

**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 5 OF 2010**

**BENARD MWANGI NDERITU ..... 1<sup>ST</sup>**  
**PLAINTIFF**

**HESBON OMONDI ..... 2<sup>ND</sup>**  
**PLAINTIFF**

**FRANCIS RUMANO ..... 3<sup>RD</sup>**  
**PLAINTIFF**

**PETER WAMBUGU ..... 4<sup>TH</sup>**  
**PLAINTIFF**

**STEPHEN KAMAU ..... 5<sup>TH</sup>**  
**PLAINTIFF**

**MARY WAMBUI ..... 6<sup>TH</sup>**  
**PLAINTIFF**

**VERSUS**

**NDIARA ENTERPRISES LIMITED .....  
DEFENDANT**

**CONSOLIDATED WITH**  
**ELC CASE NO. 128 OF 2020**

**NDIARA ENTERPRISES LIMITED .....  
PLAINTIFF**

***ELC CASE NO. 5 OF 2010***

***Ruling***

**VERSUS**

**HESBON OMONDI ..... 1<sup>ST</sup>**  
**DEFENDANT**

**FRANCIS RUMANO ..... 2<sup>ND</sup>**  
**DEFENDANT**

**PETER WAMBUGU ..... 3<sup>RD</sup>**  
**DEFENDANT**

**MBIKI IRUNGU ..... 4<sup>TH</sup>**  
**DEFENDANT**

**MOSES KAMURI KINGORA ..... 5<sup>TH</sup>**  
**DEFENDANT**

**BINEX TECHNOLOGIES ..... 6<sup>TH</sup>**  
**DEFENDANT**

**PETER MUREITHI ..... 7<sup>TH</sup>**  
**DEFENDANT**

**JOSEPH MUIRURI NDONYE ..... 8<sup>TH</sup>**  
**DEFENDANT**

**PATRICK LUKALIA ..... 9<sup>TH</sup>**  
**DEFENDANT**

**PASTOR JOHN NDUATI ..... 10<sup>TH</sup>**  
**DEFENDANT**

**STEPHEN KAMAU ..... 11<sup>TH</sup>**  
**DEFENDANT**

<b>CHARLES WESONGA JUMA .....</b>	<b>12<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>PATRICK IRUNGU .....</b>	<b>13<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>PETER MUREITHI .....</b>	<b>14<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>NELLIUS MACHANDI NYAMBURA .....</b>	<b>15<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>JOSEPH KITHITO .....</b>	<b>16<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>ELIJAH MPUTHIA .....</b>	<b>17<sup>TH</sup></b>
<b>DEFENDANT</b>	
<b>JOSHUA MAINA .....</b>	
<b>18<sup>TH</sup> DEFENDANT</b>	

### **RULING**

1. What is before the court for determination is the 5<sup>th</sup> Plaintiff's Notice of Motion application dated the 24<sup>th</sup> October 2025 where he seeks the following Orders:

**a) Spent.**

**b) That this Honourable court be pleased to recall the witnesses who testified in this matter as the**

**Plaintiff in the absence of Counsel for the Applicants to be cross-examined and further for the Applicant's Counsels to call the 5<sup>th</sup> Plaintiff, Stephen Kamau and his witnesses in ELC 5 of 2010 to testify.**

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

2. The application is premised on the 5<sup>th</sup> Plaintiff's supporting affidavit.

He avers that he has filed a witness statement and has been to court severally to prosecute his case. However, he has learnt that the 2<sup>nd</sup> Plaintiff in **ELC No. 5 of 2010** testified and thereafter the Plaintiff's case was closed when her Counsel was absent due to illness. He claims that the said advocate did not inform him of the said hearing date because she had been sick, thus he was also absent on the said date.

3. He contends that the Plaintiffs' seeks entitlement to the suit land in which they were born and bred since the 1970's. Further, that the 4<sup>th</sup> and 6<sup>th</sup> Plaintiffs are deceased. He pleads that the 2<sup>nd</sup> Plaintiff be recalled for cross-examination

and that he is allowed to testify and avers that the Defendants will not suffer any prejudice.

4. The application is opposed by the Defendant vide the replying affidavit of its managing director, one Alfred Kariuki. He avers that when the matter came up for hearing on 24<sup>th</sup> and 25<sup>th</sup> February 2025, one Moses Kamuri King'ori whom the 5<sup>th</sup> Plaintiff has confirmed is his witness interrupted proceedings and he was allowed to address the Court. He explains that on 24<sup>th</sup> February 2025, he claimed that he could not reach his advocate, Norah Owino Advocate and on 25<sup>th</sup> February 2025, he states that the said advocate was sick. He urges the Court to infer that since the 5<sup>th</sup> Plaintiff's witness was in court, then the 5<sup>th</sup> Plaintiff and his advocate deliberately absented themselves from Court in order to frustrate the hearing of this matter. He also points out that the application is filed eight (8) months from 25<sup>th</sup> February 2025, when the matter first proceeded in the absence of the 5<sup>th</sup> Plaintiff's advocate.

5. He avers that on 27<sup>th</sup> May 2025, there was an advocate who held brief for Norah Owino, Advocate and informed the Court that she was admitted at Aga Khan Hospital Kisumu. Further, later Norah Owino Advocate filed a letter dated 27<sup>th</sup> May 2025 addressed to this Court indicating that she was admitted at the said hospital. He contends that their duly appointed investigator, one Kellystone Kivuva confirmed that Norah Owino Advocate was not an inpatient at Aga Khan Hospital, Kisumu when the matter came up for hearing on 27<sup>th</sup> May 2025 despite her claims.
6. He reiterates that there is a consistent pattern by the Plaintiffs, the Applicant and his advocate of deliberately delaying the conclusion of the matter. He pointed out several instances of adjournments at their instance and avers that prolonged delay of this matter amounts to breach of the right to a fair and expeditious hearing as guaranteed under the Constitution.

7. He also claims that the Applicant will not suffer any prejudice if the application is not allowed, as his witnesses will have an opportunity to testify and cross-examine witnesses when **ELC Case No. 128 of 2020** (which is consolidated with this suit) comes up for hearing, as the two cases concern the same facts and issues and will be resolved in one judgement.
8. A further affidavit was filed by Norah Owino, Advocate. She avers that the Plaintiffs in the main suit represent a registered group known as Saikoma Self Help Group and are seeking adverse possession orders.
9. She explains that in the year 2025, she was admitted three times at Aga Khan Hospital Kisumu. She annexed treatment sheets and a statement from her insurer for the year 2025 and averred that the matter has been previously adjourned at the instance of the Defendant's Counsel due to illness and when she unfortunately lost her daughter and which they

excused her, thus it is unprofessional of the Defendant to claim that she proves she was ill.

**10.** The application was canvassed by way of written submissions.

### **Submissions**

**11.** The 5<sup>th</sup> Plaintiff relies on the decisions of **Kariuki v Wangeci & 7 others Civil Application E250 OF 223) [2024] KECA 1692 (KLR)** and **Patel v EA Cargo Handling Services ltd [1974] EA Pg 76** to submit that it will be unjust to deny him and his witness an opportunity to testify when the Defendant will not be prejudiced by allowing the application.

**12.** On its part, the Defendant submits that allowing the application will be tantamount to delaying justice, yet Article 159 (2) of the Constitution and Section 1A of the Civil Procedure Rules calls for just, expeditious and affordable resolution of disputes.

- 13.** He also submits that there are no grounds set out in the body of the 5<sup>th</sup> Plaintiff's application, which is a contravention of Order 51 Rule 4 of the Civil Procedure Rules.
- 14.** The Defendant also submits that allowing the application will also occasion it injustice as it has already presented evidence in its defence. It argues that the Plaintiff is always given a right to begin under Order 18 Rule 1 of the Civil Procedure Rules, to allow the defence to make a reply, thus it would be illogical to allow a Plaintiff's witness to testify after the defence.

### **Analysis and Determination**

- 15.** Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the Plaintiffs' case should be re-opened to allow the 5<sup>th</sup> Plaintiff to testify and if the 2<sup>nd</sup> Plaintiff should be recalled for cross-examination.

**16.**The 5<sup>th</sup> Plaintiff has sought to recall the witnesses who testified in this matter as the 2<sup>nd</sup> Plaintiff in the absence of his Counsel, to be cross-examined. It has further sought for him together with his witnesses in ELC 5 of 2010 to testify. The Defendant has vehemently opposed the application and contends that it has been filed after an inordinate delay of over eight (8) months, deliberately to delay determination of the matter.

**17.** The record indicates that the suit was scheduled for hearing on 24<sup>th</sup> and 25<sup>th</sup> February 2025 by consent of the parties. On 24<sup>th</sup> February 2025, one Moses Kariuki informed the Court that his advocate, Norah Owino was absent and sought time to instruct another lawyer. The Court allowed an adjournment and marked it as the last. The next day, on 25<sup>th</sup> February 2025, the Court allowed the matter to proceed on which day the 2<sup>nd</sup> Plaintiff testified and the 5<sup>th</sup> Plaintiff's case was marked as closed. Subsequently, the Defendant's case commenced. On 27<sup>th</sup> May 2025 when the matter came up for

further hearing, the Court was informed that Ms. Owino Advocate was admitted at the Aga Khan Hospital, Kisumu.

**18.** The Courts generally have discretion to allow reopening of cases only when it serves justice and does not cause undue prejudice. Further, the Court is expected to consider whether such an application is strategically used to delay proceedings.

**19.** In **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] KEHC 3930 (KLR)** it was held that:

*“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 unexplained delay.”*

20. On recalling the 2<sup>nd</sup> Plaintiff for cross – examination, Section 146 (4) of the Evidence Act state as follows:

***“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.”***

21. While allowing an application of similar nature, this Court (A. Omollo J) stated as follows in **Maiyo & another v Ng’enyi [2025] KEELC 8649 (KLR)**;

***“I appreciate that this will cause delay but my view is that it is better that all parties are given opportunity to present their case rather than go home thinking that the outcome would have been different had it not been for them being denied opportunity to state their claim or defend it.”***

22. I note on the 25<sup>th</sup> February, 2025 both the 5<sup>th</sup> Plaintiff and his Counsel

failed to attend Court. Further, Mr. Nyaberi sought an adjournment on their behalf, which the Court declined and marked their case as closed. The Defendant has vehemently opposed the reopening of the 5<sup>th</sup> Plaintiff's case to allow the witness to testify. The Advocate has explained that she was unwell but the Defendant argues that the said Advocate was not admitted at Aga Khan Hospital Kisumu as claimed. Further, the Defendant claimed it hired an investigator to confirm if the Advocate for 5<sup>th</sup> Plaintiff was indeed admitted at Aga Khan Hospital Kisumu and the said investigator found that she was not admitted therein. In my view, I find the Defendant's action of hiring an investigator was in bad taste and contrary to a party's right to privacy.

**23.** Be that as it may, Article 50 (1) of the Constitution provides for a right to fair hearing and stipulates that:

***'Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a***

***court or, if appropriate, another independent and impartial tribunal or body.'***

**24.** Based on the facts before me while relying on the legal provisions quoted and associating myself with the decisions cited, in the interest of justice noting that the Defendant had not closed its case and has not demonstrated any prejudice it will suffer if the 5<sup>th</sup> Plaintiff is allowed to testify, I will exercise my discretion by reopening the 5<sup>th</sup> Plaintiff's case and allowing the witness to testify.

**25.** On the prayer to recall other Plaintiffs' for cross examination, I will decline to grant it since all the Plaintiffs had testified and are on one side. Further, once the 5<sup>th</sup> Plaintiff has testified, the Defendant can have leave to recall its witness to clarify any issue that might arise, if need be.

**26.** In the foregoing, I find the instant Notice of Motion application partially merited and will allow it in the following terms:

- a. The 5<sup>th</sup> Plaintiff, Stephen Kamau and his witnesses in ELC 5 of 2010 be and are hereby recalled to testify.
- b. Costs of this application is awarded to the Defendant Ndiara Enterprises Limited.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS  
10<sup>TH</sup> DAY OF MARCH, 2026**

**CHRISTINE OCHIENG  
JUDGE**

**In the presence of:**

Beatrice Kariuki for Defendant in 5 of 2010

Mrs Owino for 5<sup>th</sup> Plaintiff/Applicant

Nyaberi for 3<sup>rd</sup> Defendant/Respondent

Court Assistant: Joan