



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Ndichu & others (Environment and Land Case 190 of 2017)
[2025] KEELC 7951 (KLR) (18 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE 190 OF 2017**

JA MOGENI, J

NOVEMBER 18, 2025

BETWEEN

REGINA NJERI NJOROGE PLAINTIFF

AND

LILIAN WANGUI NDICHU & OTHERS DEFENDANT

RULING

1. By a Notice of Motion dated 6/03/2025 brought under Section 146(4) of the *Evidence Act*, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya the 1st Defendant/Applicant seeks Orders:-
 1. Spent.
 2. That the Plaintiff be recalled for Cross-Examination.
 3. That costs of this Application be in the cause.
2. The application is based on the grounds on the face of it and supported by the Affidavit of Zakayo Kimani Maina sworn on 6/03/2025:
 - i. That the Defendants/Applicants will suffer injustice if the evidence of the Plaintiff is not put under scrutiny by way of Cross-Examination.
 - ii. That the hearing of the Plaintiffs case proceeded ex-parte and the Defendant's did not get an opportunity to cross-examine the Plaintiff.
 - iii. That Counsel for the Applicants/Defendants was unable to attend to this matter as he had another matter in Milimani Law Courts being Millmani Child Case E140 of 2025 requiring his Physical attendance as the children were going back to school around that time hence was a matter of urgency.



- iv. That Counsel for the Applicants had informed the Other Counsels in this matter and requested for their indulgence which they agreed to indulge him.
 - v. That it is in the interest of Justice that the Application is allowed.
3. The application is opposed. The Respondent filed a Replying Affidavit sworn on 25/03/2025 where the Plaintiff/Respondent deposes that the Applicant only avers that the Counsel was in Milimani in a matter but there is no Cause List attached. Further that the Applicant has not bothered to pay throw-away costs yet the Respondent incurred costs in having the Valuer in Court. Further he avers that the Counsel who was holding brief did not raise any objection in the matter proceeding.
 4. He contends that the application has been brought after undue delay just a day to the hearing.
 5. The Counsel for the Applicant also filed a Supplementary Affidavit dated 2/04/2025 and attached a Cause List from Milimani from the Magistrate's Children's Court showing that he could not attend a matter at Thika ELC Court because he was attending a matter at the Magistrate's Court.
 6. The Court directed that the Notice of Motion be canvassed by way of written submissions.
 7. The Defendant/Applicant's filed their submissions dated 6/04/2025 and submitted that the Court should consider the application since *the Constitution* under Articles 25 and 50 provides for the right to a fair trial. Further that the Counsel who was holding brief had been directed to mute his microphone when he attempted to address Court and so he was not able to inform the Court about the Counsel who was held up in Milimani.
 8. The Applicant further submits that since the Plaintiff has not closed their case and they were to invite another witness they will suffer no prejudice if the recall for cross-examination orders are granted. That the Defendants should not be punished for mistakes of the Counsel and that the Court should under Section 146 of the *Evidence Act* exercise discretion and allow the application.
 9. In response the Plaintiff/Respondent filed their submissions dated 4/06/2025 and the gist of his submissions are that the Counsel for the Defendant/Applicant chose not to attend Court deliberately since the date of the hearing was taken in Court when they were in attendance.
 10. That there is no good enough reason to avail the Court to exercise its discretion of recalling a witness that has been placed before the Court by the Defendant/Respondent.
 11. Further whereas this matter was scheduled for hearing on 12/03/2025 the Applicant served the Plaintiff/Respondent on 11/03/2025 with the application dated 6/03/2025. This is a move that comes after undue delay given the time it has taken to file the application. The Respondent urged the Court to dismiss the application.
 12. I have considered the Notice of Motion and the Affidavit in support. I have also considered the Grounds of Opposition, the written submissions of the Counsel and the authorities cited. The issue for determination is whether this application is merited.
 13. I have gone through the Court record on the 25/02/2025 where Mr Njoroge who was holding brief for Mr Kang'iri informed the Court that Mr Kimani had sent an email that he will be ready to proceed. He however informed the Court that he had not received any communication from the other Defendants.
 14. Since there was no email on record or reason why Mr Kimani was not ready to proceed, the matter was set for hearing at 10:15 am but proceeded at 10:38 am with only Counsel for the Plaintiff in attendance – Mr Kang'iri and the Plaintiff Regina Njeri Njoroge testified. The next hearing date was set for 12/03/2025 and the instant application was filed on 11/03/2025.



15. I have considered the relevant provisions specifically Section 146(4) of the *Evidence Act*, Order 18 Rule 10 of the Civil Procedure Rules, Article 50 (1) and 159 (2) (d) of *the Constitution* 2010. I find that the 1st - 7th Defendants/Applicants and 9th to 17th and 19th to 20th Defendants ought to be given an opportunity to be heard. The Applicants' averment that the Counsel was attending a matter in the Children's Court is opposed although I note that this is a Court which does not take precedence over the Environment and Land Court. However, as Article 159 implores us not to consider the technical issues but commit to dispensing justice. Indeed, a mistake of Counsel ought not be visited on the client but not always since the case belongs to the litigant and not the Counsel.
16. I note that only the Plaintiff testified and closed her case on that date. No prejudice will be occasioned to the Plaintiff if she is recalled for cross examination.
17. This being a land matter it is important that all parties are given an opportunity to be heard so that they are not locked out to the seat of justice but this must always be considered through the prism of Section 1, 1A, 3, and 3A. I have considered the prevailing circumstances herein and I find that the 1st Defendant/Respondent herein who is the registered proprietor of the suit land ought to be heard.
18. In the case of James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR, the Court of Appeal observed as follows: "The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

"There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

19. I find merit in the application and the same is allowed. I thereby grant the orders sought namely:-
 - a. The Plaintiffs' case be and is hereby reopened for the Defendants to cross examine the Plaintiff.
 - b. The 1st - 7th Defendants/Applicants and 9th to 17th and 19th to 20th Defendants to cater for the Plaintiff's Counsel and witnesses costs totaling Kshs. 10,000/- within the next 14 days from the date hereof.
 - c. The matter to be fixed for hearing within the next 45 days from the date hereof.
 - d. If the Defendant fails to comply with the above terms, the Plaintiff will be free to take a Judgment date.
 - e. Mention for compliance and to take a hearing date on 16/02/2026.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF NOVEMBER, 2025 VIA MICROSOFT TEAMS.

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MOGENI J
JUDGE



In the presence of:

Ms. Mugo holding brief for Mr. Kang'iri for the Plaintiff

Ms. Thuo holding brief for Mr. Kimani for 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th – 17th Defendants

Mr. Gitau for 1st, 8th and 18th Defendants

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

