



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kibisu v Sangale (Civil Case E003 of 2020)  
[2024] KEHC 8502 (KLR) (Civ) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8502 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E003 OF 2020**

**MA ODERO, J**

**JULY 12, 2024**

**BETWEEN**

**MYRA MMBONE KIBISU ..... PLAINTIFF**

**AND**

**AYAGA M. SANGALE ..... DEFENDANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated 4<sup>th</sup> May, 2023 by which the Applicant Myra Mmbone Kibisu seeks the following orders;-

- “(i) Spent.
- (ii) The Honourable Court be pleased to recall the Plaintiff for further examination in chief, for further cross- examination and re-examination for purposes of adducing material evidence.
- iii. This Honourable Court be pleased to make an order allowing the Plaintiff to call the valuers as witnesses to produce the valuation reports on parcel L.R No. 330/693 located in Thompson Estate Lavington and the property in Shamavilla, Shamakhoko LR. No. Tiriki/Shamakhoko/938 & 939.
- iv. The Plaintiff’s draft further witness statement and valuation report annexed herein be deemed as duly filed.
- v. Costs of this application be in the cause.”

2. The application was premised upon Article 159 (2) (d) of the constitution of Kenya 2010, Section 146 (4) Evidence Act Cap 80, Laws of Kenya, Order 18 Rule 10 of the Civil procedure Rules 2010, Sections



1A, 1B & 3A of the Civil Procedure Act and all enabling provisions of the law and was supported by the Affidavit of even date sworn by Eunice Lumallas an Advocate of the High Court of Kenya.

3. The Respondent Ayaga M. Asangale Opposed the application by filing Grounds of Opposition dated 13<sup>th</sup> June 2023 which were premised upon the following grounds:-

- “ 1. That pleadings in this matter closed within the stipulated time and thereafter pre-trial was concluded before the matter was fixed for hearing.
2. That the matter is part heard and therefore, the plaintiff should not be allowed to circumvent procedure rules by seeking admission of documentary evidence midstream hearing of the case.
3. That the application is an egregious abuse of court process, is an ambush and does not lie in law and is meant to halt the hearings slated for 16<sup>th</sup> instant.
4. That the plaintiff has substantially proceeded with her case and was extensively cross-examined and this application seeking admission of further evidence is meant to steal a match on the defence and bolster her testimony which was extensively shaken in cross-examination.
5. That the Plaintiff is trying to recast her case and seal the weakline subjected to her case.
6. That the application is inundated and malifides, and is therefore unmerited and an abuse of the court process.
7. That in the circumstances, the application is misconceived, frivolous, vexatious, an abuse of the court process, does not lie and is for dismissal ex debito justitiae.

4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 10<sup>th</sup> July, 2023 whilst the Respondent relied upon his written submissions dated 27<sup>th</sup> July, 2023.

### **Background**

5. The Applicant herein filed the originating summons dated 23<sup>rd</sup> June, 2020, in which she sought the following orders:-

- “ 1. Whether L.R No. 330/693 situate in Thompson Estate (Off Kingara Road) in Nairobi was purchased and developed during the parties’ covertures and consequently the Applicant is entitled to a 50% share therein and/or in the alternative there is a presumption of advancement favour by the Applicant to the extent of 50% of the value of the property and which 50% of the value of the property and which 50% share the Respondent be ordered to pay the Applicant.
2. Whether the property in Simakhoko Vihiga District and which is commonly known and designed by the Respodnet as “Shamavilla” was acquired during the parties’ covertures and consequently the Applicant is entitled to a 50% share therein and/or the alternative there be a presumption of advancement in favour of the Applicant to the extent of 50% of the value of the said property: which 50% share the Respondent be ordered to pay the Applicant.



3. Whether the Applicant is entitled to compensation for loss of user from 1987 in L. R No. 330/693.
  4. Whether in the event the Respondent is unable to pay the Applicant the equivalent of 50% of the market value of L.R No. 330/693 together with accrued interest thereon at commercial rates then the two immovable properties be sold and the proceeds apportioned between the parties accordingly.
  5. Whether the Respondent seized a car belonging to the Applicant and whether or not she is entitled to the loss of her vehicle.
  6. Who bears the costs of this suit?”
6. Pre-trial was conducted and the matter was set to be heard by way of *Vive Voce* evidence. The Applicant testified on 9<sup>th</sup> February, 2023 after which the court referred the matter for Court Annexed Mediation. The outcome of the Mediation process is not indicated but the Applicant then filed this application seeking to adduce additional evidence.

### **Analysis And Determination**

7. I have considered the application filed before this court, the Grounds of opposition as well as the written submissions filed by both parties. The only question for determination is whether this application seeking to adduce additional evidence is merited.
8. Order 18 Rule 10 of the [Civil Procedure Rules](#) 2010 provides that

“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”
9. Likewise Section 146 (4) of the [Evidence Act](#) Cap 80 Laws of Kenya authorizes a court to allow for recall of a witness for purposes of adducing further evidence in chief or for further cross-examination with the rider that the parties have the right of further cross-examination if need be. In the case of [Mohamed Abdi Mohammed -vs- Ahmed Abdullahi Mohamed & 3 Others](#) [2018] eKLR the Supreme Court of Kenya set out the guiding principles for admission or additional evidence as follows:-
  - “(a) The additional evidence must be directly relevant to the matter before court and be in the interests of justice;
  - b. It must be established that, if given it would influence or impact the result of the verdict;
  - c. It is shown that it would not have been obtained with reasonable diligence for use at the trial process, was not within the knowledge of or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
  - d. Where the additional evidence adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
  - e. The evidence must be credible in the sense that it is capable of belief;



- f. The additional evidence discloses a stronger prima facie case of will deception on the court;
- g. Whether a party would reasonably have been aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
- h. Whether the additional evidence discloses a strong prima facie case of willful deception of the court;
- i. The court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence;
- (j) The court must find the further evidence needful;
- (k) A party who has been successful at the trial must not seek to adduce evidence to make a fresh case on appeal, fill up the omissions or patch up the weak points in his/her case;
- (l) The court will consider the proportionality and Prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence.”

10. Order 11 of the Civil Procedure Rules which provides for pre-trial procedures does not bar a court from exercising its discretion to allow a party to recall a witness. All the court must ensure is that all parties are accorded a fair hearing.

11. I note that the Applicant this matter is yet to close her case. I am not persuaded that the Respondent stands to suffer any great prejudice if the prayers sought are granted. The Respondent will be given copies of statements/Affidavits of the witnesses to be called and will be granted an opportunity to cross-examine the said witnesses.

Further it is my view that the witnesses to be called will enable the court reach a just decision in this matter.

12. Finally I allow the application dated 4<sup>th</sup> May, 2023 in terms of prayers (2) (3) and (4). The plaintiff's further statements of valuation report to be served upon the Respondent within 14 days. Fresh Hearing dates to be taken before the Presiding Judge Family Division, Milimani Court Nairobi.

13. Since this application was necessitated by the failure /omission of the Applicant to comply fully with Order 11, the costs will be met by the Applicant.

**DATED IN NYERI THIS 12<sup>TH</sup> DAY OF JULY, 2024.**

.....

**MAUREEN A. ODERO**

**JUDGE**

