



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

CONSTITUTIONAL PETITION NO. 1 OF 2015

IN THE MATTER OF A CONSTITUTION PETITION BROUGHT PURSUANT

TO ARTICLES 22 (1) (2) (3) (4) AND 23 (1) (2) (3) (A) (B) (C) (D) (F) 35

AND 258 (1) (2) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND IN THE MATTER OF THREATENED CONTRAVENTION OF THE FUNDAMENTAL

RIGHTS AND FREEDOMS OF THE PETITIONERS AS ENSHRINED AND

PROTECTED UNDER ARTICLE 40 (1) (2), 47, 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF THE AUCTIONEERS ACT

AND

IN THE MATTER OF KERUGOYA PRINCIPAL MAGISTRATE

CIVIL CASE NO. 14 OF 2011 AND NO. 347 OF 2013

AND

IN THE MATTER OF CANCELLATION OF TITLE

TO LAND L.R. NO. MWEA/MUTITHI/STRIP/337

BETWEEN

NJAGI MAGONDU MWANIKI.....1ST PETITIONER

ELIJAH MUCHIRI NJAGI.....2ND PETITIONER

STANLEY MWANIKI NJAGI.....3RD PETITIONER

KARIUKI NJAGI.....4TH PETITIONER

WAGICHUGU NJAGI.....5TH PETITIONER

ROBINSON NGARI NJAGI.....6TH PETITIONER

SIMON KIURA NJAGI.....7TH PETITIONER

DANCUN KARABA NJAGI.....8TH PETITIONER

JOSEPH GITARI NJAGI.....9TH PETITIONER

VERSUS

AGRICULTURAL FINANCE CORPORATION.....1ST RESPONDENT

KEYSIAN AUCTIONEERS.....2ND RESPONDENT

LILIAN WARUGURU KANGEE.....3RD RESPONDENT

ELIAS MWANGI NGUNDU, SAMSON KIARIE

(Sued as the Chairman and Treasurer of

MATITHI WAMUMU SELF HELP GROUP.....4TH RESPONDENT

RULING

1. The Petitioners instituted this petition simultaneously with a Notice of Motion under certificate of urgency on 9th April 2015 seeking the following orders:-

(a) Spent.

(b) That the Honourable Court be pleased to issue a temporary injunction restraining the 3rd Respondent from occupying, selling, dealing or evicting the Petitioners from land parcel No. MWEA/MUTITHI/STRIP/337 pending the hearing and determination of this application.

(c) That the Honourable Court be pleased to issue a temporary injunction restraining the 3rd Respondent from occupying, selling, dealing or evicting the Petitioner from land parcel No. MWEA/MUTITHI/STRIP/337 pending the hearing and determination of the petition.

(d) That the Honourable Court be pleased to issue an order of stay of proceedings in Kerugoya Principal Magistrate Civil Suit No. 374 of 2013 pending the hearing and determination of this petition.

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

2. When the Notice of Motion application was placed before the duty Judge, the same was not certified urgent but the application was fixed for inter-parties hearing on 11th May 2015.

3. When the application finally came up for inter-parties hearing on 16th September 2015, the parties agreed by consent to maintain status quo pending the hearing and determination of the main petition.

4. It was also agreed by consent of the parties that the petition herein be heard by way of viva voce evidence.

5. On 17th January 2018, the hearing of this petition commenced with the 1st and 2nd Petitioners giving their evidence before the petition was closed. The matter was fixed for mention on 23rd May 2018 and 28th June 2018.

6. On 28th June 2018, the parties fixed the case for defence hearing on 20th November 2018. Before the case could be heard, the trial Judge Justice S.N. Mukunya passed on.

7. When this petition came up for mention on 11th July 2019, the Petitioners notified the Court of the Notice of Motion dated 6th August 2019 which is the subject of this Ruling.

8. On 21st November 2019, the parties agreed to have the Notice of Motion dated 6th August 2019 canvassed by written submissions.

PETITIONERS/APPLICANTS CASE

9. The Notice of Motion dated 6th August 2019 is brought under *Section 1(a) and 1(b) and Section 3A CPA and Article 159 of the Constitution of Kenya 2010*. The Applicant/1st Petitioner is seeking the following orders:

(a) That this case be heard Denovo.

(b) That the 1st Petitioner be granted leave to file a further supporting affidavit to the petition.

(c) That the costs of this application be in the cause.

10. According to the 1st Petitioner/Applicant, this application has been necessitated by consultation with his new firm of Advocates where he realized that some documents and issues were not captured in the affidavit in support of the petition which he now wishes to be given an opportunity to include further list of documents.

11. The 1st Petitioner/Applicant contends that those documents and facts are vital to the determination of this petition. He attached copies of the alleged documents and marked “**MJa** and **MJb**”.

12. The 1st and 2nd Respondents did not file any response to the said application.

3RD RESPONDENT’S CASE

13. The 3rd Respondent through the firm of Kiguru Kahiga & Co. Advocates opposed the said application vide grounds of opposition dated 9th September 2019 and filed the same date.

14. According to the 3rd Respondent, the said application lacks merit and does not lie in that the Petitioner/Applicant has at all times been represented by a competent firm of Advocates and directions were procedurally taken out.

15. The 3rd Respondent also contends that the application is made with unreasonable delay as the Petitioner has already testified.

4TH RESPONDENT’S CASE

The 4th Respondent did not file any response to the said application.

SUBMISSIONS BY THE 1ST PETITIONER/APPLICANT

16. The 1st Petitioner/Applicant submitted that this petition is part-heard by Hon. Mr. Justice Mukunya (deceased) and that it is only fair that the same be heard afresh.

17. The 1st Petitioner/Applicant also submitted that proceeding with the matter in the absence of an advocate who is on record unknowingly to everyone was fatal and that he has attached documents which he alleges were inadvertently left out and that the Respondent will not be prejudiced if the application is allowed.

3RD RESPONDENT’S SUBMISSIONS

18. The 3rd Respondent submitted that this petition had proceeded and the Petitioner/Applicants testified and closed their case.

19. The 3rd Respondent further submitted that the hearing of this petition proceeded after directions were taken out on 19th October 2017 when parties submitted that they had duly complied with all preliminary issues of filing and exchanging documents and hence the matter was certified ready for hearing.

20. The 3rd Respondent also submitted that this application is a mere after thought in that the Applicants had all the time to put their house in order before the matter took off for hearing and even before they closed their case on 8th May 2018.

21. In conclusion, the 3rd Respondent submitted that to re-open the matter for hearing afresh will be prejudicial to the Respondents.

ANALYSIS AND DETERMINATION

I have considered the Notice of Motion and the supporting affidavit dated 6th August 2019. I have also taken into consideration the submissions by the parties. It is not in doubt that this suit was confirmed for hearing and proceeded whereby the plaintiff closed its case. The case was adjourned for defence but the trial Judge Hon. Mr. Justice S.K. Mukunya lost his life in a tragic fatal road accident (his Soul Rest in Eternal Peace). The plaintiff changed Advocates and filed the present application. The principles governing an application such as before the Court are that the Courts needs to establish why the evidence sought to be introduced now was not adduced prior to the plaintiff’s case being closed. Re-opening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is discretionary one which must be exercised judiciously. While considering a similar application, **Kasango J.** in the case of **Samuel Kitilewa Vs Housing Finance Co. of Kenya Ltd & another** stated as follows:

“18. The Ugandan Court in the case SIMBA TELECOM (supra) held thus:

“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 re-opened. Consequently even after the case has been re-opened, 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 inordinate and unexplainable delay”.

The evidence given by the Plaintiff in support of this application is that the hearing of this case proceeded without the involvement of the 4th Defendant who had Entered Appearance through the firm of Irungu Mwangi Advocate but failed to file defence. The Plaintiff also stated that he left an important document which he now wishes to produce in evidence. The Plaintiff also contends that he was not served with a notice of judgment and his advocate was not also notified. However, he has not provided any satisfactory explanation why he was not able to adduce the additional evidence which he now wishes to introduce. Be that as it may and considering that I was not the initial trial Judge and that Hon. Mr. Justice S. N. Mukunya passed on, I exercise the Court’s discretion and allow the application on the following terms:

(1) This case to be heard Denovo.

(2) The 1st Petitioner is granted 14 days to file and serve additional list of documents.

(3) The Respondents shall be at liberty to file and serve a further list of documents in response within 14 days from the date of service thereof, if need arise.

(4) The costs of this application shall be costs in the cause.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 8TH DAY OF MAY, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Wambui holding brief for Mr. Kiguru Kahiga for the Defendants
2. Mr. Asimwe holding brief for Wanjiru Wambugu
3. Mbogo – Court clerk