



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC. CASE NO. 221 OF 2014

JONES MULULU MUEKE.....
PLAINTIFF

VERSUS

ANTONY KIOKO MWANIKI.....
DEFENDANT

RULING

1. This is a ruling concerning the notice of motion dated 15/03/2025, filed by the plaintiff, expressed to have been moved under **Article 50(1)** and **Article 159(2)(b)** and **(d)** of the Constitution of Kenya, **Section 19(1)** of the **Environment and Land Court Act, 2012**, **Sections 1A, 1B,** and **3A** of the **Civil Procedure Act, Order 51 Rule 1** and **Order 45 Rules 2** and **5** of the **Civil Procedure Rules, 2010**, along with all other relevant provisions of the law. The plaintiff prays for the following orders:

- a. THAT the plaintiff's case in the main suit be reopened and the plaintiff, being the only witness, be allowed to testify based on his amended plaint dated 13th May 2021 and subsequent amended pleadings.**
- b. THAT the honourable court be pleased to review its orders on the costs imposed on the plaintiff for adjournment of the hearing of 26/02/2025, and a refund of the said costs and court adjournment fees be refunded to the plaintiff by the defendant.**
- c. THAT the defendant be barred from raising any further objections and/or applications geared at derailing the hearing of this matter, the matter having gone through pre-trial on 6/11/2024.**
- d. THAT the defendant bear costs for the motion.**

2. The motion is based on the grounds listed on the face thereof and the supporting affidavit sworn by the plaintiff on 15/03/2025. In summary, he asserts that although he testified and closed his case on 23/10/2018, subsequent to this, a co-defendant tragically passed away, causing the suit against him to abate.

3. Further, the parties subsequently amended their pleadings, with the plaintiff submitting an amended plaint dated 13/05/2021, the defendant filing an amended statement of

defence along with an amended counterclaim dated 05/05/2023, and the plaintiff subsequently filing a reply to the amended defence and a defence to the defendant's counterclaim on 26/04/2023. A new pre-trial directions session was conducted on 6/11/2024, during which he presumed that the matter was to be heard *de novo* on 26/02/2025. However, the court ruled otherwise, necessitating the need to reopen his case.

4. He maintains that the defendants are responsible for the adjournment during the hearing of the suit on 26/02/2025, as they raised an objection which the court upheld. Furthermore, he was prepared to testify, and therefore, costs should not have been imposed against him. Additionally, he requests that this court prevent the defendants from raising future objections, as such actions hinder the progression of this matter.
5. The motion is challenged by the defendant's replying affidavit of 4/04/2025, in which he asserts that the plaintiff's claim that the land subdivision took place during the course of the litigation is contradicted, with evidence indicating that it occurred prior to that period. No new or important evidence justifies reopening the case; any such evidence could have been obtained earlier with reasonable diligence.
6. Allowing the case to be reopened would be an injustice, as the plaintiff has not explained the significant delay in seeking to

reopen it. The costs for adjournment were rightly imposed on the plaintiff, who failed to notify the court or the opposing party in time, and the plaintiff has not met the legal threshold for review, lacking both new evidence and any error apparent on the record. The request to bar the defendant from making further objections is characterised as unprecedented and contrary to the principles of a fair trial.

7. In quick rejoinder, the plaintiff's supplementary affidavit reiterated the averments in his earlier affidavit. Subsequently, the court directed the parties to submit written arguments with clear directions regarding the page limitations. However, Messrs. **Purity Mureithi & Co. Advocates** for the plaintiff and **Fred K. Musyimi & Associates Advocates** for the defendant failed to adhere to these directives and submitted extensive arguments. Without unnecessary elaboration, and guided by the Supreme Court of Kenya's decision in **Okoti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others [2023] KESC 69 (KLR)**, this court hereby strikes out these submissions.

Issues for determination, Analysis and Determination.

8. Thus, having given careful thought to the motion, its grounds and affidavits, the distilled issues for determination that will adequately address the matters in controversy are: -

a. Whether the plaintiff should be recalled.

b. Whether the plaintiff has met the legal threshold to warrant the review of the orders issued in the impugned ruling.

c. Whether the defendant should be barred from raising objections during the hearing of this matter.

These issues shall be handled in chronological order shortly.

a. Whether the plaintiff should be recalled.

9. The pertinent legal provisions addressing this matter are located in **Section 146 (4)** of the **Evidence Act**, which authorises the court to recall a witness for additional examination-in-chief or further cross-examination. This Provision is mirrored in our **Order 18, Rule 10** of the **Civil Procedure Rules (CPR)**, which also grants the court the authority to pose questions to a witness.

10. In reopening a case, the court exercises judicious discretion rooted in law, evidence, and reason. The criteria to be applied in this discretionary exercise were comprehensively summarised by the persuasive decision of **Susan Wavinya Mutavi v Isaac Njoroge & another [2020] KEELC 8 (KLR)**, as follows:

“First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that

the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible."

11. Having reviewed the grounds laid out in the motion and examined the record, this court does not entertain in its mind that the plaintiff has satisfied the legal threshold to warrant the exercise of discretion in his favour. This conclusion is drawn from the fact that, after he had closed his case and prior to the testimony of the defence, he discovered that the substance of the adjudication, namely **L.R. No. Machakos/Mua Hills/ 601 (the suit property)** had been subdivided to create **Machakos/ Mua Hills/ 1484-1487**. This subdivision prompted various amendments to the pleadings by all parties involved. In

granting the plaintiff's application to amend the plaint, the court, in its ruling of 30/04/2021, duly found that the subdivision was *pendente lite*.

12. Accordingly, having made such a finding, the plaintiff's recall is obviously not intended to fill gaps in his case; rather, this evidence on subdivision was not reasonably available to him at the time of his testimony. The production of records of such subdivisions is crucial to his case. Furthermore, the defendant is responsible for the circumstances that the plaintiff now faces, and he cannot be permitted to gain an advantage over the plaintiff and benefit from his illegality. Therefore, this court finds that such relief is justified.

b. Whether the plaintiff has met the legal threshold to warrant the review of the orders issued in the impugned ruling.

13. With respect to this issue, the relevant provisions governing the review of court decisions are set out in **Section 80** of the **Civil Procedure Act** and **Order 45, Rule 1** of the **CPR**. **Section 80** states that;

“Any person who considers himself aggrieved-(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which

passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

14. Further, **Order 45, Rule 1(1)**, of the **CPR** provides as follows:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

15. The salient conditions brought out in **Order 45 Rule 1 (1)** of the **CPR**, such as the discovery of new and important matter, mistake, and sufficient cause, have to be proved by an applicant, and in dealing with such applications, the court has to exercise its judicious discretion. With regard to the prevailing jurisprudence, this court aligns itself with **paragraph 32** of the Supreme Court's decision in **Parliamentary Service Commission v. Wambora & 36 others [2018] KESC 74 (KLR)**, in which it articulated the following non-exhaustive guiding principles for the consideration of applications for review of court decisions:

(i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court. (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court; (iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application. (iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically. (v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the

decision under review. (vi)The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:(a)as a result a wrong decision was arrived at; or(b)it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

16. Accordingly, in the circumstances of this case, the plaintiff has not indicated that the basis of the motion involves an obvious error on the face of the impugned ruling, a mistake, or sufficient cause. He is reiterating reasons why the costs should not have been imposed upon him. However, guided by the decision in the **Parliamentary Service (Supra)**, the court concludes that the plaintiff is attempting to re-argue his case, which is not permissible in review proceedings. This court further determines that it is *functus officio* in this matter and that the grounds raised are not suitable for review but are appropriate for an appeal. Consequently, this court finds that the relief sought is unmerited.

c. Whether the defendant should be barred from raising objections during the hearing of this matter.

17. This is an unusual prayer and encroaches upon our principles concerning the right to a fair hearing. As articulated in the decision of the Supreme Court of Kenya in **Muruatetu &**

another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2017] KESC 2 (KLR), the right to a fair trial is a non-derogable right and constitutes one of the foundational elements of a just and democratic society. The absence of this right would inevitably lead to the collapse of the rule of law and diminish public confidence in the justice system.

18. The European Court of Human Rights recognises that the right to a fair trial extends to both criminal and civil proceedings and aims to guarantee that a litigant is not deprived of the opportunity to present his case effectively before the court. **See paragraph 87 of the decision of the Apex Court in Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR).**

19. Considering all these factors, there is, without any doubt, that the reliefs sought by the plaintiff are unwarranted. This court affirms this because the prayers he is requesting contradict the fundamental principles outlined in **Article 25(c)** of the **Constitution** and the right to a fair hearing, which is underpinned by **Article 50**.

20. In elucidating this constitutional right, which is extensive and encompasses the right to a fair trial, the decision of the Supreme Court of Kenya in **Kidero & 4 others v Waititu & 4 others [2014] KESC 11 (KLR)** acknowledged that the principles of natural justice support this right. These principles include the concepts of *audi alteram partem* (hear the other

side; no one shall be condemned unheard) and *nemo judex in causa sua* (no man shall judge his own case). In consequence, this court therefore finds this prayer is not merited.

21. In the end, and for the above reasons and findings and considering this is an interlocutory ruling, this court grants the following final orders: -

a. Plaintiff's case shall be reopened for him to testify.

b. Costs shall be in the cause.

c. A hearing date of the main suit shall be issued.

Orders accordingly.

Delivered and Dated at Machakos this 24th February, 2026.

**HON. A. Y. KOROSS
JUDGE
24.02.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant

Miss Mutunga holding brief for Mr. Musyimi for defendant

Miss Muriithi for plaintiff

ORIGINAL