Osundwa v Buluma & 3 others (Environment & Land Case 18 of 2014) [2024] KEELC 818 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 818 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 18 OF 2014

EC CHERONO, J

FEBRUARY 22, 2024

BETWEEN

MARY N OSUNDWA ..... PLAINTIFF

AND

FRED BULUMA ..... 1ST DEFENDANT

EDWIN BARASA ..... 2ND DEFENDANT

BARASA BULUMA ..... 3RD DEFENDANT

GLADYS KWENDO ..... 4TH DEFENDANT

RULING

1. The application that is the subject of this ruling is dated 12th October, 2023 filed by the 2nd defendant/ Applicant. The principal order sought is for the court to be pleased to recall the 1st defendant Fred Buluma Barasa for purposes of producing a letter from Agricultural Financial Corporation dated 17/07/1989.

2. By way of background, this suit was commenced vide a plaint dated 27th January,2014. In her plaint the plaintiff/respondent claims that the defendants have encroached into her parcel of land No. Ndivisi/ Muchi/198 wherein she is the legal representative of the estate of Andrew Osundwa Ekumba-Deceased and thus the sole registered proprietor.

3. The defendants on the other hand claim to be rightfully in occupation of the property stating that the said Andrew Osundwa Ekumba sold the land to Francis Barasa Buluma and as such the plaintiff's acquisition of the land through transmission is fraudulent.

4. This matter proceeded for hearing with the plaintiff calling two witnesses and closing her case. The defendant also called one witness i.e Fred Mukoya Barasa alias Fred Buluma and it is during re-examination that counsel sought leave to file a formal application to introduce new evidence being a

letter. In his application, the applicant avers that they have not closed their case and that the document they wish to introduce could not have been discovered even with due diligence since the parties are involved in a myriad of cases causing a mix up.

5. The applicant further avers that the document was discovered in another file Civil Suit No. 317 of 1999 and the same is important and substantive to his case. It was argued the application has been brought in a timely manner and it was in the best interest of justice that the orders sought are granted.

6. The plaintiff/respondent in opposition to the application filed an affidavit sworn on 14th November,2023. In her replying affidavit, she argued the substantive issues of the pending claim and that the current application was vexatious, frivolous and an abuse of the court process. They argued that the proposition by the applicant that there was a confusion in files and documents is an issue concerning the office of the counsel on record and had nothing to do with the plaintiff.

7. The application was agreed to be canvassed orally and this Honourable Court reserved its ruling for 22/02/2024.

8. I have carefully considered the application which is the subject of this Ruling, the responses thereto, documents in support and the oral submissions made on behalf of the parties hereto. I have also considered the relevant legal framework and jurisprudence on the key issues in this application. In my humble view, the issue for determination is whether the applicant has satisfied the criteria upon which a court exercises jurisdiction to recall a witness and receive new evidence.

9. The legal framework that provides for instances such as this is; Section 146 (4) of the *Evidence Act* generally grants the Court powers to recall a witness. It provides thus:

> "(4) 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."

10. Order 18 rule 10 of the *Civil Procedure Rules* grants the Court powers to recall any witness who has been examined. It provides thus:

> " 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."

11. From the wording of these sets of laws, the court has discretion depending on the facts and circumstances of the case to allow such an application provided it does not occasion any prejudice in the legal sense and the same is to be done in the interest of justice and in accordance with the rules of fair trial as protected in Article 50 of *the Constitution*.

12. In the case of *Raindrops Limited v County Government of Kilifi* [2020] eKLR Justice Richard Nyakundi while considering a more or less similar application quoted with approval the case of State v Hepple, 279265, 271 {1977} which states;

> " the Judge must consider whether the party deliberately withheld the evidence preferred in order to have it presented at such time as to obtain an unfair advantage by its impact on the trier of facts."

13. The learned judged further quoted the dictum in *Cason v State* 140 MD App 379 {2001} which espouses the principles as follows;

> " Whether good cause is shown, whether the new evidence is significant; whether the jury or Judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or Judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony." (underlined emphasis mine)

14. Further, the *Civil Procedure Rules* and more so the essence of taking pre-trial directions as provided under order 11 is to ensure full disclosure to avoid trial by ambush which causes a miscarriage of justice. The legal text by the Learned Authors of *Murphy on evidence* 12th Edition at paragraph 17.17 thus:

> " the general rule of practice, in both Criminal and Civil cases, is that every party must call all the evidence on which he proposes to rely during the presentation of his case, and before closing his case. (See Kane {1977} 65 CR APPR 270). This involves the proposition that the parties should foresee, during their preparations for trial, what issues will be, and what evidence is available and necessary in order to deal with those issues. The definition of the issues in a Civil case, by exchange of statements of case and witnesses' statements, is designed to enable this to be done wherever possible."

15. Having stated the above, it is clear that in allowing or disallowing an application such as the one before the me, the court ought to exercise its jurisdiction judiciously. In *Samuel Kiti Lewa v Housing Finance Company Limited & another* {2015} eKLR Lady Justice Mary Kasango stated as follows;

> " 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."

16. Turning to the circumstances of this case, I have mentioned elsewhere in this ruling that the applicant had called one witness who had tendered his evidence in chief and had been cross examined; and that during re-examination the current request was made. In my view, the application was made in a timely manner and the same is therefore not an afterthought.

17. Further, it is my considered observation the applicant has a legitimate expectation from this Court to be granted leave to factor in the additional evidence to clarify contentious issues to the claim. This is an application in which the mover has sought leave and discretion of the Court before Judgment and the test is whether the evidence if presented would clarify issue and buttress the position taken by the defendant. This in essence means the granting of the defendant's application would not be to condone laxity or indolence but to permit the clarification and demonstration of such evidence.

18. In contesting the re-opening of the case at re-examination stage, the defendant has not shown that it would alter the character of the case as presented or occasion a miscarriage of justice or in that context a mistrial which cannot be remedied by being given an opportunity to recall further evidence limited to the raised additional evidence.

19. Furthermore, the witness to be recalled was already in the list of witnesses having previously testified as such I find that no prejudice will be suffered by the respondent. I have also perused the court record and I note that the said letter forms part of the record and the respondent therefore has had a chance to

consider the contents thereof and shall equally be afforded an opportunity to cross-examine the witness on the new evidence.

20. Ultimately, I am persuaded to allow the application in the interest of justice and for purposes of allowing the court to determine the issues in question on merit and in the spirit of the Oxygen principles of the *Civil Procedure Act* and Article 159 (2)(d) and Article 50(1) of *the Constitution* ,2010.

21. The Notice of Motion dated 12th October,2023 is hereby allowed. Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY, 2024

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr Juma Waswa for the Respondents

2. Applicant/advocate-absent

3. Bett C/A