



**Nzuki v Muthoka & another (Environment & Land Case
E018 of 2020) [2025] KEMC 31 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEMC 31 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
ENVIRONMENT & LAND CASE E018 OF 2020
YA SHIKANDA, SPM
MARCH 10, 2025**

BETWEEN

MARY NDUKU NZUKI PLAINTIFF

AND

JOHN MWENDWA MUTHOKA 1ST DEFENDANT

ROSE MUTETE 2ND DEFENDANT

RULING

1. The Plaintiff herein moved the court by way of a Notice of motion pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*. The application is dated 10/6/2024 and was filed on 28/6/2024. The application seeks the following orders:
 1. The Honourable court be pleased to re-open the plaintiff's case with a view to introducing a survey report;
 2. The Honourable court to issue an order directing the Makueni County Surveyor to prepare and file a survey report on the acreage of the suit property known as Makueni/Nzau/459 within 14 days;
 3. The costs of the application be provided for.
2. The application is supported by the affidavit of the plaintiff/applicant and is premised on the following general grounds:
 - a. The plaintiff filed this suit citing trespass on the part of the defendants;
 - b. The matter proceeded in court and the same was closed on 3/6/2024;
 - c. The case was closed without a survey report which is a crucial document that will enable the court arrive at a just determination;



- d. The applicant had through her Advocate made an oral application to have the survey report adduced but was directed to make a formal application;
- e. The survey report can only be availed if the case is re-opened and have the County Surveyor prepare and submit the same;
- f. No prejudice will be suffered by the defendants if the case is re-opened and the County Surveyor avails the report;
- g. It is in the interest of justice that the application be allowed.

In the affidavit in support of the application, the applicant reiterated the grounds on the face of the application. The plaintiff filed a further affidavit to emphasize on the grounds for the application.

The Response

3. The defendants opposed the application by filing a Replying affidavit sworn by the 1st defendant herein on 19/7/2024. The 1st defendant deposed that the application was inept, frivolous, vexatious and an abuse of the court process. That the plaintiff was granted an opportunity to file the application on 26/9/2022 but she did not do so until all the witnesses had been heard and the cases closed. That the plaintiff ought to have procured the report prior to filing the suit and no reason has been given to explain why the report was not procured prior to the filing of the suit. The defendants deposed that justice delayed is justice denied and that litigation must come to an end.

Main Issues For Determination

4. Having considered the application and the response by the 1st defendant, I find that the main issues for determination are as follows:
 - i. Whether there are sufficient grounds for the court to re-open the case or hearing;
 - ii. Whether the court should order the County Surveyor to prepare and submit a survey report;
 - iii. Who should bear the costs of the application?

The Plaintiff's/applicant's Submissions

5. The applicant filed written submissions. She submitted that the court has to facilitate access to justice for all persons. That the jurisdiction to re-open a case is discretionary and must be exercised judiciously. The applicant mentioned five principles that, in her view, govern an application to re-open a case and contended that she had satisfied all the requirements. The plaintiff relied on various provisions of law as well as case law but did not bother to provide copies of the authorities relied upon. The plaintiff argued that the application was not an afterthought and had been brought without unreasonable delay.

The Defendants' Submissions

6. The defendants also filed written submissions. The defendants agreed that the decision to re-open a case was discretionary. However, the defendants argued that a party seeking to re-open a case must show that they have discovered some new and important evidence which was not within their knowledge. The defendants argued that the applicant ought to have known the need of a survey report even before filing the suit. That the application was an afterthought meant to seal the loopholes in the plaintiff's case. The defendants further argued that the application had been brought after inordinate delay. The defendants contended that re-opening the case would be prejudicial to them. The defendants urged the court to dismiss the application and relied on the following authorities:



- a. Samuel Kiti Lewa v Housing Finance Co. of Kenya & another [2015] eKLR;
- b. Nairobi ELC No. 573 of 2011- Thomas Kinyua Mbeu v Maurice Ndambuki Kitivo.

Analysis And Determination

The legal provisions

6. Section 1A of the [Civil Procedure Act](#) provides as follows:
 - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".
7. Section 1B provides as thus:
 - (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology".
8. Section 3A provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

Order 18 rule 10 of the Civil Procedure Rules provides as follows:

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. Section 146(4) of the [Evidence Act](#) provides that:

The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”



Analysis

10. I have considered the application, the response by the defendants as well as the parties' submissions. In the case of *Dominic Mutua Maweu v Occidental Insurance Co. Limited* [2014]eKLR, the court allowed the defendant to re-open the defence case and produce a policy Insurance which had been omitted during the defence hearing. In allowing the application, the court observed as follows:

“I cannot find any basis of refusing the prayer sought by the defendant. As rightly submitted by the defence, this court is obligated to give effect to the overriding objective of section 1A of the *Civil Procedure Act* Cap 21. The pertinent part of that objective is that this court should facilitate the just resolution of civil disputes. In my view, the ends of justice would be best served by allowing the prayer sought.”

11. In the Australian case of *Smith v New South Wales* [1992] HCA 36; (1992) 176 CLR 256, 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 situations 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.”

12. In the case of *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another* [2015]eKLR relied upon by both parties, it was held that the court retains discretion to allow re-opening of a case. The court further held that the discretion must be exercised judiciously. That 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. Further, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay. In the case of *Hashi Shirwa v Swalahudin Mohamed Ahmed* [2011]eKLR, the court observed that re-opening a case is not an impossibility but there must be cogent reasons for re-opening and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case. While declining a similar application, the court held as follows:

13. A court has a duty to ensure parties are fair to each other and not conduct trial by ambush. The role of the court in this shroud of mystery is to be an impartial umpire ensuring that there is no rough tackle and offside play. Litigants are not in a game of chess where for every move made, there must be a counter move and re-introduction of a checkmate. If the court allowed that, litigation would never end.”

14. In my view, re-opening of a case is an indulgence requested from the court by a party in default. He is not entitled to the indulgence. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to re-open the case will be exercised judiciously in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant to provide the court with a full, honest and acceptable explanation of the reasons for failure to avail the evidence sought to be adduced by re-opening of the case. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.



15. I agree with the defence that having sued the defendants for trespass, the plaintiff ought to have realised the need for a survey report before filing the suit. Had the plaintiff exercised due diligence, she would have caused the survey to be done and a report prepared before filing the suit. The record indicates that on 26/9/2022, counsel for the plaintiff asked the court to direct the Surveyor to visit the site and conduct a survey. The defence did not object to the application on condition that the plaintiff pays the costs of the survey. It would appear that the plaintiff was not ready to meet the full costs. The court then directed the plaintiff to file a formal application on the issue. This was even before the plaintiff testified.
16. Upon the court giving the directions, the plaintiff opted to proceed with the hearing. The plaintiff did not bother to file the application until 28/6/2024 after both parties had closed their cases. This was after a period of one year and nine months from the time the plaintiff was directed to file a formal application. The Plaintiff seeks an equitable remedy. It is the kind of prayer that calls upon the court to exercise its discretion. In my view, the court retains discretion to allow the application. The discretion must be exercised judiciously. In exercising such discretion, the court should ensure that granting the orders sought does not embarrass or prejudice the opposite party. In that regard, the prayers sought should not be granted where it is intended to fill gaps in evidence. Furthermore, such prayer would be defeated by inordinate and unexplained delay.
17. In my view, the delay in filing the application was inordinate. The plaintiff/applicant did not even bother to explain the delay. In any event, it was the duty of the plaintiff to obtain the survey report even before filing the suit. After filing the suit, the plaintiff saw the need for a survey report and was directed to file a formal application. That was not done until after about two years. The plaintiff waited for all the evidence to be taken and now wants to re-open the case and introduce evidence. Article 159(2) (b) of *the Constitution* of Kenya provides that justice shall not be delayed. Justice herein has been delayed. In the case of *Argan Wekesa Okumu v Dima college Limited & 2 Others* [2015] eKLR, Mabeya J held that when delay has been established, unless it is well explained, it becomes inexcusable.
18. Section 1A of the *Civil Procedure Act* provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and that the Court shall, in the exercise of its powers under the Act or the interpretation of any of its provisions, seek to give effect to the overriding objective. It is also provided that a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. Section 1B of the *Civil Procedure Act* enjoins the court to ensure timely disposal of proceedings, among other things. The plaintiff has, without reasonable cause or excuse, failed to assist the court to further the overriding objective of the Act.
19. My view is that a party in default cannot claim as of right, but must earn the court's succour. The same applies to the overriding objective captured under sections 1A and 1B of the *Civil Procedure Act*. A party who decides to sit on their rights and delay or derail the due process cannot hide under the guise of "procedural technicality". Expeditious disposal of disputes is key to all cases and is fundamental to the administration of justice. It is a component of substantive justice as opposed to mere procedural technicalities. I would borrow the words of the Court of Appeal in the case of *John Onger Mariaria & 2 Others v Paul Mutundura* [2004] 2EA 163, wherein the Court observed quite authoritatively that:

Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulderswhereas it is true that the court has unfettered discretion, like all judicial discretions, must be exercised upon reason not capriciously or sympathy alone.....



justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”

20. In the case of *Aggrey O. Obarev Telkom Kenya Limited*[2011] KEHC 2161 (KLR), Kimaru J (as he then was) had this to say on the issue of delay:

In the present application, although the proceedings were ready on 30th August 2010, (within the period in which the applicant would have lodged the appeal) the applicant did not present the present application to this court until three months later i.e. on 1st December 2010. The applicant did not give a cogent reason for this delay. It is clear that the applicant was indolent. He is guilty of laches. This court cannot exercise its discretion in favour of such indolent litigant. The justice of this case demands that this court declines to exercise its discretion in favour of the applicant”

21. In the case of *Abigael Barmao v Mwangi Theuri* [2013] KEELC 78 (KLR), Munyao Sila J held:

“My view of this application is that the plaintiff has been guilty of laches. If a proper explanation had been provided as to why there has been a delay of more than 4 years, then probably I would have been moved to grant the injunction. But no explanation has been given, and I can only conclude that the plaintiff is guilty of delay. There is no doubt that 4 years before seeking relief is a period that is inordinately too long. I therefore decline to grant the injunction sought but make no orders as to costs. I direct the plaintiff to set down the suit for hearing and the matter to be determined on merits”.

22. The remedy sought by the plaintiff is founded in equity and one of the maxims of equity is that "delay defeats equity". In *Snell's Equity*, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in *Smith v Clay* (1767) 3 Bro. C.C. 639n. at 640n) it is asserted that a court of equity:

has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."

23. The plaintiff herein is guilty of laches. She has not even explained why she could not move the court in good time even after intimating to court that there was need for a survey report. Furthermore, the survey report does not even exist. The plaintiff wants the court to assist her in obtaining the survey report by directing the County Surveyor to conduct the survey. It is not for the court to look for evidence that shows whether or not the defendants trespassed on the plaintiff's land. It is for the plaintiff to prove or adduce evidence that would establish that fact.

24. My understanding of sections 1A, 1B and 3A of the *Civil Procedure Act* is that the provisions cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules. In my view, the overriding objective was brought to ensure that justice is served to both parties and further, where there is a conflict of the Oxygen Rules Principles with the substantive law, the law ought to be interpreted in such a manner that will ensure the administration of justice. I find nothing in the overriding objective to suggest that a delay of almost two years which has not been sufficiently explained can be excused.

25. Delay is an anathema to a fair trial which is one of the key fundamental rights provided to all litigants under Article 50 of *the Constitution*. Furthermore, it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party to bring their action after undue inordinate delay, without any justifiable reason. The provisions of law as well as the authorities relied upon by the plaintiff are not in her favour. The plaintiff cannot expect the court to fish for new evidence after the hearing has been concluded



and without proper basis. The application is clearly an afterthought calculated to fill in gaps in the evidence. Our system of justice is adversarial in nature. The court should not be used to aid an indolent party under the tag of “interest of justice”. I think I have said enough to show that the application is untenable. The conduct of the plaintiff as explained above defeats the prayers sought. The plaintiff cannot go into slumber then wake up and expect the court to assist her in building her case without even explaining why she was asleep all that time.

Disposition

26. In view of the foregoing, I find that the application is devoid of merit. I proceed to dismiss it with costs to the defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 10TH DAY OF MARCH, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y. A SHIKANDA

