

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 45 OF 2015 (OS)

CATHERINE KIENDE M'ITONGA.....PLAINTIFF/APPLICANT

VERSUS

LAWRENCE MBITI RUTERE.....DEFENDANT/RESPONDENT

RULING

1. Both the plaintiff's case as well as that of the defendant were closed on 14.10.2020 and the matter was scheduled for submissions on 24.11.2020. The plaintiff however filed an application on 8/03/2021 seeking orders to reopen the plaintiff's case.
2. The applicant avers that the matter proceeded in absence of her counsel, her last witness was a lay person who was not accorded the opportunity to be led by the plaintiffs advocate and further the defendant was not sufficiently cross examined. The advocates failure to attend court should not be visited on her as her advocate had assured her that the matter would proceed virtually only for them to accompany him from his office to NKUBU when he was called along the way and he asked her to get back to MERU and seek to have the matter placed aside.
3. The application is opposed by the defendant who avers that the hearing notice by the court was served upon the plaintiff's advocate on 24/08/2020 and on the hearing date the plaintiff and her witness were in court and she was granted an opportunity to proceed with her last witness. Further, she did not raise any issue regarding the absence of her advocate and the allegation that the matter was to proceed virtually is misleading. That he has already filed his submissions and the plaintiff's intention is to delay the finalization of this old matter.
4. The single question falling for determination in this application is **whether the applicant has satisfied the criteria upon which the court should exercise its discretion to re-open a case.** The plaintiff avers that on the hearing date they were on their way to NKUBU and when the advocate on record learnt that the matter was not proceeding virtually he instructed the plaintiff to head back to MERU and seek to have the file placed aside. No explanation has been given to this court as to why counsel was headed to NKUBU on the day of hearing or why upon learning that the matter was to be heard in court he proceed to NKUBU instead of heading back to MERU together with his clients. Further the plaintiff did have an opportunity to re-examine her witness and even cross examined the defence witness.
5. I also find that the application has been made after inordinate delay which has not been explained. The said hearing was on 14/10/2020, but the application was filed almost five months later.
6. It is trite law that 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 inordinate and unexplained delay. The fact is that in this case there is inordinate delay in bringing this application to court and the plaintiff is conducting her case rather casually.
7. I find no merit in the application dated 8/03/2021 which is dismissed with costs to the defendant. Further, as the defendant has already filed his submissions the plaintiff is hereby directed to file her submissions within 7 days of this ruling. Judgment shall thereafter be delivered on notice.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE