



**Otara v Mukuriah & 4 others (Environment & Land Case  
E031 of 2022) [2025] KEELC 858 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 858 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E031 OF 2022  
MAO ODENY, J  
FEBRUARY 27, 2025**

**BETWEEN**

**AMOS M OTARA ..... PLAINTIFF**

**AND**

**BONIFACE MUNYINYI MUKURIAH ..... 1<sup>ST</sup> DEFENDANT**

**MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAKURU ..... 3<sup>RD</sup> DEFENDANT**

**MINISTRY OF DEVOLUTION ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, NAKURU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 30<sup>th</sup> April, 2024 by the Applicants seeking the following orders:
  - a. Spent
  - b. That the Honourable Court be pleased to review its orders given on the 12.02.24 closing the Defence case and for filing of submissions and allow the Defence to reopen its case on the basis of discovery of new information not within our knowledge at the hearing of the suit.
  - c. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants case be reopened and the Defence be allowed to call its witness, one James Ngugi Kimani from the State Department of Housing to adduce additional evidence in the matter herein.
  - d. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants be granted leave to file a supplementary list of documents and a witness statement by the said James Ngugi Kimani attached herein and the same be deemed to be properly filed.



- e. That the Plaintiff be at liberty to cross examine the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants' witness on the additional evidence adduced.
  - f. That the costs of this Application be in the cause.
2. The application was supported by the annexed affidavit of the State Counsel Sonia Wanjeri sworn on 30<sup>th</sup> April, 2024 where she deponed that she is an Advocate of the High Court of Kenya practicing at the Office of the Attorney General in the conduct of this case on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants.
  3. It was her disposition that pursuant to the directions issued on 12<sup>th</sup> February 2024 closing the Defendants case and the Plaintiff's subsequent submissions, they wrote a letter dated 5<sup>th</sup> April, 2024 to the State Department for Housing and Urban Development in respect of government house NAKU/HOU/MG 140 that sits on Nakuru Municipality Block 20/122/ whereby they obtained additional evidence.
  4. The Plaintiff/Respondent Amos. M. Otara, filed a Replying Affidavit sworn on 6<sup>th</sup> June, 2024 and deponed that during the hearing of the defence case on 12<sup>th</sup> January, 2024, the State Counsel appearing for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants, Ms. Sonia Wanjeri told the court that the named Defendants would neither be calling any witness nor producing any evidence and they closed their case. He deponed that the instant application has been brought to respond to his submissions already filed and served upon all parties herein.

#### **2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> Defendant/ Applicants' Submissions**

5. Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants/Applicants filed submissions dated 13<sup>th</sup> January, 2025 and identified the issue for determination as: whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants should be allowed to reopen their case. Counsel submitted that the Applicants' supplementary documents attached to the application is new information that they were not privy to, prior to the commencement and conclusion of the hearing, and consequently could not be availed to the Court at the time.
6. According to counsel, the application is based on the documents and witness statement received from the State Department of Housing which was at the time of filing of this suit under the Ministry of Transport which is not a party herein thus explaining why such crucial evidence was not within their knowledge at the time.
7. Counsel further submitted that the suit was filed against the Ministry of Lands as a custodian of land records but the State Department of Housing which was under the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works therefore it was not possible for them to obtain these documents at the pre-trial stage.
8. Ms. Wanjeri stated that they intend to call the Assistant Director Estate Management Department, Mr. James Ngugi Kimani, to show that the suit property was built on a parcel reserved for government housing and urged the court to allow the orders sought in the application.

#### **Plaintiff/Respondent's Submissions**

9. Counsel for the Plaintiff/Respondent filed submissions dated 22<sup>nd</sup> January, 2025 and identified the issue for determination as to whether the court should reopen the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendant's defence case and allow them to adduce additional evidence.



10. Mr. Ratemo submitted that the plaintiff opposed the application through a replying affidavit sworn on 6<sup>th</sup> June 2024 and stated that this suit was filed on 6<sup>th</sup> July 2022 and upon service of summons the defendants entered appearance and filed defence through the Honourable Attorney General.
11. Counsel gave a brief chronology of events in the suit and stated that the suit came up for mention on 14<sup>th</sup> June 2023 and despite service of a mention notice, there was no appearance by or representation for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants whereby the court confirmed the suit ready for hearing and fixed it for 18<sup>th</sup> October 2023.
12. That on 18<sup>th</sup> October 2023, there was no appearance by or representation for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants despite service of a hearing notice therefore the hearing proceeded in their absence but during the hearing of the defence case on 12<sup>th</sup> January 2024, the State Counsel appearing for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants, told the court that the defendants would neither be calling any witness nor producing any evidence since the records held by the 5<sup>th</sup> Defendant showed that he was the lawfully registered owner of the suit property heREin.
13. Counsel further stated that the Applicants closed their case without calling any witness or producing any evidence and in compliance with directions on the filing of submission; the plaintiff's advocates filed submission on his behalf and served the same upon all parties.
14. That from paragraphs 3, 4, 5 and 6 of the supporting affidavit it is clear that the instant application has been brought to Respond to the plaintiff's submissions already filed and served upon the parties herein. It was counsel's submission that the purported new evidence has all along been in existence and within the reach of the defendants and that there is no averment in the supporting affidavit to the contrary. Further that there is no averment in the supporting affidavit that even with due diligence the purported new evidence could not have been discovered and produced during the hearing.
15. Mr. Ratemo submitted that the Applicants have never filed and served any list of witnesses on which James Ngugi Kimani, the witness whose evidence is sought to be adduced appears and further that the said witness has always been in the employment of the applicants and no plausible reason has been given why he was not called during the hearing.
16. Counsel also submitted that the counsel for the applicants has deponed on contentious matters and there is no affidavit by the applicants themselves demonstrating any prejudice they will suffer in the event the orders prayed for are not granted. The application has not met the threshold for the grant of the orders prayed that it be dismissed with costs.
17. Counsel relied on the cases of Minister for Health & Another vs Uasin Gishu Memorial Hospital Limited & Another; Attorney General & Another (Interested Parties) (Petition 20 of 2019) [2019] KESC 14 (KLR), Republic vs Chief of General Staff & another [2017] eKLR on the principles to guide the court in such applications and urged the court to dismiss the same with costs.

### **Analysis and Determination**

18. The issue for determination is whether this court should allow the Defence to reopen its case based on discovery of new information not within their knowledge at the hearing of the suit.
19. In the case of Odoyo Osodo Vs. Rael Obara Ojuok & 4 Others [2017] eKLR the court stated as follows:

“The Court’s discretion in deciding whether or not to re-open a case which the Applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised



judiciously and in favour of an Applicant who had established sufficient cause to warrant the orders sought.”

20. Counsel for the Applicant deponed that they discovered the additional new information after the plaintiff had filed his submissions and that the suit had been filed against the Ministry of Lands as a custodian of land records but the State Department of Housing which was under the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works was not a party to the suit therefore it was not possible for them to obtain these documents at the pre-trial stage.
21. Similarly, in the case of Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] eKLR the Court held as follows:

“ 17. Uganda High Court, Commercial Division in the case *Simba Telecom –v- Karuhanga & Anor* (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That Court referred to an Australian case *Smith –versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case *Simba Telecom* (supra) held thus:

“I agree with the holding in the case of *Smith Versus South Wales Bar Association* (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the Court retains its discretionary powers whether to admit any piece of evidence or not.” ...

19. 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.”

22. The court has the discretion to allow the reopening of a case or rejecting the application if no sufficient reasons are advanced for such discovery of new evidence. The discretion must be exercised judiciously for proper administration of justice



23. The court must look at whether the additional evidence is directly relevant to the matter before the Court and would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit, the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence as was held in the Supreme Court case of Minister for Health & another v Uasin Gishu Memorial Hospital Limited & another; Attorney General & another (Interested Parties) (Petition 20 of 2019) [2019] KESC 14 (KLR) (29 November 2019) (Ruling).
24. From the affidavit of counsel for the defendants and from the record of the proceedings in this case, the Attorney General is the Chief Legal Advisor of the government and has access to all government agencies and departments that give them instructions to represent them. The rules of procedure and natural justice apply to all including the government agencies where timelines must be adhered to for the smooth administration of justice.
25. It should be noted that counsel never filed any witness statements as required by procedure and when the matter came up for hearing, she told the court that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants were neither calling any witnesses nor tendering any evidence. Counsel therefore closed the defendants' case and took a date for filing of submissions.
26. Counsel filed this application immediately after the Plaintiff had filed submissions. A party should not be allowed to fill in gaps in a case or steal a match of the opposing party. There is no trail by ambush.
27. I find that the Applicants have not given any sufficient reason to warrant the reopening of the defence case. The Notice of Motion dated 30<sup>th</sup> April, 2024 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**M. A. ODENY**

**JUDGE**

