is more credible than that of a single witness. What matters in law is the quality and credibility of the evidence and not the quantity of the evidence. Consequently, the evidence of a single credible witness might have greater probative value than the evidence of 100 worthless witnesses.

***(b) Who shall bear costs of the application***

26. Although costs on an action or proceeding is at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant in the instant application should be deprived of the costs of the application. Accordingly, the Plaintiff shall be awarded costs of the application.

**F. CONCLUSION AND DISPOSAL**

27. The upshot of the foregoing is that the court finds no merit in the Defendant's application. Accordingly, the notice of motion dated 30<sup>th</sup> January, 2020 by the 1<sup>st</sup> – 3<sup>rd</sup> and 5<sup>th</sup> -9<sup>th</sup> Defendants is hereby dismissed with costs to the Plaintiff.

It is so decided.

**RULING DATED, SIGNED AND DELIVERED AT NYERI VIA MICROSOFT TEAMS PLATFORM THIS 5<sup>TH</sup> DAY OF MAY, 2021.**

**IN THE PRESENCE OF:**

Mr. Kariuki Murugi for the Plaintiff

Mr. Muu for the Defendants

Court assistant - Wario

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**Y. M. ANGIMA**

**JUDGE**

**05.05.2021**