



**Nkarichia v Magiri & 7 others (Environment & Land Case
E004 of 2021) [2024] KEELC 239 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 239 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E004 OF 2021**

**CK NZILI, J
JANUARY 24, 2024**

BETWEEN

FRANCIS KIRIMI NKARICHIA PLAINTIFF

AND

DAVID NKANATA MAGIRI 1ST DEFENDANT

M'IBIRI M'BOGORI 2ND DEFENDANT

JUSTUS MURUGA M'IKIUGU 3RD DEFENDANT

LAND REGISTRAR MERU CENTRAL DISTRICT 4TH DEFENDANT

CHIEF LAND REGISTRAR NAIROBI 5TH DEFENDANT

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT
NAIROBI 6TH DEFENDANT**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
MERU 7TH DEFENDANT**

ATTORNEY GENERAL 8TH DEFENDANT

RULING

1. By an application dated 11.10.2023, the 2nd defendant seeks to arrest the judgment of this court, which had been reserved for 29.11.2023 pending review or setting aside orders made on 11.5.2023, dispensing with the appearance of the 2nd defendant and lasting for re-opening of the 2nd defendant's case so that he can testify. The reasons are contained on the face of the application, and a supporting affidavit sworn on 11.10.2023 by M'Ibiri M'Mbogori. The applicant avers on 27.9.2023, the court dismissed his applications, seeking that he testifies through his son Samuel Mwenda Riungu after the court had dispensed with his appearance on 11.5.2023.



2. The applicant avers he was then suffering a stroke as per treatment notes, medical reports, and prescriptions attached as annexures marked MM – 03 (a) (b) c (1) – (v), respectively.
3. The applicant avers his overall health has since substantially improved in the recent past after intensive physiotherapy and could now testify in his defense.
4. The applicant further prays he be allowed to call his son as his witness to the sale agreement to testify as per an attached supplementary witness statement attached as annexure MM -05. The applicant avers that the medical report is a new and important matter or evidence; if shut out, he will be condemned unheard. He regrets the delay occasioned to the case but believes the prejudice can be compensated through costs.
5. The 1st defendant supports the application through a supporting affidavit of David Magiri Nkanata sworn on 17.10.2023. It is averred that in the interest of justice to all the parties, it is only just and fair that the notice of motion be allowed; otherwise, the applicant should not be closed out on issues involving land where the plaintiff has raised the issue of fraud.
6. By grounds of opposition dated 19.10.2023, the plaintiff contends that the applicant is guilty of laches and has come to court with unclean hands; there are no good reasons for the orders sought, the application is a delaying tactic, and the application is incompetent.
7. At the hearing on 26.10.2023, Mr. Muthomi, advocate for the 2nd defendant, relied entirely on the application save to add that the grounds of opposition by the plaintiff addressed only matters of law, were in general terms and did not answer to the facts made on oath by the applicant. Counsel relied on *Peter O. Nyakundi & 68 others vs. Principal Secretary State Department of Planning Ministry of Devolution & another* (2016) eKLR and *Kennedy Otieno Ondigo & others vs Kettraco* (2010) eKLR that where a replying affidavit has not filed the averments on oath stand uncontroverted.
8. Mr. Nyamu Nyaga, counsel appearing for the 1st defendant, supported the application through written submissions dated 18.10.2023 stating that the right to be heard under Article 50 of *the Constitution* is so important and, in this case, the court should look at the circumstances leading to the orders of 27.7.2023. The 1st defendant relied on *Ngatu vs Mpinda & 3 others* (Civil Application 83 of 2019) (2021) KECA 84 (KLR) (22nd October 2021) (Ruling), counsel termed the grounds of opposition as not challenging the facts as pleaded.
9. Mr. Kimathi, for the 4th – 8th defendants, submitted that his clients were not opposed to the application and, therefore, associated himself with the other defendants supporting the application. Counsel urged the court to find the evidence by the 1st defendant as credible and not scandalous, which would help the court determine the issues. Further, counsel submitted that the plaintiff had an opportunity to seek a fingerprint report to prepare his case; hence, the applicant should be granted an equal opportunity to be heard.
10. Mr. Obwanda, counsel for the plaintiff/respondent, left the matter for the court's discretion while relying on *Raila Odinga & others vs. Independent Electoral & Boundaries Commission* (2013) eKLR, Mr. Muthomi advocate in a rejoinder, appealed for the court's judicial conscience-guided-by numerous court's decision on the right to a hearing since there will be no prejudice to the opposite parties if the application is allowed.
11. The issues calling for my determination are:
 - a. If the applicant has made a basis to stay, arrest of the judgment review and re-open the defense.
 - b. If the prayers would prejudice the parties.



12. Sections 1A & 1B of the *Civil Procedure Act*, as read together with Order 17 *Civil Procedure Rules*, Sections 3, 18, 19 & 22 of the *Environment and Land Court Act*, underscore the overriding objective of this court and call for the parties to assist the court to further the overriding objective by facilitating just, expeditious, proportionate and accessible resolution of disputes.
13. Section 25 of the *Civil Procedure Act* and Order 21 of the *Procedure Rules* Provide that after the parties have been heard, the judgment shall be delivered within 60 days from the date of completion of the hearing. The power to arrest delivery of judgment or any court action is to be used sparingly, rarely, and only where there are deserving reasons. In *Musa Misango vs Eria Musigirie & others* (1966) E.A 390, Sir Udo Udoma said the court has a right to stop an action if it is wantonly brought without the shadow of an excuse, Omondi J as she then was in *Hassan Hashi Shirwa vs Swalabudin Mohammed Ahmed* (2011) eKLR, said re-opening a case was not an impossibility, but there must be a cogent reason for re-opening.
14. On the right to be heard in *Union Insurance Co. of Kenya Ltd vs Ramzan Abdul Danji* Civil Application No. 179 of 1998, the Court of Appeal said that the right to be heard was a basic natural justice concept and ought not to be taken lightly. The court looking at the record of the court was not impressed that the applicant had been denied the right to defend itself. The court said the law was not that a party must be heard in every litigation, and so long parties are given a reasonable opportunity of being heard and have not utilized it, then the only point on which the party not utilizing the opportunity can be heard was why he did not utilize the opportunity.
15. It is not disputed that the applicant availed himself for a defense hearing on 11.5.2023, but could not testify due to sickness. The court allowed him to testify through an intermediary. On 27.7.2023, the 2nd defendant sought another adjournment since a guardian had not been appointed. Despite objection appointment by the plaintiff, the court gave the 2nd defendant another last option to substitute or replace his witness statement within 30 days, in the absence of which his defense shall stand closed. A mention date was taken for 19.9.2023 to confirm compliance. On 19.9.2023, the applicant informed the court of an application dated 4.9.2023. This court gave its ruling on 27.9.2023 and declined the request.
16. The applicant now seeks to re-open the defense since Article 50 of *the Constitution* grants him the right to be heard. He did not utilize the above opportunities. The applicant says he has been sick or indisposed, but has improved tremendously so that he can testify on his behalf. He now wants to introduce a supplementary witness statement by an extra witness apart from himself.
17. This court's record clearly shows that that witness statement should have been filed within the set timelines. No explanation has been made for why the option was not taken on time or at all. The plaintiff has already closed his case, and filing a new witness statement at his stage would be unfair.
18. The parties' rights must be balanced under Article 50 of *the Constitution*. The right to be heard is not absolute. A party who has been accorded an opportunity and squanders it cannot be heard to complain without a tangible reason why he did not avail himself to testify.
19. Given that the applicant can testify and the reasons preferred, I stay the delivery of judgment and grant the applicant a chance to testify based on his witness statement, which the plaintiff and the rest of the defendants were served with before the plaintiff closed his case. The supplementary witness statement dated 11.10.2023 is as a result of this rejected.

Orders accordingly.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 24TH DAY OF JANUARY 2024**

In presence of

C.A Kananu/Mukami

Parties

Mr. Mbaya for the plaintiff

Kwoba for Obwonda for plaintiff

Mr. Nyamu Nyaga for 1st defendant

Muhtomi for 2nd defendant

Miss Maina for Kimatho for 4th – 8th defendants

HON. CK NZILI

JUDGE

