



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waweru v Njuguna & 4 others (Environment & Land Case  
394 of 2017) [2024] KEELC 1608 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1608 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 394 OF 2017**

**OA ANGOTE, J**

**MARCH 14, 2024**

**BETWEEN**

**GEOFFREY THIONG'O WAWERU ..... PLAINTIFF**

**AND**

**KEZIAH WAHU NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**ROSEMARY WAMBUI GICHURU (SUED AND SUING AS THE  
REPRESENTATIVES OF THE ESTATE OF GEORGE GIKONYO KAMAU -  
DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH GIKONYO KAGWI ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants' Notice of Motion application dated 28<sup>th</sup> August, 2023 brought pursuant to the provisions of Articles 159(2)(b) and (d) of *the Constitution*, Sections 1A, 1B, 3A of the *Civil Procedure Act*, Cap 21 and Order 51(1) of the Civil Procedure Rules seeking the following orders;
  - i. Spent
  - ii. That this Honourable Court be pleased to grant leave to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to re-open their case.
  - iii. That this Honourable Court be pleased to grant leave to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to file their further list of documents.



- iv. That the Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.
  - v. That the costs of the Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Kezia Wahu Njuguna, the 1<sup>st</sup> Defendant of an even date. She deponed that this matter has since been concluded and came up for mention to confirm filing of final submissions on 13<sup>th</sup> November, 2023 and that they have since discovered a crucial document that will aid the Court in determining the matter.
  3. The 1<sup>st</sup> Defendant deponed that the crucial document is the Judgement in Criminal Case No 1653 of 2017 delivered on 3<sup>rd</sup> August, 2023 acquitting Edward Wainaina Kamau and Amos Waweru Kamau; that during the hearing of the case, the Plaintiff insinuated that the 2<sup>nd</sup> Defendant and herself hired goons to cause chaos and interfere with the suit property and that reference was specifically made to the accused persons in Criminal Case No 1653 of 2017 as their agents.
  4. It was her deposition that the Judgement in Criminal Case No 1653 of 2017 will aid this Court in making a just and fair determination of the issues at hand, particularly in relation to the allegations relating to her and the 2<sup>nd</sup> Defendant using the persons who have since been acquitted to cause damage to the property and that no prejudice will be suffered by the Plaintiff since he will have an opportunity to respond further and cross-examine on the document if need be.
  5. In response, the Plaintiff filed Grounds of Opposition as well as a Replying Affidavit both dated 22<sup>nd</sup> September, 2023. Vide the Grounds of Opposition, it was stated that;
    - i. The Application offends Sections 1A and 1B of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as it is a calculated attempt at causing delay in the expeditious conclusion and final determination of this suit.
    - ii. The Application is an affront to the discretionary jurisdiction of this Honourable Court as it is simply intended to belatedly assist the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to fill gaps in their cases.
    - iii. The Application is grounded on falsities, and this disentitles the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' from exercise of this Honourable Court's discretionary jurisdiction in their favour.
    - iv. In any event, re-opening the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' cases will be futile because the judgment delivered in Chief Magistrate's Court (Kibera) Criminal Case No. 1653 of 2017, Republic vs. Edward Wainaina Kamau & Amos Kamau Waweru constitutes inadmissible evidence in these proceedings under Sections 46 and 47A of the *Evidence Act*.
  6. Vide the Replying Affidavit, the Plaintiff deponed that he and his witnesses have severally deponed and testified to the existence of the criminal case vis-a-vis the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' family members' (including Edward Wainaina Kamau and Amos Waweru Kamau's) threats and intimidation of his potential witness, Francis Mburu Manguah;
  7. It was deponed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants adduced a copy of the charge sheet in the criminal case in their list of documents; that he made further reference to the case during his application to amend the Plaintiff and that at all times from 16<sup>th</sup> October, 2019, the Defendants have been aware of the existence of the suit.
  8. According to the Plaintiff, the Defendants have attempted to delay the conclusion of this case as they await the conclusion of the criminal case and that as at 11<sup>th</sup> July, 2023, when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants closed their cases, they were aware of the delivery of the judgment in the criminal case slated for the



3<sup>rd</sup> August, 2023 and made a conscious decision not to call or adduce any direct evidence relating to or touching on the said criminal case.

9. Consequently, it was deposed, the Defendants want to re-open their cases to relitigate it afresh and fill in gaps brought out during trial by his Advocates on record.
10. The 1<sup>st</sup> Defendant on her own behalf and on behalf of the 2<sup>nd</sup> Defendant filed a Supplementary Affidavit on 28<sup>th</sup> August, 2023. She deposed that whereas indeed they have been aware of the criminal case No.1653 of 2017 and parties therein, the matter had not been concluded and judgment delivered and that the current application should not be treated as an attempt to delay the matter or an attempt to fill in any gaps in their Defence and Counter claim.

### **Submissions**

11. The Plaintiff's Counsel submitted that it is well settled that a Court's jurisdiction and power to order a party's closed case to be re-opened is discretionary in nature and must be exercised judiciously and that the Court will not allow a case to be re-opened if the evidence sought to be produced could have been led or produced earlier during trial, and no reasonably justifiable reasons for failing to do so have been advanced.
12. Counsel submitted that the evidence on record clearly demonstrates that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had sufficient time and opportunity to call and lead direct primary evidence to rebut the Plaintiff's case, in compliance with Section 63 of the Evidence Act and that the Judgement in the criminal case is not admissible herein not being a Judgement in rem.
13. Counsel for the Plaintiff submitted that the existence of the judgment in Kibera MCCC/1653/2017 is not an issue in dispute requiring determination by this Court and that Section 47A renders admissible into evidence a final judgment of a competent Court in any criminal proceedings which declares a person to be guilty of a criminal offence and subsequently in instances of acquittal such as herein, the same is superfluous in separate proceedings since it is immaterial and irrelevant to the facts in issue.
14. According to counsel, even if the Defendants were allowed to produce the Judgement in the criminal case, they are incompetent witnesses to analyse and interpret it and cannot provide any further assistance to this Court in terms of evidence required to render a final judgment.
15. Counsel urged that for the purposes of determining civil liability in this case, Edward Wainaina Kamau and Amos Waweru Kamau are not parties in this case, and their legal status is completely irrelevant and immaterial and that the Defendants are simply engaging in mischievous conduct calculated at delaying the expeditious conclusion of the suit and delivery of a final judgment in the matter.
16. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel submitted that this Court retains discretion to allow re-opening of a case and the principles therein were elaborated in Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & Another [2015] eKLR and that the Court in Raindrops Limited vs County Government of Kilifi [2020] eKLR, found that in an application seeking to re-open a case, the Court is obligated to consider the evidence sought to be introduced, so as to determine the real issues in controversy and dispense justice to the parties.
17. It was submitted that section 45 of the Evidence Act, as read together with section 46, implies that a judgment such as the one sought to be produced by the Defendants is admissible since it relates to a matter of a public nature that is relevant to the inquiry and that the same can aid the Court in making a just determination on the issues raised in this case in further consideration that the Plaintiff herein was also the complainant in the said criminal case.



18. It was submitted that guided by Section 107(1) of the *Evidence Act*, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants desire to exonerate themselves from the claim that they hired Mungiki to cause chaos and interfere with the suit property; that the judgment in criminal case No 1653 of 2017 is one such crucial piece of evidence as it was referred to by the Plaintiff in support of his claim that the accused persons therein were hired by the Defendants.

### **Analysis and Determination**

19. Having considered the Motion, responses and submissions, the sole issue that arises for determination is whether the Court should re-open the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case and receive additional evidence.
20. The *Evidence Act*, Cap 80 does not contain explicit provisions with respect to re-opening of cases for purposes of receiving additional evidence. The closest the Act comes to is Section 146 (4) which provides as follows;

“(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.”

21. Similarly, 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.”

22. The Courts’ jurisdiction to re-open a case with a view to receiving additional evidence is a discretionary power exercised pursuant to the provisions of Section 3A of the *Civil Procedure Act*. It is common ground that where a Court is called upon to exercise discretion, the same must be exercised judiciously. This was as aptly expressed by the Court of Appeal in *Patriotic Guards Ltd vs James Kipchirchir Sambu*, Nairobi [2018] eKLR as follows;

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

23. The principles that guide the Court in exercising its discretion while considering whether to re-open a case and receive evidence were aptly and persuasively expressed by the Court in the case of *Samuel Kiti Lewa vs Housing Finance Co. Of Kenya Ltd & Another* [2015] eKLR, the Court stated thus;

“17. Uganda High Court, Commercial Division in the case *Simba Telecom vs 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.”

20. 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.”

24. Similarly, the Court in *Susan Wavinya Mutavi vs Isaac Njoroge & Another* [2020] eKLR, stated thus;

“Over the years, Kenya’s superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. 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 party’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 the 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.”



25. In the case of *Raila Odinga & 5 others vs IEBC & 3 Other* [2013] eKLR, the Supreme Court stated as follows on the correct legal position where a Court is called upon to consider whether to admit or reject additional evidence:

“...The parties have a duty to ensure they comply with their respective time lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the Court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence.”

26. The Supreme Court in *Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR expounded on the guidelines in the admission of additional evidence. Whereas the principles were set out as regards admission of additional evidence in appellate Courts, this Court opines that the principles are applicable herein. The Court stated thus;

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case-by-case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We, therefore, lay down the governing principles for allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. It is shown that it could 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 or petition by the party seeking to adduce the additional evidence;
- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. The evidence must be credible in the sense that it is capable of belief;
- f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. Whether a party would reasonably have been aware of and procured the further evidence in the course of a trial is an essential consideration to ensure fairness and due process;



- h. Where the additional evidence discloses a strong prima facie case of willful deception of the Court;
  - i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
  - j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
  - k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”
27. The Court will be so guided.
28. By way of brief background, vide a Further Amended Plaint dated 6<sup>th</sup> December, 2021, the Plaintiff seeks, inter- alia, declarations that he is the lawful owner of “ all that parcel of land comprising by measurement approximately 0.25 Acres that ought to have been excised from initially Title No Dagoretti/Riruta/2243 or subsequently from Title No Dagoretti/Riruta/ 4472 and is now comprised of two parcels of land known as Title Numbers Dagoretti/Riruta/6629 and Dagoretti/Riruta/6630 each measuring approximately 0.07Ha (0.173Acres( hereinafter the suit property);
29. It is the Plaintiff’s case that the titles to the suit properties in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are null and void and that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be directed to carry out amalgamation and sub-division to create a portion of land measuring 0.25Acres to be transferred to him. According to the Plaintiff, he acquired the suit property by way of purchase from one Kamau Waweru (deceased).
30. It is the Plaintiff’s case that despite knowledge of his proprietorship, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as executors of the Estate of the deceased, Kamau Waweru went ahead to cause sub-division of the suit property and further caused the transfer of the same to his exclusion and that the above actions were fraudulent.
31. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deny the Plaintiffs claims asserting that the parcel of land transferred to the Plaintiff is Dagoretti/Riruta/4474 in accordance with the Sale Agreement between their father and the Plaintiff; that the same was further in accordance with the consents to sub-divide and transfer as sought by their deceased father and that the Plaintiff illegally took possession of the suit property in 2017.
32. The record shows that the matter first proceeded for hearing on 23<sup>rd</sup> October, 2019 and on several other dates including on 21<sup>st</sup> September, 2020, 9<sup>th</sup> June, 2021, 16<sup>th</sup> March, 2023, and 11<sup>th</sup> July, 2023 which marked the close of the hearing of the suit, the Plaintiff and 1<sup>st</sup>-3<sup>rd</sup> Defendants witnesses having testified.
33. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants now seek to have this case re-opened. They contend that they have since the close of the case, discovered crucial evidence being the Judgement in criminal case no 1653 of 2017 delivered on the 3<sup>rd</sup> August, 2023. According to them, the Judgement aforesaid acquitted Edward Wainaina Kamau and Moses Waweru Kamau who have been adversely mentioned in this case and that the Plaintiff insinuated that the said Edward Wainaina Kamau and Moses Waweru Kamau were agents who were used to hire goons to cause chaos and interfere with the suit property.



34. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants place reliance on Section 45 & 46 of the Evidence Act contending that the Judgement in the criminal case relates to matters of a public nature relevant to the inquiry and whereas it may not provide conclusive proof that the accused persons did not commit the acts alleged by the Plaintiff, it can aid the Court make a just determination of the matter.
35. On his part, the Plaintiff asserts that the Judgement aforesaid does not constitute new information and is meant to fill the gaps in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case and that in any event, the same is in-admissible by virtue of Sections 46 and 47A of the Evidence Act.
36. The law with respect to the admissibility of evidence taken in criminal proceedings and the judgments arising therefrom, in subsequent civil proceedings, is provided for under Sections 44, 45 and 46 of the Evidence Act which provide as follows:

“ 44. Judgments in rem

- (1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.
  - (2) Such judgment, order or decree is conclusive proof-
    - (a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
    - (b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
    - (c) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
    - (d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.
45. Other judgments of a public nature Judgments, orders or decrees, other than those mentioned in section 44 of this Act, are admissible if they relate to matters of a public nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which they state.
46. Inadmissible judgments
- Judgments, orders or decrees other than those mentioned in sections 43, 44 and 45 of this Act are inadmissible except where the existence of such



judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.”

37. The above provisions of the law enunciate the admissibility of judgements, including criminal judgements, proceedings and evidence therefrom, in subsequent proceedings.
38. The Courts have held that judgements in criminal trials constitute judgements in rem in so far as they determine the legal character to be ascribed to the accused persons as to their guilt or otherwise in the charges against them.
39. Etyang J. in the case of Japheth Nzila Muangi vs Kenya Safari Lodges & Hotels Ltd [2008] eKLR held as follows:

“It is trite law that ordinarily a judgment binds only the parties to it. This is known as Judgment in personam. A judgment may also be conclusive not only against the parties to it but also against all the world. This is known as a judgment in rem. This is a judgment which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.

.....

The plaintiff contends that Mr. Kamuyu virtually held him responsible for the false or fraudulent accounting which allegedly existed in the Accounts Department at Mombasa Beach Hotel. To demonstrate Mr Kamuyu’s intentions, the three accused, who were employees in that Department, were charged with theft. But the court pronounced a final judgment about their character and found them innocent. Through the acquittal of these accused the plaintiff seeks to demonstrate that there was no false accounting or any criminal activity going on in his Department which would have justified his dismissal. I think, in the light of the above, it is correct to say, and I do so hold, that the judgment in criminal case No.3247 of 1999 was a judgment in rem is admissible.” (emphasis added)

40. In Tile And Carpet Centre Limited vs Kenya Commercial Bank Limited & 2 Others [2020] eKLR, Tuiyott J(as he then was) took a similar stance stating;

“The criminal proceedings determined, on a standard of proof beyond reasonable doubt, whether or not the Plaintiff’s employee alongside employees of the Defendant as well as those of KBC and G4S were guilty or not of the charges they faced. The judgment in the criminal trial is in rem in so far as it determined the legal character to be ascribed to the accused persons as to their guilt or otherwise of the criminal charges they faced.”

41. The Court agrees with the aforesaid position and harbours no doubts as to the admissibility of the Judgment in criminal case no 1653 of 2017 herein. The question is whether the Judgment is relevant to the inquiry before this Court warranting the re-opening of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants case and admission into evidence.
42. The crux of the matter before this Court is the ownership of the suit property which both parties lay claim to. Within this general issue, allegations have been raised as regards trespass and destruction of property. Indeed, the Plaintiff seeks aggravated damages for trespass as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
43. The Plaintiff in particular is categorical that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, aided by the accused, used thugs to destroy the suit property. The Plaintiff, by himself and through his witnesses’ made specific



reference to the criminal case and stated that the accused were arrested at the property and charged. The charge sheet in the case is one of the documents relied upon by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

44. The criminal case also came up during the hearing of the matter. Counsel for the Plaintiff informed the Court that the Plaintiffs' final witness was unable to testify on account of threats by the accused. He informed the Court that the accused had been found to have a case to answer in the criminal case having been charged with trespassing on the Plaintiffs' land with persons linked to mungiki.
45. Considering the foregoing narration, the Court opines that the Judgment herein is relevant only to the extent of allegation of trespass, but not on the main issue of ownership of the suit property. The Judgement in the criminal case was delivered on 3<sup>rd</sup> August, 2023 after the close of the Defendants' case on 11<sup>th</sup> July, 2023 and it cannot be said that this evidence could have been obtained during the trial.
46. In the same vein, both parties having alluded to the criminal proceedings during its lifetime, the Court does not believe that the plea of admission of the Judgment herein is an attempt to fill in gaps in evidence.
47. However, considering that the only evidence that the Defendants intend to produce is the Judgment in the criminal case, whose contents are not disputed by the Plaintiff, recalling the witness to only produce the Judgment in the criminal case will not only be a waste of judicial time, but will not add any value, especially if the said Judgment is addressed by the parties in their submissions.
48. I say so because the Judgment sought to be produced does not belong to the Defendants. The same is available to all the parties and the public. Considering that the Defendants and their witness did not author the Judgment, and in view of the fact that the Defendants were not the accused persons in the criminal court, they cannot be cross examined on the same. All they can do is to produce it and say no more.
49. Further, the only issue that the said Judgment deals with is the culpability of the accused persons, which is apparent on the face of the Judgment. This court can examine the said Judgment without witnesses producing it as an exhibit. In the circumstances, I decline to re-open the defence case as urged by the Defendants. However, the parties are at liberty to submit on the contents of the Judgment vis a vis the Plaintiff's allegation of trespass.
50. Ultimately, it is the finding of the Court that the plea for re-opening the defence case is not warranted. The Defendants' application dated 28<sup>th</sup> August, 2023 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Chumba holding brief for Ms. Rotich for 1<sup>st</sup> and 2<sup>nd</sup> Defendant/ Applicant

No appearance for Plaintiff.

Court Assistant: Tracy

